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"A MAD AND MELANCHOLY RECORD": THE CRISIS OF INTERNATIONAL LAW HISTORIES[1]

VASUKI NESIAH

In an illuminating 2002 article in the Modern Law Review, Hillary Charlesworth spoke of how "international lawyers revel in a good crisis."[2] As she elaborated, "A crisis provides a focus for the development of the discipline and it also allows international lawyers the sense that their work is of immediate, intense relevance."[3] A cursory examination of how the origins, rationale and evolution of different branches of public international law are described in dominant histories of the field will take us on a narrative path that lurches from crisis to crisis. The holocaust offers an especially illuminating example of how a particular historical conjuncture is invoked to describe a crisis in the international system, and where international law is presented as developing a salutary response, in this case the human rights framework, that underscore's international law's relevance and adequacy to the crisis. In Charlesworth's article, she uses the Kosovo crisis as the 'crisis-space'[4] through which to understand how international law mobilizes crisis to assert and delimit the questions pertinent to a historical moment, and, concomitantly, offer answers that advance and empower the discipline and profession of international law. Charlesworth makes a compelling argument that the crisis approach to the discipline truncates international law's imagination of how it operates in the world, narrows the socio-historical issues it takes into account and neglects structural dimensions of a historical moment. We jump from incident to incident in international relations without analyzing the threads that tie them together, and shape both the enabling conditions and enduring consequences of 'crisis'. For instance, she describes how the gender dynamics of international relations get neglected as we focus on the headlines rather than probing the biases,

1 The words "mad and melancholy record" are taken from Robert Jackson's description of the history that the Nuremberg trials told but it could equally be, I argue, the story told about international law itself. *One Hundred and Eighty-Seventh Day*, NUREMBURG TRIAL PROCEEDINGS, July 26,1946, https://avalon.law.yale.edu/imt/07-26-46.asp.

2 Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 THE MOD. L. REV. 377, 377 (2002).

3 *Id.*

4 The term 'crisis-space' is indebted to David Scott's conceptualization of the term "problem space" as a way to speak of the production of a problem in ways that prefigure the answers. *See* Stuart Hall, *David Scott*, BOMB (1 June 2005), https://bombmagazine.org/articles/david-scott/. Crisis space speaks to the specificity of the issues being discussed in this article.

hierarchies, and exclusions that are baked into those headline international incidents. [5]

In this article, I build on Charlesworth's insight in examining histories of international legal development that link international law to international relations, and in particular to crisis in the international system. What is striking about the work of crisis invocation in international law is that it is itself a response to how international law labors under a sense of its own legitimacy crisis—is it real law? Is it adequate to the problems and challenges that disrupt and threaten world order? These questions have long haunted the discipline, and again and again it has responded with theorizations and histories of its own role in international affairs that have doubled down on the crisis of international law by externalized it, and harnessing crisis talk in the production of legitimacy for international law as an important response to crisis, rather than as being in crisis or producing crisis.[6] Today, we see these narratives of international law proliferate in response to revived and reinvigorated strands of authoritarianism across the world. For instance, in the transition from the Trump administration to the Biden administration, a range of commentators heralded the latter for promising a return to a liberal world order that pulls back from the crisis of authoritarianism by embracing international law and international institutions. I argue instead that rather than redeem international law, we need to see the crisis-space of the current moment as an opportunity to interrogate the dark side of international law, including its intimate imbrication with histories of racial capitalism over the last four hundred years.

How did the crisis of racial capitalism boomerang into the crisis-space of authoritarianism that the world is confronting today?[7] In thinking through this question, I turn to past histories of international law and crisis. This article draws from my earlier work critically analyzing two historical projects, one from the mid-nineteenth century and one from the mid-twentieth century; both tell a story about the politics of accountability and its institutional channeling into international law and judicial institutions.[8] The first case I look at is Gary Bass's account of Nuremberg in his history of post-war judicial processes as an

5 For an analysis of how invocations of crisis empower particular strands of international conflict feminism *See* Karen Engle, Vasuki Nesiah and Diane Otto, "Feminist Approaches to International Law" in Jeffrey L Dunoff and Mark A Pollack, eds., *International Legal Theory: Foundations and Frontiers,* (Forthcoming with Cambridge University Press).

6 *See* Dunoff and Pollack Ibid. for discussion of the constitutive role of 'crisis' in a range of subfields across international law.

7 In using the term "boomerang" I echo Aime Cesaire and Hannah Arendt's invocation of the term to speak to the relationship between violence against the colonized in the global south, and the violence of fascism in Europe. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1973); AIMÉ CÉSAIRE, DISCOURSE ON COLONIALISM (Monthly Rev. Press 1972) (1955).

8 The two articles I draw from are (1) Vasuki Nesiah, *Doing History with Impunity*, ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle, Zinaida Miller, & D.M. Davis eds., 2016), an earlier article that looks not only at Nuremberg but also engages with Bass's discussion of Constantinople and The Hague, and (2) Vasuki Nesiah, *Crimes Against Humanity: Racialized Subjects and Deracialized Histories*, THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS (Immi Tallgren & Thomas Skouteris, eds., 2019); a significantly shorter and revised version was published as Vasuki Nesiah, *The Law of Humanity has a Canon: Translating Racialized World Order into "Colorblind" Law*, POLAR: POLITICAL AND LEGAL ANTHROPOLOGY REVIEW (Nov. 15, 2020), https://polarjournal.org/2020/11/15/the-law-of-humanity-has-a-canon-translating-racialized-world-order-into-colorblind-law/.

alternative to vengeance in the fight against impunity.[9] For Bass this is inspiration for a future of international criminal law that can entrench the rule of law and a normatively grounded world order. The second case I look at is Jenny Martinez's account of the mid-century tribunals that were instituted on diverse shores of the Atlantic Ocean to monitor the abolishing of the slave trade from 1807 on.[10] For Martinez this is inspiration for a future of international criminal law that can deal with race and racial injustice. Both these histories of international law, present courts and tribunals as marrying morality to power in response to the crisis of "radical evil"— a Kantian term that is perhaps most famous amongst international human rights lawyers from the title of Carlos Nino's book *Radical Evil on Trial*.[11] From Nuremberg's trial of Nazi officials to the trial of the Argentinian military dictators, Nino argued for the preventive charge of international law through prosecutions in the crisis-space of human rights atrocity in facilitating transition to democracy . Nino's articulates the governing rationale of international criminal law that international lawyers have found most compelling, often in the name of victims and as part of a vision of an international law anchored post-war world order.

My analysis in this article draws on two separate papers I have previously published; each of which has a more extended engagement with the arguments of Bass and Martinez respectively. This article brings those distinct projects into conversation by examining the work of crisis space dynamics in redemptive teleologies about international law's centrality to the international system in these different historical conjunctures, the aftermath of the holocaust in Bass and the aftermath of the international slave trade in Martinez. This article argues that when we attend to international law's imbrication in the histories and legacies of slavery, colonialism, and other dimensions of racial capitalism, we may well discover that international law also worked to legitimize and empower the world order that enabled these crises. Thus, the Bass and Martinez histories of international law tell a story that purports to show international law as offering a progressive response to various moments of world crisis; however, closer examination may reveal that these histories frame and reframe the crisis-space of these moments in ways that deny and distract from the legacies of racial capitalism. Rather than focus only on international law and its response to fascist violence, we need to also look at how that response ignores, distracts from, or even facilitates colonial and neocolonial oppression. Rather than focus only on international law and its story of the abolition of the slave trade in the 19th century or its condemnation of genocide in the 20th century, we need to also look at international law's history facilitating slavery and racial oppression.

The Bass and Martinez interventions offer two examples of how crisis talk gets knit into a redemptive turn to history by noted scholars of international law and international relations. Both these liberal internationalist histories were written at different moments in the fortunes of international criminal law, but both advance a historical narrative that points towards a redemptive anti-

9 GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS (2000).

10 JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012).

11 CARLOS NINO, RADICAL EVIL ON TRIAL (1998).

impunity telos. Bass's *Stay the Hand of Vengeance* was published in 2000 at a moment of great optimism about ICL. The Rome Statute had been passed two years earlier, capping a decade long Grotian moment for international criminal law—moving from ad hoc tribunals in The Hague and Arusha to several rounds of drafting of a new statute for the international criminal court. If the end of the cold war and the spiral into an extended war in the Balkans threw international law into crisis, by the end of the 1990s, international law saw itself as having developed an effective response, not just to the Balkans but to wars and war crimes everywhere. Bass's history told a story that situated the ICC within a century long honing of ICL's normative, statutory and institutional muscle to fight impunity, rather than being just an ad hoc solution to the immediate crisis.[12]

Over a decade later, in 2012, when Jenny Martinez published *The Slave Trade and the Origins of International Humanitarian Law,* the ICC had lost its luster and was being threatened with mass withdrawals from African Union (AU) countries as it confronted damning criticisms of a racist focus on Africa and Africans, while the west enjoyed impunity in Iraq, Afghanistan, and elsewhere. Responding to this legitimacy crisis, Martinez speaks to the progressive potential of ICL as illuminated with an even longer historical perspective that looks at the work of transnational tribunals in responding to the crisis of the international slave trade by helping implement its abolition in tribunals that were established a century before Nuremberg. In the following pages, I begin by thinking with and against Bass's discussion of Nuremberg before moving back to Martinez's 19th century history of the Freetown tribunals. The last section develops some concluding reflections about how we may move forward in thinking through the relationship between international law and crisis on the world stage in confronting authoritarianism today.

