doi:10.1017/amp.2023.88

THE GOLER T. BUTCHER MEDAL LECTURE: CHANTING THEIR NAMES

This lecture was convened at 4:00 p.m. on Friday, March 31, 2023. Patricia Viseur Sellers, Special Advisor for Slavery Crimes to the Prosecutor of the International Criminal Court and 2023 Goler T. Butcher Medal recipient, was the honoree and lecturer.

Remarks by Patricia Viseur Sellers*

Thank you to the ASIL Selection Committee, the Annual Meeting Co-Chairs, President Gregory Shaffer, and Executive Director Michael D. Cooper for presenting me with the 2023 Goler T. Butcher Medal. I gratefully use this wonderful occasion to present a lecture to ASIL members.

Goler T. Butcher was a gifted and determined lawyer. She was gifted in her determination. Her lawyering sat at the crossroads, if not vortex, of her individuality as a Black woman, her rootedness in the African American community, which doubly enriched her American citizenry and enhanced her ethos as an international citizen, especially in regard to Africa. There were layered legal talents that she brought as honorary Vice-President of the American Society of International Law.

Ms. Butcher served as a Legal Advisor for the Department of State, the Chairman of the House Democratic Study Group on Africa, and as an Assistant Administrator of the Bureau for Africa at USAID, the Agency for International Development. She also served on the Board of Amnesty International and was a member of the Council on Foreign Relations. Significantly, she was a beloved beacon of international law at the Howard University School of Law.

Goler T. Butcher emerged from a generation of lawyers, forged by the dismantling of American apartheid, which was given the euphemistic misnomer, "Jim Crow." The strategic vison of attorney Pauli Murray and the apt legal execution of Thurgood Marshall personified that era's social engineering thru the law, that was to be undertaken irrespective of the seat, office, courtroom, classroom, community meeting hall, pulpit, or boardroom from which the African American lawyer raised her voice. For Goler T. Butcher, the lawyer was compelled to advocate against and not to re-enforce the discriminatory status quo.

The overlapping of my life and Goler T. Butcher's is unlike that of Professor Henry J. Richardson III, Judge Gabrielle Kirk-McDonald, or UN Mandate-holder Gay McDougall who knew her well, who called her friend, colleague, sister, and warrior against South African apartheid. Professor Richardson immediately assumed an open-armed spread, in admiration of her talented breadth, when I mentioned Goler T. Butcher's name. That swift, bodily gesture was the equivalent of the spontaneous verbal utterance that would be admissible in a court of law.

My overlap with Ms. Butcher is more recent. Our families hail from Philadelphia and we both attended, at different times, the University of Pennsylvania's Law School. However, when at Howard University's Law School, Professor Butcher relentlessly continued her advocacy to end

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global hunger—underscoring the human right to be free from starvation. In 2020, starvation, as a war crime, was amended into the Rome Statute of the International Criminal Court under Article 8.

Goler T. Butcher is my venerated international law ancestor. Chanting her name will keep me sane—because today, I too encourage amendments to the Rome Statute.

My lecture, given in my personal capacity, focuses on the exigent need to repair the legal, structural deficiencies in the Rome Statute. Specifically, repair is required; to amend the Rome Statute to include slavery and the slave trade as war crimes under Article 8; to amend the Rome Statute to include the slave trade as a crime against humanity under Article 7; and to ensure that the proposed United Nations Crimes Against Humanity Treaty expressly enumerates a provision for the slave trade.

The 2023 ASIL Annual Meeting asks us to seek the "Reach of International Law" to solve the world's challenges.

ASIL is "reaching" as it engages in contemplative conversations about race and racism that are the "afterlife" of slavery and the slave trade. ASIL has pledged reparative actions to redress the discriminatory membership practices as inscribed in the Richardson Report. Also, I will conclude my remarks about amendments and enumeration by reaching out to ask a question that only the ASIL can answer.

First, I must lay a foundation.

Slavery and the slave trade—as institutions and as practices—were supported by a plurality of legal regimes—regional international law, national law, commercial law, administrative law, contract law, the laws of war, admiralty law, estate law, canon law, common law, civil law, and Koranic law, among others, for hundreds of years.

Today's distorted knowledge of African-descended enslavement consequentially has caused an erasure and diminution of the legal power of slavery and the slave trade as international crimes. Firstly, there are reductive images of slavery limited to plantation cotton or tobacco picking or sugar cane cutting slavery. Gone are the realities of the enslaved toiling in the General Mines in Brazil or the United States urban-centered slavery on waterfronts, in offices, or in stockyards.

Forgotten or suppressed is the knowledge that slavery was thoroughly gendered and correlated to age-designated taskings. Enslaved adolescents were the original jockeys in the Kentucky Derby and Steeple Chase horse races. Enslaved men were the stevedores or longshoremen at the harbors of New York, Charleston, Rio de Janeiro, Bahia, and Kingston. Enslaved girls and women were maids, cooks, seamstresses, midwives, as well as laborers in plantation fields. Enslaved children worked in fields, in stables, and in molasses distilleries. Enslaved children watched over younger enslaved children and existed as human pets or play objects for the slave owners' children.

