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The Precarious Agency of Racialised Recaptives

Review of Emily Haslam, *The Slave Trade, Abolition and the Long History of International Criminal Law* (Routledge 2020) in *London Review of International Law* (2022)

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In the summer of 2020, Black Lives Matter protestors toppled the statue of slave trader Edward Colston into Bristol Harbour. Debates on monuments, in particular monuments to the men who sustained, supported, and benefited from racialising practices such as the slave trade, continue to divide. In Bristol, where there was agreement on removing the Colston statue from its prominent position, the debate soon moved to the question of who or what should replace the fallen statue.¹ A recurring suggestion has been to replace Colston's statue with that of British abolitionist William Wilberforce.² Wilberforce, along with Thomas Clarkson and George Fox, is among the names of those white British men credited with successfully influencing the necessary policies and laws to ban the slave trade, and later slavery itself. This narrative is very much in line with a redemptive story of slavery at the imperial centre. The abolition of the slave trade, like the period of decolonisation, is largely attributed to white progressives—propping up a story of white redemption. Similar progress narratives are also dominant in international criminal law (ICL). Here, the slave trade is mostly written out of the histories of international criminal law entirely. Its story of redemption begins typically with the Nuremberg trials following the Second World War. 'From Nuremberg to Rome' is the dominant narrative that places genocide and ethnic cleansing of the 20th century in the spotlight, highlighting the supposed redemptive abilities of law for Western racism within Europe. Among the *erasures* of such progress histories are longer histories of structural violence as well as accounts of agency and resistance of racialised victims themselves.

By placing slave trade repression within a longer history of ICL, and by highlighting acts of resistance of recaptives, Emily Haslam's book *The Slave Trade, Abolition and the Long History of International Criminal Law* takes on a monumental task. She not only metaphorically

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¹ In Bristol, there had been many years of discussions on removing Colston. Four protestors were charged with criminal damage to the Colston statue. The four were acquitted at a jury trial in January 2022.

² See eg S Heffer, 'It's time for a new statue in Bristol – and one man deserves it most', *The Telegraph*, 16 July 2020, available at <https://www.telegraph.co.uk/art/architecture/time-new-statue-bristol-one-man-deserves/> (accessed 24 March 2022); T Cork, 'All the things suggested to replace Edward Colston's statue in Bristol', *Bristol Post*, 15 July 2020, available at: <https://www.bristolpost.co.uk/news/bristol-news/things-suggested-replace-edward-colstons-4329248> (accessed 24 March 2022).

topples the Colston statue by writing slavery and abolition into the history of international criminality, she also metaphorically protests against the erecting of Wilberforce as the redeemer of imperial brutality. This is, however, not a polemical book. Overall, Haslam's book tends to shy away from grand gestures, focusing instead on a fairly narrow topic of recaptives and Mixed Commissions during a period of a few decades in the early nineteenth century. Behind this narrower, even tentative, story is a much bolder one that allows for linkages between the abolition movements of the nineteenth and twenty-first centuries, and opens possibilities for a serious engagement with reparation and debt cancellation of people and places that continue to be burdened by racialisation and inequality.

From Freetown to Rome

Before turning to these bigger themes, let us consider the book on its own terms: 'The aim of this book is to inscribe the figure of the recaptive into international criminal legal histories'.³ The recaptive was a slave found on board illegal slave ships after the 1807 Act for the Abolition of the Slave Trade ended the slave trade in the British Empire. Such illegal slave ships were intercepted by the British Navy and their fate was, for a certain time at least, decided by so-called Mixed Commissions. Mixed Commissions were set up through bilateral treaties between the British and other European powers sailing the Atlantic, namely the Netherlands, Portugal, and Spain.⁴ Haslam is quick to stress that for recaptives, 'the transition to recaptivity [from captivity under slavery] did not necessarily represent an assertion of their humanity, nor guarantee their liberation'.⁵ Mostly recaptives were brought to Freetown in Sierra Leone; the question of the legality of interceptions—and of the recaptives' futures—were decided there, before Mixed Commissions.⁶ The Commissioners adjudicated on the capture and detention of slave ships, either condemning slave ships and emancipating the recaptives, or restoring both and compensating the owner. The relevant law was the law of prizes (although other legal regimes were also considered), meaning that the fate of the recaptured slaves was inherently legally tied to the question of property relations. Emancipated recaptives were not generally free to do as they pleased, but rather put to work for the British Empire in other ways, often

³ Emily Haslam, *The Slave Trade, Abolition and the Long History of International Criminal Law: The Recaptive and the Victim* (Routledge 2020) 2.

⁴ R Lesaffer, 'Mixed Commissions, Mixed Blessing: On the British-Portuguese Anti-Slave Trade Treaty 1817' *Oxford Public International Law* (2017), available at: <https://opil.ouplaw.com/page/mixed-blessing> (accessed 24 March 2022).