I. NUREMBERG: "THE MOST SIGNIFICANT TRIBUTE THAT POWER HAS PAID TO REASON"[13]

In his ambitious history of post-war justice on the international stage, Gary Bass seeks to establish the long history of war crimes tribunals and efforts towards such tribunals from Britain's assessment of prosecutorial options post-World War I (including preliminary efforts in that direction at Leipzig and Constantinople), through to the US led efforts at Nuremberg, and then on to the ad hoc tribunals of the '90s, leading up to the ICC. He presents these efforts as a rejection of impunity for accountability; a rejection of vengeful war for

12 This was so despite the fact that the ICTY and its twin, the ICTR, are often referred to as ad hoc tribunals because their mandates are specific to each context; However, these UN creations are also situated by Bass and others in a historical pattern (the 'justice cascade') of an increased turn to international criminal law that culminates in the ICC. In addition to Bass Ibid., see Kathryn Sikkink, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2012).

13 *See* BASS, *supra* note 9, at 47. Bass quotes Robert Jackson's opening statement at the trials to frame his own claims about Nuremberg's significance in the history of war crimes adjudication. Jackson's opening statement for the Prosecution at Nuremberg gave Bass's book its subtitle and the broader theme that ties the fight against impunity for the wrongs of war to the legalist triumph over the quest for vengeance: "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason." See *infra* at 32.

tribunalized justice.[14] In his telling, these are way stations in the struggle for humanist idealism in liberal states' international relations, and in this way they also become founding stones in international law's development as it hones its response to global crises.[15] His is a nuanced and complex account; it is not a story of the forces of justice moving forward with clarity of purpose and definitive institutional force; rather, it is a story of justice "lurching forward" unevenly and incrementally, emboldened at some points and compromised at others, but with forward momentum nevertheless. There are two struggles in Bass's account: an internal struggle within liberal states for the better angels to triumph over the Kissingeresque realists, and an external struggle with so called illiberal states.[16] With a direction and force forged through those battles against vengeance on the one hand, and impunity on the other, Bass claims there has been a long movement towards legalism and international justice as the more effective and noble response to the crisis of war crimes and mass atrocity. That response becomes embodied through international criminal law in "a well-institutionalized international forum where such cases can be heard"; ultimately, this emerges as a story of fitful progress towards the rule of law and its redemption.

Nuremberg looms large in the Bass narrative, and it is that part of the Bass story that I will focus on in this article because of its resonance with the dominant international law history of that episode as well.[17] The trials are presented as performatively enacting the Allies' moral authority in the defeat of fascism, embodied most crucially in this institutional commitment to international law as the foundation of the new post war world order. In Bass's narrative, Nuremberg emerges as the historical, moral and institutional centerpiece; it is the linchpin that helps connect the cosmopolitan humanist dots from Leipzig to The Hague. This arc of the story translates as a progressive narrative of international law increasingly focused on the fight against impunity as it navigates the storms of the 20th century with the highest ideals of global citizenship as its loadstar.

At the beginning of the century discussions about war crimes and the genocide against the Armenians leading into Versailles post-World War I represented a burgeoning universalism in responding to crisis, and the accompanying notion that humanity had a common stake in the conduct of war and peace. For Bass, this is the moment that births a notion of humanity that is grounded in collective moral condemnation of the inhuman, namely crimes that were so egregious as to be classified 'crimes against humanity'. Yet these anti-impunity intentions did not materialize in robust prosecutions of World War I war crimes. It is this gap between intent and legal action that was corrected with Nuremberg. Bass describes Nuremberg as a triumph against all odds. Indeed, when FDR and Churchill met in Quebec to discuss policy for the war's end, they both signed a statement agreeing to summarily execute Nazi leadership.[18] For Bass, the policy shift from executions to trials is a shift from vengeance to liberal

14 *See* BASS, *supra* note 9, at 329-30.

15 *Id.* at 37–38. Indeed, he says that a kernel of the international legal liberalism that matured into an ICL policy that culminated in the ICC was laid in the early 1800s in the aftermath of the Napoleonic wars.

16 *Id.* at 186. As exemplified for instance by Nuremberg in contrast to Stalin's prescription for mass executions.

17 *See generally id*. Significantly, Tokyo is referenced by Bass but largely ignored, as his primary preoccupation is the Nuremberg trials. This is the fate of Tokyo in most human rights histories!

18 *Id.* at 151.

legalism that pulls the aftermath of WWII into the international human rights law history books. Bass describes the change in policy as one that emerged through a series of "David against Goliath" battles fought in the realms of public opinion,[19] policy making,[20] and international diplomacy[21] to become what Nuremberg prosecutor Robert Jackson would famously pronounce as "the most significant tribute that power has ever paid to reason."[22]

Bass seeks to do several things in his depiction of the Nuremberg court as the unlikely hero of the postwar settlement that followed the severity of the WWII crisis-space. Most significantly, he wants to cast criminal prosecutions as an astonishing achievement of universalist ideals which emerge through an epic struggle against numerous obstacles and wide-ranging opposition. Anti-impunity represents, in this narrative, a harnessing of the best of the American system's cosmopolitan promise to the international legal response to war. Quoting Henry Stimson, American Secretary of War, in his effort to reform Germans "with the Bill of Rights and the Supreme Court," Bass describes Nuremberg as a "trial proposal" that emerges from "the Constitution, the holy of holies in American domestic politics."[23] It is a humanist vision about the possibilities of a cosmopolitan peace that perseveres against the forces of evil and lays an international law foundation for a new world order.

In addition to a celebration of Nuremberg as a flag for judicial due process rather than vengeance, Bass's broader narrative is also interested in making the case that Nuremberg clarifies that the principled commitment to the political virtues of law and due process is Ariadne's thread helping liberal states confront crisis by giving them a sense of direction and purpose; it also helps, Bass argues, retrospectively make sense of a century marked by war and wartime impunity and the maze of conflicting policy paths that different international actors advocated at different moments. As he tells the story, from Constantinople to Nuremberg, the mantle of liberal idealism shifts from Britain to the United States as the voice of progress in a universalist struggle against impunity. If the impulse

19 *Id.* at 169. When the American public was surveyed, summary executions against the German and Japanese leadership trumped all other options in public opinion polls. The legalistic response became celebrated and framed in patriotic rhetoric regarding the American commitment to law only after the trials had begun. Indeed, for many, it was only after they were completed.

20 *Id*. Bass pays much attention to the internal battle within the American cabinet, with Secretary of War Henry Stimson, who advocated trials, waging a long battle against Secretary of State Hans Morgenthau, who favored summary executions and the blitzing of German industrial power. President Roosevelt shifted to a more temperate position when it became apparent that it was more politically expedient to ensure Germany survived as a viable trading partner.

21 *Id.* at 173–80. Bass layers his depiction of the internal policy battles within the higher echelons of American policymaking with an account of the external battles on the highest echelons of international relations. The US push for trials battled against the British and Soviet preference for the execution option. Eventually Robert Jackson, who later served as America's Chief Prosecutor in Nuremberg, negotiated terms for the London Charter that reflected the American vision for a war crimes tribunal. Finally, Bass notes that the scope of the Nuremberg prosecutions was also one that emerged through fraught negotiations within the US and amongst allies. In the early stages of negotiation, there was much support for focusing only on acts of German aggression that entailed breaches of international law against other nations. There was doubt about whether there were political and legal grounds to also take on atrocities within Germany. Thus, initially the Holocaust itself was going to be side stepped and treated as an internal matter. Eventually, however, with lobbying from the American Jewish diaspora and discussions within the American team negotiating the London charter, the U.S. position called for a broader focus on anti-impunity. This expanded prosecution agenda succeeded in winning the day in negotiations with the allies as well.

22 *Id.* at 147.