Never deny that the enslaved also were always sexually enslaved. Male slave owners could rape enslaved females to impregnate, to terrorize, to punish, or to initiate their sons into sexual practices. Enslaved girls with European facial features were groomed during pre-puberty to later serve in brothels or private homes to provide sexual "comfort." Enslaved females, who had recently given birth, were commissioned as wet nurses to breastfeed white infants. Breast milk was commodified. In Brazil, the practice of wet nursing was called "mercenary nursing."

Horrifically, to increase the population of slaves, and the wealth of owners the enslaved had to procreate other slaves.

Institutions of the Slave Trade always accompanied slavery practices, starting with the Trans-Atlantic Slave Trade and then continuing and exacerbated by the internal, domestic trade in enslaved persons.

The United Kingdom's nineteenth century legal objection to slave trading only applied to the international commercial pathways of the high seas. Ironically, the halting of the Transatlantic Slave Trade in 1815 by a succession of bilateral treaties between Britain and Atlantic Ocean

enslaving nations actually entrenched the lucrative internal, domestic slave trading of the New World-born enslaved who descended from enslaved Africans.

The internal slave trading involved plantations, but also educational, scientific, and religious institutions. Internal slave trading occurred by contract or redemption for debts or as collateral for defaulted loans. A very common slave trade practice existed among family members—by inheritance, or as a dowery, gifts, or by way of donations. The open trade in enslaved children was considered a niche market, as was the trade in female wenches for reproduction purposes. The internal slave trade was a ubiquitous, lucrative practice.

Scholars in ASIL/BASIL's first conference on slavery reparations in May 2021, organized by Honorary ASIL President, Judge Patrick Robinson, contested the intemporal defense and advanced the proposition that the legality of the Trans-Atlantic forms of slavery and the slave trade could be contemplated as "European Regional International Law" that was contested persistently by certain kingdoms in Western Africa, most notably King Alphonse of the Congo.

In the 1790s, actors in the French Revolution outlawed slavery or more precisely the "Code Noir," that had been by enacted by King Louis XIV in 1685. Thus, the French Revolution decidedly prohibited slavery in all French colonies. In 1802, however, Napoleon Bonaparte reversed that decree and reinstated the institutions and practices of slavery in France and in the French colonies that would endure legally until 1848.

However, the most fervent, or persistent objectors to the legal regimes of slavery were the Quilombos of Brazil, the Maroon communities of Jamaica and Cuba, and, of course, Haiti—whose simultaneous decolonization and abolition of slavery through revolution from the 1790s through to 1804 wrought back from France its liberty and its lucrative sugar economy. Haiti's liberation resulted in France selling its North American colonial landmass, known as the Louisiana Purchase, to the United States, to President Jefferson. The Louisiana Purchased tripled the land mass of the United States and increased and extended westward the internal slave trade in the country.

Almost one hundred years elapsed between Toussaint L'Ouverture's Haitian Revolution in the 1790s to the gradual abolition of slavery in Brazil that first freed enslaved children and then their enslaved parents. To abolish slavery in the United States, a bloody war of Secession was waged, which imparted The Lieber Code or Lincoln's Order 100.

The Lieber Code was released just weeks prior to the Emancipation Proclamation that freed the slaves in the Confederate states that were in rebellion with the U.S. government. Notably, the Lieber Code, as military law, prohibited military members from enslaving free persons and ordered that if the enslaved were captured or controlled as inhabitants of occupied territory they were to be freed. To do otherwise would be tantamount to war crimes. The Lieber Code remains an important, early codification of the law of armed conflict.

The primary international instrument outlawing *de jure* and *de facto* slavery and the slave trade is the 1926 Slavery Convention in which slavery and the slave trade were recognized as international violations independent of any war nexus. In the convention, the now familiar definition of slavery, "the exercise of any or all the powers of ownership over a person," is partnered with the less familiar definition of the slave trade that governs an intent to reduce a person to or the further maintenance of an enslaved person in slavery by any means.

Please bear with me as I quote the definition of the slave trade from the 1926 Slavery Convention:

> [A]ll acts involved in the capture, acquisition or disposal of a person with intent to reduce [her or] him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging [her or] him; all acts of disposal by sale or exchange of a slave acquired

> with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

The 1926 Slavery Convention recognized that, slavery and the slave trade occur in tandem. The slave trade is usually a precursory act to enslavement. They are interlinked: yet they are distinct international crimes. Slavery criminalizes the status or condition of the enslaved person. The slave trade criminalizes the reduction of a free person to slavery or the further conveyance of an enslaved person to another situation of enslavement, whether by gift, bequeaths, exchange, or sale.