⁵ Haslam (n 3) 2.

⁶ Freetown is known to ICL as the locus of the Special Court for Sierra Leone. Haslam cites Schwartz in stating that around 90,000 recaptives were settled in Freetown. S Schwarz, 'Reconstructing the Life Histories of Liberated Africans: Sierra Leone in the Early Nineteenth Century' 39 *History in Africa* (2012) 175-207.

resettled as indentured labourers in a different British colony, compelled to undertake unregulated apprenticeships, or enlisted. Haslam demonstrates how this commodification and lack of agency has echoes in today's constructions of victims in ICL.

Haslam's book is a valuable addition to recent discussions on the history of ICL. These discussions have added to the critique of ICL by proposing 'counter-histories', 'alternative histories', or 'shadow histories'.⁷ Haslam notes that extending the history of ICL back to the slave trade and slavery is 'controversial' for two main reasons: First, 'because the slave trade was not an international crime during this period of abolition' and because of 'the synonymy of international criminal law with the 20th century in the dominant international legal mindset'.⁸ And indeed, on the first point, from a positive law perspective, license is taken with the *nullum crimen sine lege* principle of (international) criminal law as the slave trade was no international crime at the time.⁹ But then, license was taken with this principle at the Nuremberg and Tokyo trials too.¹⁰ And, if we adopt similar arguments on the gravity of crimes, 'it seems difficult to identify a more sustained and organised international atrocity' than slavery.¹¹ More controversial is indeed the second point regarding the dominant international legal mindset that is invested in associations with the twentieth century and more specifically criminal accountability for the Holocaust as ICL's origin.¹² Understandably, Haslam navigates this with tentative suggestions on Mixed Commissions as 'part of the development of international institutional justice'¹³ and dubbing the transatlantic slave trade 'the foundational crime of modernity'.¹⁴ This can appear like trying to have it both ways, by both critiquing the progress narrative and at the same time submitting to its logic of linearity: 'From Freetown to Rome'.

⁷ Haslam chooses 'alternative history' as her frame, 3. See also contributions in I Tallgren & T Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (Oxford University Press 2019).

⁸ Haslam (n 3) 2.

⁹ Here, Haslam notes the deflection that occurs through the common trope of slavery and piracy as the first universal crimes. The *hostis humani generis* label for the slave trader is, according to Haslam a 'false memory'. See also E Haslam 'Writing More Inclusive Histories of International Criminal Law: Lessons from the Transatlantic Slave Trade' in Tallgren & Skouteris (n 7) 130-144.

¹⁰ Many of the crimes adjudicated in the Nuremberg and Tokyo trials were not recognised as international crimes prior to the tribunals' charters' deeming them so. On the necessity of accountability at Nuremberg despite the non-retroactivity principle, see C Tomuschat, 'The Legacy of Nuremberg' (2006) 4(4) *Journal of International Criminal Justice* 830-844.

¹¹ Haslam (n 3) 8.

¹² See KJ Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2011).

¹³ Haslam (n 3) 11.

¹⁴ *ibid* 8.

However, if this history is conceived unabashedly as one of imperialism in its different guises, rather than as the history of a discipline, an immensely meaningful critique emerges. From this vantage point, Haslam's extension of the history of ICL to include slavery brings to the surface continuations of racialisation through law, the enabling of capital accumulation over human life, silences in history-writing, and the frequent lip service paid to humanitarianism by liberal legalism. This far more uncomfortable narrative is one which displaces progress in favour of complicity. Not only does it clarify that the 'appearance of a Royal Navy Ship did not—and could not—put an end to the misery of those stowed on board slave ships,'¹⁵ it places both the story of slavery *as well as* abolition in the context of continuations of racialisation and exclusion.

From abolition to abolitionism

Imperial histories are always also an invitation to think about contemporary forms of racialisation and oppression. A link that is not made explicit in the book, but lies seductively between the lines, is an analysis that links the story of nineteenth century abolition movements (of the slave trade) with twenty-first century abolition movements (of the police). Not only does a connection lie in the shared terminology of 'abolition', but it also lies in the linkage between thinking about those who are often cast as perpetrators on account of their race. This linking allows for a deeper understanding of continuations of structural racism through and with law. It also allows for a focus on the means employed to create redemptive stories of overcoming racism while maintaining the underlying structures that uphold it.

'Abolition', writes Haslam, 'was a partial and incomplete project which gave rise to injustices of its own'.¹⁶ The people who had gathered to topple the Colston statue in the summer of 2020 saw clearly the link between the incomplete project of abolition and contemporary forms of racialisation and oppression. The movement had spilled over to the UK from the USA, where the 46-year old Black man George Floyd was killed by police violence in 2020. Highlighting systemic brutality by the police against the Black population in the USA, and against the background of emerging data that the pandemic was disproportionately affecting racialised people, BLM was a movement that deeply affected public debate and consciousness. There was a new clarity around the fact that the racialisation of Black people continued despite the

¹⁵ *ibid* 85.