23 *Id.* at 164–66.

to prosecute crimes against humanity emerges from British idealists coming to terms with the ashes of World War I, their vision at that moment get vindicated by American idealists who argued for Nuremberg from the ashes of World War II. The passage revealed by Ariadne's thread through the maze of conflicting national interests and competing visions of international relations was gradual and challenging but each step taken in the direction of anti-impunity is an achievement. Indeed, Bass repeatedly notes that each step forward is not to be taken for granted. It was not inevitable; Nuremberg was the majestic triumph of high-minded commitment to legalism despite the lesser resolve of allies and fellow travelers.

A. *RESITUATING MID-20TH CENTURY INSTITUTION BUILDING: A TRIBUTE TO ACCOUNTABILITY OR IMPUNITY?*

The invocation of a crisis-space is by necessity a portrayal that includes somethings within the frame and excludes others, it highlights some events and ignores others. In Bass's framing, the focus is on the crisis of WWII criminality – and this is where he gets his optimistic portrayal of international law's response as manifest in the Nuremberg trials. By attending to how Bass' framing delimits how he sees the problem, and concomitantly, how he assesses the work of international law, we can also attend for what is excluded from his analysis of crisis and how we might then assess the work of international law differently. For instance if we look at the war crimes of those who prosecuted at Nuremberg, not just those who were prosecuted, Nuremberg emerges not only as a symbol of the struggle against impunity, but as an icon of impunity. International law facilitates the equation of victors' justice with justice as such, the equation of impunity for victors as anti-impunity.[24] Consider, for instance, the week in August 1945 when the London Charter was drafted. The London Charter, or the Charter of the International Military Tribunal as it is officially titled (and to which Bass gives the Americans the central role in establishing), details the mandate and procedure of the Nuremberg trials. It was signed by the Allies on August 8, 1945, sandwiched between the US bombing of Hiroshima on August 6 and the US bombing of Nagasaki on August 9. The 'crisis' of these bombings for the people of Hiroshima and Nagasaki does not enter Bass's crisis space or disturb his positing of Nuremberg as a choice of anti-impunity over impunity, of American liberal legalism over vengeance, or even, in the words of Robert Jackson, of reason over power.

That second week of August 1945, encapsulates how impunity for crimes against non-White peoples can be braided with a delimited commitment to accountability. The weight of Nuremberg, Hiroshima and Nagasaki in the annals of international law bake these racial logic into the international law canon, and its legitimation of imperial power.[25] In Bass's narrative, America's imperial

24 *See also* Mahmood Mamdani, *Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa*, ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle, Zinaida Miller, & D.M. Davis eds., 2016).

25 Jack Goldsmith, *The Shadow of Nuremberg*, N.Y. TIMES (Jan. 20, 2012). Obama, for instance, has employed the Nuremberg trials themselves to make the argument about American exceptionalism arguing that "the Nuremberg trials" were "part of what made us different" in ways that "taught the entire world about who we are."

power is ignored or rendered as a benevolent servant to the democracy and the rule of law rather than white supremacy or imperial conquest. [26] These contradictions may not simply be dimensions of American empire, but may well be more central to international legal liberalism and the world order which it birthed: from the nation-state[27] to human rights[28] to "humanitarian reason."[29] Thus contra Bass, we suggest that the "dark side of virtue" in international law may be central to the foundational concepts of liberalism and their institutional and legal embodiment on the international stage.[30]

The delimiting of the accountability mandate of Nuremberg is striking. The London Charter not only sidestepped its twinned siblings, Hiroshima and Nagasaki, it also ignored a host of allegations about Allied war crimes that had taken place over the duration of the war.[31] These crimes included civilian air raids such as the bombing of Dresden by the British and Americans,[32] wartime rapes by occupying Russian soldiers in Berlin, the killing of German prisoners of war in Dachau, and many more acts of torture, ill treatment, and killings of both civilians and enemy combatants.[33] The London Charter designates the court's subject matter jurisdiction as crimes against peace (a precursor to the modern crime of aggression), war crimes, and crimes against humanity. However, the Charter also indicates that this is not a "universalist" approach to these crimes; rather, the Tribunal was established "for the trial and punishment" of persons committing these crimes only when they are "acting in the interests of the European Axis countries."[34] Thus, the statement of the Court's jurisdiction in advancing a measure of accountability for some is tethered to its advancing the impunity of others in all these other instances of crimes against peace, war crimes, and crimes against humanity.

Significantly, Bass's narration of the Nuremberg story focuses primarily on the development of an American post-war policy on trials and the negotiations

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26 *After the Attack…The War on Terrorism*, MONTHLY REVIEW (Nov. 1, 2001). For example, in the wake of post 9/11 U.S. strikes on Afghanistan in October 2001, the editors of Monthly Review began their November issue noting that "in Britain, empire was justified as a benevolent 'white man's burden.' And in the United States, empire does not even exist; 'we' are merely protecting the causes of freedom, democracy and justice worldwide." *See also* Michael Ignatieff who defends American empire in YORK EMPIRE LITE: NATION BUILDING IN BOSNIA, KOSOVO, AFGHANISTAN (2003).

27 *See generally* ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

28 *See generally* COSTAS DOUZINAS, HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOSPOLITANISM (2007). *See also* Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS L., 1 (2002).

29 DIDIER FASSIN, HUMANITARIAN REASON: A MORAL HISTORY OF THE PRESENT (RACHEL GOMME TRANS., 2011).

30 *See* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004). In fact the relationship between impunity and anti-impunity, may well be the geo-political projection of the psychological construction of selfhood, where splitting the domain of impunity and the domain of anti-impunity is also a negotiation between those two domains and the actors relevant to each. *See also* NATHANIEL BERMAN, PASSION AND AMBIVALENCE: COLONIALISM, NATIONALISM AND INTERNATIONAL LAW (Randall Lesaffer ed., 2012).

31 *SEE* EVA FAUEN, *TOP 10 ALLIED WAR CRIMES OF WORLD WAR II*, LISTVERSE (DEC. 14, 2012), HTTP://LISTVERSE.COM/2012/12/14/TOP-10-ALLIED-WAR-CRIMES-OF-WORLD-WAR-II.

32 *See* KURT VONNEGUT, SLAUGHTERHOUSE FIVE (1991); RICHARD OVERY, *The Post-War Debate,* FIRESTORM: THE BOMBING OF DRESDEN,1945, 123–42 (Paul Addison & Jeremy, eds., 2006).

33 *See* HAROLD MARCUSE, LEGACIES OF DACHAU: THE USES AND ABUSES OF A CONCENTRATION CAMP, 1933–2001, (2001) (book by Herbert Marcuse's grandson).

34 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, ch. II, art. 6, Aug. 8, 1945, 82 U.N.T.S. 280.

amongst the Allies that led to the London Charter. There is very little on the actual trials themselves, and he pays no attention to the specifics of the cases or what Jackson, in his summation, described as the "Trial's mad and melancholy record."[35] The establishment of the court emerges as sufficient achievement for those championing accountability through international law. However, there is value in taking Nuremberg outside the debate about the pros and cons of such efforts to understand its significance, because here too we can see the accountability conversation as a footnote to a larger project. In particular, there is value in looking at the work done by Nuremberg in the post-war global landscape: a performative enactment of exceptionalism for a world audience (one which continues to be performed to this day)[36] to amplify the moral authority claimed by the Allies in shaping the post-war world order. After all this was not only a post war moment but a post colonialism moment; anti colonial movements had swept across the global south and most countries were in different stages of achieving independence. Already, the framing of the war effort itself as a fight for democracy and liberty distracted from the embarrassment of colonialism, not only on the global stage but also in various national theaters.[37] However, going forward, what would prove even more significant would be Nuremberg's place in the architecture of post-colonial global governance.

The narrative of Nuremberg as an ode to liberal global governance is an anthem to the world order birthed in the ashes of the war and its claim to universalist legitimacy even as formerly colonized countries were emerging as nation-states. Perhaps this is why even the details of the trials are ignored by Bass; the institution of the court itself is the signature of global governance announcing a new era – not just ending the war but announcing a new era of American hegemony in this post-colonial period. It contributes to the endorsement of the position of the US led allies as arbiters of a new world order in which their military victory is entrenched not only through the anti-democratic design of the Security Council, but also through the international financial institutions ("IFIs") established in that same period. The United Nations and the Security Council were established in October 1945. Only a few weeks later, in November 1945, the Nuremberg trials got underway according to the terms drafted in the London Charter. The next month, the International Monetary Fund was established and (together with the World Bank) went on to push a plethora of policies that continued the "planned misery" that characterized colonialism.[38] The momentous international institution-building that took place in the last three months of 1945 produced organizations that were deeply intertwined, not just in their origins, but also in their trajectories.