¹⁶ *ibid* 3.

abolition of slavery, despite the civil rights movement, and despite decolonisation. ‘Abolish the police’, although specific in its demand to literally be rid of law enforcement, also stood for a broader discussion on state violence and the carceral state.¹⁷ Abolition within a short space of time became resignified to mean the incomplete abolition of racial inequality. In terms of Haslam’s book, there are two points where this link is relevant: first, on the question of victimhood, a topic that is central in the book; and second on the question of incarceration as a means for achieving justice, a topic that is more peripheral in the book.

As to the first, abolition of the slave trade, Haslam stresses, took place within the context of property relations, not, as some may assume, humanitarianism. Nowhere was the commodification of the recaptives more evident than in the fact that the origins of international abolition law were set out, as noted above, in the law of prizes—the law that regulated the capture of enemy property in war. Indeed, the same law that was engaged for abolition had also been employed to enslave black sailors throughout the eighteenth century.¹⁸

The practice of retrieving value from racialisation is today referred to as ‘racial capitalism’.¹⁹ We see contemporary forms of the extraction of (surplus) value from unequal racial relations in global value chains, in domestic labour hierarchies, and in a posturing of diversity that serves only to maintain the given structures.²⁰ Crucially, we should not be tempted into thinking that commodification, and oppression more generally, were not resisted by slaves and recaptives. In the spirit of recent work that emphasises anticolonial resistance narratives, Haslam sets out to highlight the experiences of recaptives in order to stress their resistance and agency.²¹ Haslam explains how the testimony of recaptives became of import for the Mixed Commissions to consider whether a ship had been captured legally. A reader who comes to Haslam’s book seeking slaves’ testimony on their brutal captivity and exploitation would, however, be disappointed. The section on recaptives’ testimony is brief and somewhat complicated by the mention of names of ships with little background information.²² One is left wondering whether this is a section about agency or lack of agency. Quite how influential Mixed Commissions

¹⁷ See A Y Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003).

¹⁸ Haslam (n 3) 11.

¹⁹ The term was coined by Cedric J Robinson. See CJ Robinson, *Black Marxism: The Making of the Black Radical Tradition* (University of North Carolina Press 2000).

²⁰ For an interpretation regarding value extraction from diversity, see N Leong, ‘Racial Capitalism’ (2013) 126(8) *Harvard Law Review* 2151-2226. On capitalist accumulation through a racial lens, see J Melamed ‘Racial Capitalism’ 1(1) (2015) *Critical Ethnic Studies* 76-85.

²¹ See also P Gopal, *Insurgent Empire: Anticolonial Resistance and British Dissent* (Verso 2019).

²² Haslam (n 3) 69-72.

really were also remains disputed.²³ After these slightly tepid pages, Haslam rightly emphasises, in the spirit of Boaventura de Sousa Santos's work on 'epistemicide', the significance of silences.²⁴ While the book treads somewhat awkwardly between them, one is nevertheless heartened by the sensitivity that informs this awkwardness. After all, Haslam writes, the "'real" recaptive is lost forever, and to pretend otherwise would be an appropriation.'²⁵ Here we can draw a direct line to ICL, where the victim is more regularly 'invoked' than permitted to speak for themselves.²⁶ The difference is that in the case of ICL, the 'real' victim is not yet lost. These slightly emaciated tales of agency and the reference in ICL to racialised victims only underlines the degree to which abolition remains 'partial'.

This appears like an appropriate segue to my second point on abolitionism in the twenty-first century, the question of the carceral state. ICL remains committed to incarcerating perpetrators of crimes, and within the field internationally, just as in the US domestically, incarceration has an inherently racialised face. It has been pointed out by many critics of ICL that all those held in detention in The Hague and all those convicted of international crimes have been predominantly from the African continent. Whilst there has been some research done on highlighting the problematic stigmatisation of perpetrators,²⁷ the link to incarceration is less pronounced. It is taken for granted that a punitive system of individual criminal accountability must, if the defendant is sentenced, result in imprisonment. It is also taken for granted that defendants must be detained, sometimes for several years.²⁸ Questions that are not asked concern the deep connection between modern forms of criminality, racialisation, and incarceration – and its political economy. These are not issues that exclusively apply to the USA, where a great deal of the prison system is privatised. By emphasising the partial and compromised project of abolitionism in the nineteenth century, Haslam implicitly raises important questions on contemporary abolitionist movements and alternative modes of addressing injustices.

²³ Samuel Moyn describes them as a 'minor episode in the overall history of the abolition of human bondage' in S Moyn, *Human Rights and the Uses of History* (Verso 2014) 55.