Scholars such a Elizabeth Bogwardt, Jessica Whyte and Quinn Slobodian have traced different dimensions of these intertwined paths. Bogwardt has

35 Nuremberg Trial Proceedings, Vol. 19, Day 187, July 26, 1946, The Avalon Project, Yale Law School.

36 *See* Jack Goldsmith, *The Shadow of Nuremberg*, N.Y. TIMES (Jan. 20, 2012), https://www.nytimes.com/2012/01/22/books/review/justice-and-the-enemy-nuremberg-9-11-and-the-trial-of-khalid-sheikh-mohammed-by-william-shawcross-book-review.html.

37 *See, e.g.*, AURIOL WEINGOLD, CHURCHILL, ROOSEVELT AND INDIA: PROPAGANDA DURING WW II (2008). Auriol Weingold's story on Churchill's use of the war in catalyzing US animus towards the "Quit India" movement.

38 I take the term 'planned misery' from Susan Marks, *Rights and Root Causes*, 74 MOD. L. REV. 57 (2011).

argued that Nuremberg, Bretton Woods, and the United Nations were projects in the three-part institutional architecture designed to empower America in post-war global governance.[39] Bogwardt describes this brave new world as an achievement bringing to life the blueprint of the 1941 Atlantic Charter that expressed the United Kingdom's and United States' joint interests. In the Atlantic Charter, the Anglo-American alliance declared that "after the final destruction of Nazi tyranny," it aimed "to see established a peace which will . . . afford assurance that all the men in all lands may live out their lives in freedom from fear and want," thereby employing various euphemisms which linked the agenda of fighting the Nazis with the military and economic agendas of the Allies.[40] In tracing the intellectual history of that economic agenda, both Whyte and Slobodian describe the institutionalization of a "neo-liberal model of world governance"[41] , in countering decolonization and the prospect of democratization of the international order. Nuremberg can be situated not only in the history of war crimes prosecutions, but also in the history of transnational judicial bodies that became central to this model. While Slobodian does not make the connection to Nuremberg, he speaks of the institutional vision of that model as entailing the "creation of supranational judicial bodies like the European Court of Justice and the WTO to override national legislation that might disrupt the global rights of capital.[42] It is not only that Nuremberg was a supranational judicial body, but that it also spoke to the notion of a global adjudication of political morality that trumped that of the nation-state precisely at the moment when the majority of the world's people were forming themselves into nation-states. Moreover, as in Bass's narrative, Nuremberg is often taken as the symbol of human rights and that supranational archimedan perspective. As both Slobodian and Whyte emphasize, human rights ('the morals of the market" as Whyte puts it) was especially important to this story; it is what tethers the post-war human rights regime that Nuremberg represents with the agendas of the neoliberal model of world governance that worked to defeat decolonization of the new world order in the postcolonial moment.

The most significant implication of the story of the interlinked post-war institutional projects resituates Nuremberg in the wider landscape of global governance in relation both to "peace and security," as well as to trade and political economy. As we have discussed Bass's account of Nuremberg is the centerpiece in a history of 20th century international relations through a narrative about accountability for war crimes. The historical arc of this story ignores, and implicitly endorses, the post-war settlement and the inauguration of what some might call the era of neo-colonialism.[43] In resituating Nuremberg in this way I have tried to reexamine the work of international law and international institutions in this historical conjuncture.

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39 ELIZABETH BOGWARDT, A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS (2007).

40 The Atlantic Charter, Aug. 14, 1941, http://avalon.law.yale.edu/wwii/atlantic.asp.

41 P. 6 of Slobodian Ibid.

42 P. 12-13 of Slobodian.

43George Monbiot, *Clearing Up This Mess*, THE GUARDIAN, https://www.monbiot.com/2008/11/18/clearing-up-this-mess/ (Nov. 18, 2008) (detailing more radical proposals, such as Keynes' proposal for an International Clearing Union to help debtor countries, that were defeated by the Americans in favor of the IMF).

For many states, the real stakes may not have been criminal justice but various alternative projects, including particular territorial, economic, and governance agendas that moved forward without opposition partly because post-war criminal justice measures got equated with justice as such. As I have discussed in greater detail elsewhere, there is a parallel between Nuremberg and the other waystations (Constantinople, The Hague) in Bass's narrative of international crisis and international law.[44] For instance, just as Nuremberg becomes the story about accountability in ways that advance a redemptive history endorsing the post-war II world order, ICL institutions of the Hague era served a parallel function in the post-Cold War world order. Just as the prosecution of German officials for war crimes at Nuremberg contributed to the legitimacy of international legal institutions in ways that distract from the impunity enjoyed by others for war crimes as monstrous as Hiroshima and Nagasaki. The work of the International Criminal Court in the name of accountability, stood alongside the refusal of accountability for atrocities that resulted from the US led war and occupation of Afghanistan and Ira in the very same moment of the ICC's work. Moreover, in all these cases, a story of crisis that focusses on war crimes and short, intense periods of extraordinary violence normalizes systematic abuses and ordinary or "slow violence." The ambitious century-long scope of Bass's narrative, and the intertwined role of legal argument and political maneuvering in his portrayal of international courts as champions of accountability and human rights in responding to international crisis, makes him a particularly valuable interlocutor for our discussion. Bass sees a unidirectional arrow from Constantinople to Nuremberg to The Hague. Strategic jostling by key political players on the international stage, the gradual development of a global human rights consciousness, international institutions, and the professional activists who staffed them all play a role in ensuring this arrow stayed its course. In Bass's story, although the human rights and accountability arrow may shoot straight ahead in some periods, while lurching forward unsteadily in others, the directionality is one of liberal states becoming more "liberal" and matching their political behavior to their political ethics. This framing does enormous work as a redemptive narrative that heralds liberal pieties of global North states as being "in the interests of humanity."[45]

In contrast to Bass's account, we have foregrounded arrows whizzing in other directions, including toward impunity. Moreover, at various historical junctures the significance of international criminal tribunals may not lie in their anti-impunity work but in dynamics that pertain to other dimensions of international politics such as the establishment of the IFIs and related institutions alongside Nuremberg as referenced above. This part of the article sought to situate the notion of international legal accountability not as a trans-historical high-minded ideal that travels from Constantinople to The Hague via Nuremberg, but as one that has had particular and contested backstories with specific political stakes in each of these moments of "tribunalizing justice." Accordingly, we have foregrounded areas such as global political economy, distribution, and redistribution as central to how we interpret international law's

44 Nesiah, *supra* note 8.

45 GARY J. BASS, FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION 24 (2008).

accountability initiatives and situate their relationship to global governance as a whole.

By foregrounding the structures and interpretive disputes that attend invocations of accountability, we can look at what work "accountability" is actually doing that warrants critical scrutiny—such as the narrowing of the human rights agenda to accountability only for extraordinary as opposed to ordinary violence, or for individuals rather than structures. Significantly, in Nuremberg as in the other contexts Bass discusses, accountability projects may have legitimized the dominant global order in the name of liberal political ethics and therefore helped entrench impunity in other realms. In my counter-account, I have highlighted how the domain of accountability initiatives in international criminal law has been limited to certain demarcated zones—primarily war crimes, crimes against humanity, genocide, and crimes of aggression (and their canonical definitions)—while there has been wide impunity for atrocities such as exploitative terms of international trade which enable and condition socio-economic abuses. Similarly, my counternarrative has drawn attention to the ways in which the mantle of legitimacy that is vested in claims to accountability has authorized companion agendas by association and delegitimized challenges to the dominant order as ones that risk empowering war criminals and criminal regimes. In other words, the dominance of the narrative that there is a turn to accountability in international law is itself doing work that I have aimed to unpack and critique. For our purposes, this is particularly telling as a story about the labor of international law in Nuremberg, the most celebrated incident for celebrants of international law's response to crisis.

II. FREETOWN: THE CROSSROADS OF SLAVERY/COLONIALISM/RACIAL CAPITALISM

For many advocates of international law's salutary history, the backdrop of Nuremberg heralding the promise of the ICC when the Rome Statute came into force in July 2002. However, a decade after the ICC had opened its doors, its own record provided a less optimistic prognosis about the future of international criminal law. In 2012, when Martinez's book came out, the ICC had proven ineffective in responding to world crises, including and especially the atrocities by America and its allies in Iraq and Afghanistan. Moreover, when it did act, the ICC faced charges of wielding racist and colonial prosecutorial policies. It is in the context of this contemporary legitimacy crisis that Martinez steps back a century before Nuremberg to look for alternative inspiration for the ICC's promise in addressing struggles over structural racism in the world order and she finds that alternative inspiration in Freetown, Sierra Leone. Freetown was one of a number of locations along the Atlantic coasts where tribunals were established with the authority to monitor the abolition of the slave trade in the middle of the 19th century. They were instituted under the aegis of Anglo-European and Anglo-American political legal and military authority on territories that had been colonized on both sides of the Atlantic. They were known as 'mixed tribunals' to indicate their transnational legal provenance, jurisdiction, and staffing. The 'mixed tribunal' in Freetown was by far the most significant of these. Courts were initially established in Brazil (an Anglo-Portuguese court), Cuba (an Anglo-Spanish court), Surinam (an Anglo-Dutch

court), and Sierra Leone (which included courts representing all of the parties). Over the following decades, Anglo-Portuguese courts were also set up in Luanda, Boa Vista, Spanish Town, and Cape Town.[46] During the course of their existence, the Sierra Leone courts held that 65,000 captured men and women should be freed because they had been illegally trafficked in violation of the abolition of the slave trade; the courts in Havana, Rio, and elsewhere released another 15,000 Africans. While Nuremberg is the most famous international judicial institution, even most international criminal law scholars and professionals do not know about these international tribunals that were established a century earlier, also in the name of supranational judicial accountability. Martinez seeks to rescue them from obscurity and offers them up as inspiration for the future of the international law. Her history of the politico-legal subject 'humanity' in international law reaches back to these records to claim their humanist origins and recuperate the laws and institutions involved in the abolition of the international slave trade as signifying the salutary juridical and moral promise of international law.

The story that Martinez tells also begins with a double crisis—the brutalities of the international slave trade was a crisis in itself, but in addition, the contradictions between slavery and the age of rights also raised questions of legitimacy for the revolutions, constitutions and normative claims of the imperial and slave holding powers heralding the rights of man in this same period. In 1807, when American and British legislators ruled the slave trade illegal, slavery itself was legal and thriving in Caribbean sugar plantations, Columbian gold mines, and American cotton fields. The triangular trade played a critical role in the political economy of the industrial revolutions that twinned the liberal revolutions of the late seventeenth century.[47] This was the heyday of colonial expansion in Africa. The political economy of slavery and colonialism were intertwined in complex ways across the Atlantic and was equally central to the social, political, and economic underpinnings of these twin revolutions.

If the logic of the "Age of Rights" was predicated on, and promised, the self-possession of the white man, the fact that these coexisted with slavery and the slave trade seemed to indicate that that logic also implicitly, yet unequivocally, affirmed and enacted the dispossession of the black man. Accordingly, the movement for the abolition of the international slave trade is often situated in accounts of a developing international legal order that sought to resolve that contradiction and recognize an evolving rights consciousness on both sides of the Atlantic as its anchor going forward. Dominant histories of human rights and humanitarianism seek to redeem the age of rights by framing

46 *See* Leslie Bethel, *The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869*, *in* CAMBRIDGE LATIN AMERICAN STUDIES (David Joslin & John Street, eds., vol. 6, 1970).

47 W.E.B. DU BOIS, THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA (Oxford Univ. Press 2014); ERIC WILLIAMS, CAPITALISM AND SLAVERY (Univ. of North Carolina Press 1944); LISA LOWE, THE INTIMACY OF FOUR CONTINENTS (Duke Univ. Press 2015); CEDRICK ROBINSON, 'THE ATLANTIC SLAVE TRADE AND ATLANTIC LABOR' IN BLACK MARXISM (Univ. of North Carolina Press 1983); WALTER JOHNSONS, RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM (Belknap Press 2017). Men and women forcibly transported from Africa worked the cotton fields in the Americas to supply raw material for the looms of Manchester. One can tell a parallel story regarding slavery, sugar plantations, and the sugar trade that was vital to the wealth of Europe.

the French and American revolutions as a founding moment in shaping a notion of humanity that organically evolved into the movement for the abolition of the international slave trade as a crime against humanity. In this vein, Lynn Hunt's story of the invention of human rights focuses on the French revolution and the "rights cascade" it engendered. Similarly, Adam Horscheild situated the movement to abolish the slave trade and the passage of the 1807 abolition legislation as the first human rights movement, extending the logic of the Atlantic revolutions. [48] Jenny Martinez describes the slave trade as the "original 'crimes against humanity'" (CAH) and the 'Mixed Tribunals' established to monitor abolition of the trade as offering a "bridge" to the international criminal court (ICC) today.[49] In her telling, this 'bridge to the future' is constructed by judicious institutional purpose in the name of humanity.[50] In a context where the ICC has been accused of anti-Africa bias and a neo-colonial prosecutorial record, the bridge to the mixed commissions is seen to carry with it redemptive inspiration for tribunals mandated with embroidering human rights and humanitarianism on international law's future.

A. *RESITUATING MID-19TH CENTURY INSTITUTION BUILDING AND THE MYTHOLOGY OF A POST-RACIAL ICL*

The links between Mixed Commissions and contemporary ICL may be tenuous in terms of influence and impact, but they are instructive in understanding the backstory (in this case the abolition of the slave trade in the name of a race-transcending humanity') that contemporary ICL historians see as most relevant to ICL legitimacy. Historians of ICL, such as Martinez, see the slave trade as racial exploitation and have done important work on how the category of race travelled in different European slave trade systems.[51] However, the potential they attribute to the human rights revolutions and the mixed commissions they have supposedly birthed is precisely their transcendence of race in the name of humanity. My interest in this history of the mixed tribunals is in probing the work of invoking race transcendence and the mixed commissions as the origin story of international criminal law, and in particular the laws and norms of CAH. The bridge of CAH may well be a bridge between mixed tribunals and the ICC, but the story it tells may not be a testament to the law of humanity but an indictment of it.

The repression of race in the historical narrative of then and now is a precondition for telling the story of empire and slavery in the mid-Atlantic as a story of emancipation. Race is foundational to the plot of Atlantic slavery, so to repress that memory and render race invisible in the work of the mixed

48 In 1807, the British Parliament and American Congress banned the international slave trade. During subsequent decades, British bilateral treaties with other European powers translated this ban into transnational tribunals (the 'Mixed Commissions') to help police the Atlantic for compliance, exercising what some describe as an embryonic form of universal civil jurisdiction.

49 JENNY MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF THE INTERNATIONAL HUMAN RIGHTS LAW 6 (2012). Tribunals discussed *supra* are called mixed commissions because they were established through bilateral or multilateral treaties, with countries having combined jurisdiction over the cases they had to adjudicate.

50 *Id.*

51 *See* Jenny S. Martinez & Lisa Surwillo, *"Like the Pirate and the Slave Trader Before Him": Precedent and Analogy in Contemporary Law and Literature*, 35 L. & HIST. REV. 82, 83-84 (2017) (discussing the category of race in the slave trader and the migrant trafficker).

tribunals requires an elaborate defensive structure, and it is the juridical category of humanity that helps forge those defences in the histories told by the discipline and the memories it represses. Both ever-present, and ever-elusive, race and racism have a schizophrenic life in international criminal law histories of these tribunals as part of the first initiative to combat "crimes against humanity" in those terms. The terms of crimes against humanity are understood as referring to a colorblind category of humanity that had no explicit racial reference but were saturated with latent racial significance.[52] The notion of humanity posited as the 'origin' of human rights and signifying the promise and potential of international law is thus shaped by a redemptive universality and a pivotal erasure of racialized power. As critical race theorists Richard Delagado and Jean Stefancic have noted in their discussion of American jurisprudence, the very language of law carries with it a canonical interpretation predicated on silencing questions of race and power: "the law does have a canon. It consists of terms like 'just,' 'fair,' 'equal,' 'equal opportunity,' 'unfair to innocent whites,' 'nice,' 'deserving,' and 'meritorious,' all with canonical meanings that reflect our sense of how things ought to be, namely much as they are."[53] Racialized structures and imaginaries hide in plain sight in histories of these tribunals as an embryonic ICL—present everywhere yet not acknowledged anywhere.

The weight of race as part of the legal architecture, as well as the everyday experience of the law was nowhere more evident than at the doors of the Mixed Commissions. Here, white judges (presorted according to their nationality) determined the fate of black men and women hovering in an interregnum between a regime of property law and a regime of colonial law, objects of property or subjects of colonial rule. Fanon's words from a century later could well have been reporting the work of those Commissions: "When I look for man in European lifestyle and technology I see a constant denial of man, an avalanche of murders."[54] The racialized peopling of these commissions have a particular grammar, juridical and ethical, that shapes central features of contemporary international criminal law and its claims to act in the name of humanity. Fanon is here deftly connecting what he would call the "fact of Blackness" with the structures of racial genocide, at once both epistemic and economic, a matter of imagination and a matter of physical violence.