²⁴ B de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge 2014). Haslam (n 3) 72.

²⁵ *ibid* 18.

²⁶ S Kendall & S Nouwen 'Representational Practices at the International Criminal Court; The Gap between Juridified and Abstract Victimhood' (2014) 76 *Law and Contemporary Problems* 235-262.

²⁷ S Stolk, 'A Sophisticated Beast? On the Construction of an 'Ideal' Perpetrator in the Opening Statements of International Criminal Trials' (2018) 28(3) *European Journal of International Law* 677-701.

²⁸ The first defendant before the International Criminal Court, Thomas Lubanga Dyilo, spent six years in pre-trial detention in The Hague.

From reinscribing to redistribution

The commodification of humans through slavery is well-known. On board ships, slaves were literally objectified as the ship's cargo. The continued commodification of freed slaves and the political economy of the abolition of the slave trade is perhaps less well known. It merits repeating that slaves were never compensated. If, however, a ship had been wrongly captured (not because it was not taking part in the slave trade per se, but because it was operating in a space where slave trading was permitted), compensation could be paid for the captured ship and its human cargo. Bounties were often paid out to captors. Recaptives who were transformed into indentured labourers meanwhile created economic benefits—not, of course, for the recaptives themselves.²⁹ Against this background of the political economy of abolition, Haslam proposes that the property relations of the recaptives be 'read back and inverted': Recaptives could be reframed as law's creditors rather than its beneficiaries.³⁰ Read as individuals to whom international law is indebted, recaptives pose the question of subjectivity—albeit primarily, for Haslam, at rhetorical level, rather than for the purposes of 'specific policy prescriptions'.³¹ This narrational reimagining allows for a rethinking of how victims might be represented today, potentially, foregrounding the neglected 'political, critical or resisting victim'.³² The agency of victims is indeed an urgent question for a discipline that benefits greatly from its idealised victims as weak, vulnerable, and dependent.³³

But why remain on the narrational level and not consider the material, and perhaps even policy, implications of framing recaptives as creditors? The framing of victims as creditors in the book leaves the monument teetering on its plinth, but it can also be smashed down by taking seriously discussions on reparation and debt cancellation. Spurred on by Haslam's invitation to consider recaptives as creditors, I would therefore like to ask a different question: How might a reframing of recaptives (and other slaves) as creditors support claims of reparations and debt cancellation? After all, the *benefits* of slavery and abolition were financial: Haslam explains that 'Mixed Commissions were able as a matter of law to do more to protect captors from

²⁹ Haslam (n 3) 106.

³⁰ *ibid* 127.

³¹ *ibid* 122.

³² *ibid* 125.

³³ I build on criminologist Nils Christie's conceptualisation of ideal victimhood to understand the 'ideal' victim of ICL, Christine Schwöbel-Patel, 'The "Ideal" Victim of International Criminal Law' (2018) 29(3) *European Journal of International Law* 703-724.

claims for damages than to formally expand recaptives' opportunities for legal emancipation.³⁴ Alongside this, it is noteworthy that under the moralist mantle of abolition, the British slave trade continued for some time as 'internal slavery'—for the object of abolition was the '*foreign* slave trade'.³⁵ It is also notable that abolition law legitimised the capture of competitors' ships, allowing for Britain to expand its domination over transatlantic trading routes. Furthermore, the hodgepodge of adjudication coming from Mixed Commissions legitimised, if not legalised, new forms of indentured labour. A recognition of how wealth was built not only on slavery but also on abolition should give further cause for a serious debate on the status of states whose people were enslaved as creditors.³⁶

Nineteenth century abolition has been frequently framed as deriving, as Priyamvada Gopal puts it, 'chiefly from the campaigning consciences of white British reformers.'³⁷ In *The Slave Trade, Abolition and the Long History of ICL*, Emily Haslam offers a critical destabilisation of this narrative by tackling the erasures undertaken through common progress histories. Beyond that, this excellent book offers useful inspiration for broader urgent work of destabilising the capitalist and imperialist structures which continue to prop up liberal legal humanitarianism.

³⁴ Haslam (n 3) 23.

³⁵ Emphasis added. Haslam cites R Shaw, *Memories of the Slave Trade: Ritual and the Historical Imagination in Sierra Leone* (Chicago University Press 2002).

³⁶ Against the background of the global economic shock triggered by the Covid-19 pandemic, the G20 and Paris Club (the world's wealthiest states) announced the so-called Debt Service Suspension Initiative for Poorest Countries. For a legislative proposal for commercial 'creditors' to introduce a moratorium on debt, see S Connelly, C Tan, K Patricio Ferreira Lima & C Tassis, 'The G20 Debt Service Suspension Initiative: What of Commercial Creditors?' (2020) 35(11) *Butterworths Journal of International Banking and Financial Law* 741-743.

³⁷ Gopal (n 21) 3.