Attention to the political economy of the slave trade helps to connect the dots even more tangibly. Historians of the slave economy have argued that over the course of the early 18th century, the abolition of the international slave trade became intertwined with the sustaining of slavery as such.[55] Thus, a central dimension of the backstory to the abolition of the slave trade is that there was a divergence in the profit circuits of the slave trade, and the profit circuits of slave holding. For some sectors of the plantation economy in North America, and arguably for their industrial partners in Manchester and elsewhere, addressing their labor needs through the market in slaves who had been already brought to

52 Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991).

53 Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of a Just Balance Changes So Slowly*, 82 CAL. L. REV. 851, 862 (1994).

54 FRANTZ FANON, THE WRETCHED OF THE EARTH 236 (1963).

55 WILLIAMS, *supra* note 46.

North America was more profitable than depending on the international trade. Thus, many of the advocates of the abolition of the international trade argued for it on the theory that it would help ensure that slaves in the national market will be more valuable. There would be added incentive for slave owners to ensure the health and wellbeing of slaves they argued, and this in turn would make slavery a more sustainable social structure. The support for domestic slavery was not uniform but it is significant that when the question of fighting for a more universal emancipation came up in the *Society for Effecting the Abolition of the Slave Trade* (the organization that led the social movement for the abolition of the trade) only one of the twelve founding members, Granville Sharpe, supported full emancipation.[56] Many of the other prominent supporters of the abolition were not opposed to slavery as an institution. William Wilberforce's parliamentary speeches made the case for how slave plantations in the West Indies will profit from the abolition of the international trade.[57] In sum, the humanitarian imperatives underlying the creation of the Mixed Commissions were conjoined with a complex of other dynamics defining what qualified as a crime, including chattel slavery.

In her pathbreaking 1993 essay, *Whiteness as Property,* legal scholar Cheryl Harris described how the project of racialization was not only about identity and affiliation but also, fundamentally, a project of stealth material distribution. "Whiteness as property," Harris argues, "has carried and produced a heavy legacy. It is a ghost that has haunted the political and legal domains . . . Only rarely declaring its presence."[58] Legal struggles against structural racism entail remembering, naming, and rendering visible the work of racial architectures, unpacking the mechanics of invisibility, and exposing how racialized systems drive the plot. In this case, it is about foregrounding how racial capitalism, including the specific contours of slavery and empire, was central to the structures and ideologies of the seventeenth and eighteenth world order. This includes the work of the Mixed Commissions where the privilege of whiteness, both extraordinary and banal, manifest in travel through nationality and property ownership without having to declare its presence. Evincing a different kind of invisibility, blackness hovered between object and subject, property and persons, past and future, an erased body on the free seas in the age of liberty.

The erasure of 'race' from ICL history is partly effected by translating questions regarding the racial ordering of the Atlantic world into legal questions about the reach of abolition in the British Parliament and American Congress and the purview of maritime law, the resolution of disputes through application of tribunal procedure and the determining of relevant colonial authority, the defining of social change through inter-European treaties and the constituting of legal institutions. Law (from the various pieces of national legislation abolishing the slave trade in Britain, the U.S., France, and elsewhere), and legal institutions (the Mixed Commissions as well as the national courts that encountered slave trade cases), provided different kinds of cloaks of invisibility that translated the politics of race into technical legal questions regarding nationality and jurisdiction, property and prize law, legal personhood and juridical freedom.

56 ADAM HOCHSCHILD, BURY THE CHAINS: THE BRITISH STRUGGLE TO ABOLISH SLAVERY 110 (2006).
57 *Id.* at 161.
58 Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1791 (1993).

Emanating from imperial claims over land and sea, Europeans (often the English Navy) asserted jurisdiction over Africans on ships brought before the commission to sort them as objects of property law or subjects of colonial law. If a ship was flying under the flag of one of the treaty parties and detained under suspicion of being embroiled in the slave trade, it was brought to a Mixed Commission where that country was represented.[59] Thus, Europe proceeded to carve up the Atlantic even before Europe carved up Africa at the infamous Berlin conference.[60] The carving up of inter-imperial oceanic jurisdiction through Mixed Commissions anchor the role of Europe and America in a racialized structure of world order.[61] ICL historians describe how each exercise in adjudication regarding jurisdiction assessed the applicability of the law abolishing the trade by focusing on the registration of the ship, nationality of ship owners, and the circumstances of capture. The privileges, vulnerabilities, and hierarchies that accompanied racial difference were central to matters such as nationality and ship ownership so race gets constituted in the details of that adjudicatory process without race having to be named. The law defining the crime was ostensibly race neutral, and mobilized language regarding abstract legal persons, their ownership claims over ships and people, and the nationality under which the ship was registered.

Thus, an equally significant part of the legacy for contemporary international law is how the causes of abolition and imperial consolidation converged. Thus, scholars learned in the legal history of empire have traced how the imperatives for extending and tightening the reach of the British imperial constitution led to a renewed interest in establishing legal authority over the high seas.[62] This led to a ramping up of efforts for policing piracy and the slave trade, and the establishing of an enforcement mechanism throughout the high seas. Intertwined with this were the long reach of the Napoleonic wars, the war of 1812 and a series of other inter-imperial tensions that made the nationality of the court adjudicating cases a particularly fraught issue. Setting up tribunals through bilateral treaties was one way of negotiating these tensions and constituted an approach of particular value to the British whose imperial star was ascendant but not uncontested.

If the laws of jurisdiction and nationality are one dimension of the legal regime of mixed commissions, another dimension, equally saturated with competing imperial interests, was prize law. The naval patrols that brought in slave ships became eligible for what was termed salvage, bounty or prize money. Maritime law incentivized ships to intervene when ships were in peril (because of storms and other natural causes), but also when they were suspected of illegal activities, including violation of the laws of war and neutrality, piracy, and the

59 Through the lens of ICL, arguably the Mixed Commissions were early precursors to what we now term hybrid courts. However, with the history of the Mixed Commissions faded from the collective memory of ICL, they were not in fact the precedent or inspiration for the hybrid courts that were set up in Sierra Leone, Timor, or Cambodia. The more proximate point of reference for these were of course the lessons learned from the ad hoc tribunals.

60 LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900 43 (2010).

61 In addition to maritime laws regulating colonization, war, piracy, trade, and the registration of a ship's nationality, treaties regarding abolition also anchored jurisdictional boundaries within the Atlantic Ocean.

62 BENTON, *supra* note 59.

slave trade.[63] Prize law functioned in tandem with treaties regarding the abolition of the slave trade to further regulate what counted as legitimate and illegitimate capture, and if African men and women on board were freed or shipped back across the Atlantic with their captors.[64] There were immediate material rewards for the ship captains who pursued slave ships if they were able to prove that the cargo was illicit. There was no question of any recompense for the slaves themselves even when it was a slave rebellion that catalyzed the bringing of a ship to harbor.[65] What is at stake in slave-trade contingent prize law is not just real property, but property in racial privilege—a racially contingent property right to implement the abolition.[66]

The precarity of personhood recognized in every mixed commission is underscored when situating the law abolishing the slave trade in the market logics of the trade. The prohibition drove up the price of slaves so there was augmented profit incentive to trade slaves; thus, legal abolition played a complex role in the calculation of risk and 25 per cent of slaves in the transatlantic slave trade were transported in the half century that following the prohibition. In this way, the political economy of the traffic in persons cast its shadow in both the revenue and loss columns of the structural beneficiaries of the slave trade, linking private law and the law of nations, law regulating private property, and law regulating international trade. The recognition of the captured African as a legal person conjoined a certain sort of juridical freedom for the captured, a certain sort of financial bounty for the patrolling officers, and a certain sort of normative legitimacy for the laws and institutions of slave trade abolition. This conjoining of the interests of the dispossessed and the self-possessed, the victims and the beneficiaries, is an 'achievement' of the deracinated definition of law and humanity and an achievement for this ICL enhancing story of origins. Race is rendered invisible even in legal principles (such as abolition) that purport to hold racism to account.

The judicial construction of freedom is a powerful register of the complex race translation work of the law of nations. Captured Africans seesawed between legal property and juridical freedom, and concomitantly, seesawed in between being valued as cargo and valued as persons—it all depended on whether the captured man or woman would be successfully trafficked to great profit, or forcibly freed if the ship was hauled into a Mixed Commission. The majority of ships that came before the Commissions had captured Africans on board and the court had to determine the terms of liability and free the would-be slaves. The men and women who had been captured aboard these ships hailed from across the African continent. It is significant, however, that the courts ordered their release but imposed no further responsibilities on the slavers to ensure they were able to go home. Thus, in the majority of cases, the 'freed' found themselves

63 The Act abolishing the slave trade specified bounties of "the Sum of Forty Pounds lawful Money of *Great Britain* for every Man, or Thirty Pounds of like Money for every Women, or Ten Pounds of like Money for every Child or Person not above Fourteen Years old." *47° Georgii III, Session 1, cap. XXXVI: An Act for the Abolition of the Slave Trade* (1805), http://www.pdavis.nl/Legis_06.htm.

64 Lauren Benton, *Abolition and Imperial Law*, 39 J. IMPERIAL & COMMONWEALTH HIST. 355 (2011). Benton has shown this was an era of inter-imperial struggle for dominance over the oceans and the legal landscape of abolition operated as one terrain on which that struggle was conducted.

65 Padraic Xavier Scanlon, *The Rewards of Their Exertions: Prize Money and British Abolitionism in Sierra Leone*, 1808-1823, 225 PAST & PRESENT 113 (2014).

66 *See* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

hundreds or thousands of miles from home, in an environment where they did not speak the local language and did not have the resources or geographic knowledge to return to their families. By mid-century, Freetown had over 40,000 people from across the continent who spoke over a hundred languages.[67] Thus we see very concretely the production of 'freed slaves' as legal persons without race, history, and social context; their humanity reduced to their legal status and detached from their community. Not a counter to the dehumanization of slave relations, juridical freedom carried its own oppressive pathologies and justifies its own unfreedoms, but this time internal to the notion of the human.[68]

ICL historians and ICC advocates situate law as the great emancipator and, concomitantly, lament lack of access to law as the source of abjection. Yet the work of law may be more complex—foregrounding race here, backgrounding it there, predicating jurisdiction and standing on racial classification in one arena, and travelling as race-neutral in another. Once a captured ship travels through the adjudicatory process, race gets constituted as background fact rather than the product of legal processes; repressed and buried to present itself only as that which is overcome through judicial recognition of an African's humanity. The rule of law is invested with the authority that attaches to a standard-bearer of this idealized notion of a pure redemptive humanity. Moreover, legal recognition of a captured man or woman as 'human' yields the affirmation of white normativity in the very heart of what it means to be human. Arguably, this legal recognition dependent precarity is part of the memory of racial difference that shapes personhood in front of ICL today where having your case heard in court is often framed as validating your victimhood, and by extension your personhood. The maldistribution of the profits of ICL legitimacy can be tracked along W.E.B. Du Bois's reflections, a century after the abolition of the trade in England and America, on the 'outlook for the darker races of mankind' as he predicts the persistence of 'the color line'.[69] Or to put it in a more contemporary vernacular, the colorline blind erasure of racial world orderings from this story of 'crimes against humanity' marks the line of white privilege as the historic origins of ICL.[70]

For ICL historians like Martinez, the work of the Mixed Commission in Freetown and elsewhere is an antidote to the morass of disillusionment that

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67 MARCUS REDIKER, THE AMISTAD REBELLION 44 (2012).

68 There are analogs here to the post emancipation world in America that prompted Saidiya Hartman to ask if "the extension of humanity to the enslaved ironically reinscribe their subjugated status?" SAIDYA HARTMAN, SCENES OF SUBJECTION 22 (997). *See also* SAMERA ESMEIR, JURIDICAL HUMANITY (2012) (on how freedom cannot be conceived outside of what is legally declared free).

69 "The problem of the twentieth century is the problem of the color line: the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea." W.E.B. DU BOIS, THE PRESENT OUTLOOK FOR THE DARKER RACES OF MANKIND 47-54 (Eric J. Sundquist ed., 1996).

70 For instance, we can see how race travels as both structure and personhood in the description of ICL history as conjoining humanitarian aims with international adjudication. Racist tropes saturate the affective constructions of guilt and innocence, of monstrous perpetrators and needy victims. They are constituted through, and constitutive of, the over determining architecture of the ICL system, while also being part of how the system is experienced and navigated in its quotidian intimacy for those who are in the system as judges and lawyers, perpetrators and victims. Yet race remains invisible—there is no explicit reference to racial categories in the ICC's official statements; one would be hard pressed to prove racist intent in describing the work of the office of the prosecutorial office; the most prominent officials of the ICC have hailed from 'the darker nations.' Contemporary criminal law employs abstract legal categories that decisively eschew race. Indeed, the ICC may be said to explicitly invoke race only to prosecute it (as in its Darfur cases).

attends the work of international courts in the Hague today. It advances a redemptive story about the potential of international law and liberal humanism by going back to the tribunals to redeem the promise of international courts as a platform for morality marrying power. In reading race and its erasure into that story, we get a different narrative about how Euro-America empowered itself for and through imperial conquest in the wake of the slave trade, and this empowerment worked partly by constructing a category of 'whiteness', and by mirrored necessity, a racial other. Yet it is not a whiteness that heralds its own presence. Rather it is a whiteness that presents as nothing less than the new world order; here latent in the cosmopolitan institutionalism that seeks to knit together humanitarian aims with international adjudication. The Mixed Commission treaties linking and separating England from America, America from France, France from Spain, Spain from Portugal, Portugal from the Netherlands, and so on, were building blocks in the discursive production of whiteness, an imperial whiteness. When Du Bois invokes the 'color line', he is not speaking of melanin and naturalized racial categories, but the line that traverses land and ocean to trace the routes of colonialism and the slave trade to occupy the systemic inequalities and hierarchies of world order. Indeed, on this view, the color line stretches both before and beyond the twentieth century that Du Bois references, as the common thread of liberal universalism, from the rights revolution of the seventeenth century to the operation of international institutions in the twenty-first century. Race and racial difference are of course fundamentally historical constructions that mean different things in different social, political, and historical contexts; thus, the work of racial difference in the Atlantic then, and in the Hague today, is profoundly different even when connected. However, foregrounding racial capitalism (in both its material and ideational dimensions) opens a window into the work of the colorblind law of the "human" in holding the color line and putting wind in the sails of a racially mal-distributive regime of global governance.

We have discussed how ICL histories celebrating the abolition of the slave trade can operate as decoy distracting us from the ways in which slavery was legal and even sustained by the abolition. Humanitarian discourse can also do work that warrants unpacking when inflecting abolition discourse, often empowering not the agency of the enslaved but the agency of the rescuer. The moral economies of rescue were pivotal in the legitimacy of the Mixed Commissions and the financial and institutional support that they could command from their sponsoring states, particularly Great Britain. Thus, many abolitionists were keen to distinguish their human rights campaign from slave led freedom struggles that challenged the rule of law, such as Nat Turner's rebellion or the underground railroad that pre-empted rescue with rebellion, and challenged the rule of law as part of the problem not the solution. For instance, the Haitian revolution was something of an embarrassment for the abolition movement because it conveyed militancy for the overthrow of slavery that was not dependent on developing the moral sympathy of the British and American public. The abolitionist paper *The Anti-Slavery Record* seeks to "soften the memory of the Haitian Revolution" through alternative narratives such as a story titled *the Humanity of the African Americans*" "depicting a 'loyal' slave who

saved his master's family from retribution."[71] The humanity of the slave had to be proved in this two-step dance rejecting slave agency in the struggle for freedom, while making themselves sympathetic characters inviting rescue. Equally, for the moral compass of rescue to point to international law as the true north, the politics of resistance and abolition had to be depoliticized, moralized and reframed through dynamics that anticipated the victim-savior-savage triad that Makau Mutua describes as the coordinates of the contemporary human rights movement.[72] The law of salvage refers, in international maritime law, to the material rewards that could be claimed by rescuing an imperiled ship, here prize law attached to the mixed commissions set up a parallel moral salvage that could be claimed by rescuing an enslaved African.[73]

The regime of the 'crimes against humanity' that is instantiated in the mixed commissions is a splitting of the human between those who have a surfeit of rights, and those who need their rights bestowed from afar. Borrowing from Jacques Ranciere one can say that the rights the abolitionists were keen to grant the captured Africans were "the rights of those who were unable to enact any rights or even any claim in their name".[74] When discussing juridification, we discussed a process for sublimating race-talk into law-talk to produce the abstract legal human subject of ICL; with moralization, the premise of moral visibility *as* human is not the re-channeling of racial categories into juridical categories, but the overcoming of race and racial identity. One is human despite being black—recall Toussaint's interrogation of the human "we are black, it is true, but..". With whiteness as the default content of humanity, the moral framing had to be one that reinforced that racial normativity. This was both a process of framing the enslaved as making a plea for recognition that they were just like whites and embedding it in campaigns empowering whites to grant that recognition. It was the imperial benefit of the rights revolutions: "you do the same as charitable persons do with their old clothes. You give them to the poor. Those rights that appear to be useless in their place are sent abroad, along with medicine and clothes, to people deprived of medicine, clothes, and rights."[75]

The Anti-Slavery Committee chose a seal for its campaign that was designed to underscore that this was a campaign of rescue and beneficence. The seal had an image of a kneeling slave (designed by the pottery magnate Josiah Wedgewood) with an emotive caption "Am I Not a Man and a Brother"; this image and caption became the de facto logo and slogan of the abolitionists.[76] The seal invoked the voice of the enslaved man, but it was used by white British abolitionists on medallions that were pinned onto garments, embossed into platters the abolitionists displayed in their homes, and so on. Not unlike the Kony2012 bracelets and the "Save Darfur" pins, the material culture of eighteenth century humanitarianism underscores that was a project where ICL "recognition" was in fact rescue. The kneeling slave in the image was designed

71 SUE PEABODY & KEILA GRINBERG, SLAVERY, FREEDOM, AND THE LAW IN THE ATLANTIC WORLD 81 (2007).
72 Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201 (2001).
73 Jacques Ranciere, *Who is the Subject of the Rights of Man?*, 103 THE SOUTH ATLANTIC Q. 297 (2004).
74 *Id.*
75 *Id.*
76 HOCHSCHILD, *supra* note 55, at 128.

with physical features intended to leave the abolitionist in no doubt about the intended racial references. Even more acutely, however, his supplicant posture and abject plea cemented racial definition: it was part of the racial ordering of humanitarian sentiment that black people prayed to white people for recognition, a prayer that overlooked race in extending recognition, human to human. To sport that, the Wedgewood medallion was to display human solidarity, inscribing difference as internal to humanitarianism such that one human granted recognition while the other human pleaded for recognition. The human was internally split, carrying with it these contradictions and hierarchies, and generosity and exploitation.

CONCLUSION

In our discussion of redemptive histories of international law, we have sought to provide alternative readings of both Nuremberg and Freetown by resituating the political stakes of celebrated incidents of legal virtue. This reframing has entailed connecting the dots between law and political economy, between regulation of ships on the Atlantic and the profit circuits of the plantation economy, and between Nuremberg and the International Monetary Fund. Most significantly, this reframing of international legal legacies entailed revisiting the history of international criminal tribunals in an effort to parochialize the invocation of "the interests of humanity."[77] For instance, the mandate and role of the Mixed Commissions is the establishment of the rule of humanity through canonical legal terms in the global racial ordering of the day, treaty, jurisdiction, prize law, property, and persons. In this framework, the extension of the human category to the illegally enslaved is a gesture of humane and humanitarian recognition. Slave traders were violating the law that indicated the illegality of the trade, but the abolition was itself an embryonic articulation of the notion that the victims of these crimes were not just the enslaved, but humanity as such. Indeed, to describe the victims as the enslaved is to understate the crime; it is the formulation of the slave trade as a "crime against humanity" that elevates it to one that violates the very value of humanness.

The multi-pronged de-racialization of "crimes against humanity" in ICL's backstory haunts the notion of the human and the entanglements of the human's dual record of extraordinary humane solidarities and extraordinary inhumane actions. The work of the category "crimes against humanity" is to steer our gaze away from those entanglements to instead focus on juridically recognized perpetrators and the drama of the slave traders as moral and legal outliers. The slave trader emerges as that exceptional perpetrator whose most remarkable and enabling characteristic is not his location in the racialized logics of profit and property that sustain the majority of humanity's profiteers, but his moral pathology. This denial of "the entanglements of slavery and freedom"[78] empowers liberal juridification as a central mechanism forging the expulsion of race and racial consciousness from the heritage of the "human." Indeed, racial

77 DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL (1st ed. 2000).

78 SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 151 (1997).

consciousness is equated with the illiberal and inhumane profiting from racial distinction; then the slave trader, in contemporary ICL, is the perpetrator of genocide and a war criminal. Constituting and legitimizing the juridical authority and moral compass of international law has entailed the racial cleansing of that heritage of the human as race neutral rule of law; a project that, therefore, remains forever entangled with law defining and prosecuting the inhuman. As Walter Johnson has argued, there is "ideological work accomplished by holding on to a normative notion of 'humanity'—one that can be held separate from the 'inhuman' actions of so many humans."[79] In understanding the imbrication of the field of ICL history in that ideological work, we need to confront the challenge that the most shocking fact about the international slave trade was not a rare inhuman monstrosity, but a banal human ordinariness.[80] Sanitizing the notion of the human may be a project of masking its internal inhumanities and its record of complicities, individual and collective, ideational and structural. Johnson further notes that in refusing to confront the dark side of human virtue, "We are separating a normative and aspirational notion of humanity from the sorts of exploitation and violence that history suggests may well be definitive of human beings: we are separating ourselves from our own histories of perpetration." The "human" sheds the weight of racial baggage—what Alexander Wheliya describes as "excess"—to emerge as a svelte, universally inclusive figure that does not implicate the structures and beneficiaries of racial capitalism.[81] Indeed, it renders the "rescuer" too a victim, part of the anonymous mass of humanity wronged by the crime against humanity that is the slave trade. Thus, the narrowing of the designated perpetrator works alongside the broadening of the designated victim to an all-encompassing humanity, not just black humanity. A "crime against humanity" renders the victim abstract, deracialized, universal; today we might say it is a category that stands for the rallying cry that "All Lives Matter."[82]

To sum up, when confronted with a crisis of legitimacy, scholars of international law and international relations have been tempted to return to a redemptive history of international law and institutions as a guide and inspirations to safer waters. Instead, we may want to consider the legitimacy crisis as a prod to interrogate international legal history for its canonical biases, particularly with attention to the legacies of slavery, colonialism, and neocolonialism that are intertwined with international legal history. Thus, history remains pivotal today with authoritarianism getting new lease of life in a range of countries around the globe. However, with the emergence of authoritarian and fascist forces in earlier moments, we may need in fact to make different connections between then and now, and between what happens in the global South and what happens in the global North. Emerging from battles over fascism and decolonizing, Aimé Césaire, the Martinique poet of negritude,

79 Walter Johnson, *To Remake the World: Slavery, Racial Capitalism, and Justice*, BOSTON REV. (Feb. 20, 2018), http://bostonreview.net/forum/walter-johnson-to-remake-the-world.

80 HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (Penguin Books 2006) (1963).

81 ALEXANDER G. WEHELIYE, HABEAS VISCUS: RACIALIZING ASSEMBLAGES, BIOPOLITICS, AND BLACK FEMINIST THEORIES OF THE HUMAN 55 (2014).

82 For critical analysis of the 'All Lives Matter' turn, *see* Laura Flanders, *Building Movements Without Shedding Differences: Alicia Garza of #BlackLivesMatter*, TRUTHOUT (Mar. 24, 2015), https://www.truthout.org/video/building-movements-without-shedding-differences-alicia-garza/.

described the boomerang effect between one and another, and his advice about how to connect those dots remains ever relevant. Thus, I want to conclude by considering one of the most poetic passages of Césaire's *Discourse on Colonialism,* both mournful and sharply denunciatory*,* but full of wisdom for making connections across time and place that disrupt rather than redeem international law. "We must study," Césaire says, "We must study how colonization works to decivilize the colonizer, to brutalize him in the true sense of the word, to degrade him, to awaken him to buried instincts, to covetousness, violence, race hatred, and moral relativism." "We must show," Césaire says that

> we must show that each time a head is cut off or an eye put out in Vietnam and in France[,] they accept the fact[;] each time a little girl is raped and in France they accept the fact, each time a Madagascan is tortured and in France they accept the fact, civilization acquires another dead weight, a universal regression takes place, a gangrene sets in, a cancer of infection begins to spread, and that at the end of all these treaties that have been violated, all these lies that have been propagated, all these punitive expeditions that have been tolerated, all these patriots who have been tortured, at the end of all the racial pride that has been encouraged, all the boastfulness that has been displayed, a poison has been distilled into the veins of Europe and, slowly but surely, the continent proceeds towards savagery . . . And then one fine day the bourgeoisie is awakened by a terrific boomerang effect: the gestapos are busy, the prisons fill up, the torturers standing around the racks invent, refine, discuss . . . [83]

The crisis of authoritarianism that we are confronting in many parts of the world today in the 21st century was foretold by "the mad and melancholy record" of crises of centuries past in Vietnam and Madagascar, Hiroshima and the Black Atlantic. In writing redemptive histories of international law as a salutary response to crisis, we ignore international law's own imbrication with these crises and fail to attend to how the gangrene sets in.

83 CÉSAIRE, *supra* note 7.