Slave trading is not a lesser included offense, or a subset of slavery. The elements of the crimes are distinct, not overlapping. Moreover, the slave trader is not a mere accessory to slavery, such as an aider or abettor.

The slave trader might intend and, therefore, act to reduce a person to the status of a slave only to learn that the buyer chooses not to exercise powers of ownership over the person. Hence, they remain free persons. Notwithstanding, an act of slave trading has still been committed. A person might be serially passed through several slaved traders, only to eventually be reduced to the condition of enslavements. Each discrete disposal of the person is an act of slave trading.

Most importantly, neither slavery nor the slave trade is dependent upon proof of the consent, nor of the lack of consent of the person. The victims' consent is legally irrelevant, under slavery and the slave trade, analogous to the legal irrelevance of consent in relation to the crime of torture.

Professor Vasuki Nesiah posits in her article, *"A Mad and Melancholy Record": The Crisis of International Law Histories*, how "law foregrounds race here and backgrounds it there . . . standing on racial classification in one area, traveling as race-neutral in another." The 1926 Convention does not refer to enslaved black Africans. It governs conduct against any slave traded or enslaved person: yet ostensibly it is based upon the institutions of the Trans-Atlantic Slave Trade and the East African Slave Trade.

However, from the early twentieth century, a parallel legal regime, however, *was* foregrounding race. What is called today, the trafficking in persons framework derives from a series of international conventions. The 1904 International Convention for the Suppression of the White Slavery Trade—that only applied to white women and girls; the Convention of 1910 on Trafficking in Children for the Exploitation of Prostitution—that only applied to white girls and boys; the 1921 Convention on the Suppression of Traffick in Women and Children—that applied to all women and children of any race; and the 1949 Convention for the Suppression of the Traffic in Person and the Exploitation of the Prostitution of Others.

The initial aims of this legal regime resided in the protection of white women and girls and later boys from being forced into cross boarder prostitution—mainly from European or North American countries into Northern Africa or Asia. Trafficking for forced prostitution that occurred in European colonies. Although the 1921 Convention on the Suppression of Traffick in Women and Children was promulgated by the League of Nations, the institutional progeniture of the 1926 Slavery Convention and its provisions are not conceptually similar nor cross-referenced to the proposals to outlaw slavery and the slave trade. Their original purposes of proscribing slavery and the slave trade are distinct from proscriptions of trafficking. Their elements differ. They address or redress different challenges. I will return to trafficking in a moment.

The 1926 Slavery Convention's slavery and slave trade definitions, as updated by the 1956 Supplementary Slavery Convention, are widely accepted under international custom and treaty law as international crimes. They are peremptory norms, having obtained *jus cogens* value. Moreover, enslavement and deportation to slave labor were enumerated in the war crimes and crimes against humanity provisions in the London Charter, which governed the Nuremberg

proceedings and in Article X, the crimes against humanity provision of Tokyo Charter that governed the Tokyo Tribunal.

Here too, with World War II jurisprudence, consider the erasure of race or "the de-racialization" of our legal memory. Nuremberg and Tokyo judgments extensively address the self-proclaimed racial superiority of the Aryan race according to the Nazi. In the Asia Pacific, the Japanese justify their racial superiority as the rational to invade and dominate China and their plan to rid the region of European colonization by extending the Japanese colonization from Korea to southeast Asia and the Pacific.

The Nuremberg judgment clearly analyzes that European Jews were examined through the kaleidoscope of race—not religion. Nazi wartime policies were premised on proclaiming Jews as racially inferior, as were African German born from the "miscegenation" of Namibian, Burundian, or Rwandan colonial subjects with Germans or the French colonial armed forces of Senegal posted in occupied Germany after World War I.

Complex policy and economic slavery systems enabled the total wars in Europe and Asia to be sustained and waged. The Nazi war economy *was* slave-based. The judgment speaks about the 500,000 Polish women deported to slave labor as houseworkers. Literally, we witness the return to enslaving of the racially different "Slav" from which the word slave originated. Convictions for deportation to slave labor as a war crime or crime against humanity figure in the Nuremberg judgment.

The exclusion of the 200,000 Comfort Women from justice in the Tokyo Judgment, who were stunningly representative of the slave trade and slavery with a clear nexus to armed conflict remains legally shameful. The shame lies with the perpetrators of the slavery crimes and with the failure to prosecute the crimes in the face of clear pertinent and probative evidence. However, the slave labor of prisoners of war, in particularly British prisoners provides the bases of convictions in the Tokyo judgment.

Today, slavery and the slave trade in all their forms remain prohibited under international humanitarian law as war crimes under Article 4(f) of Additional Protocol II, in non-international armed conflicts. Rule 94 of the International Committee of the International Red Cross recognizes that under international customary law, slavery and the slave trade are war crimes irrespective of the characterization of the armed conflict.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognizes slavery and the slave trade as human rights from which no derogation is permissible.

Furthermore, before returning to trafficking in persons, I note that the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Extraordinary Criminal Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, and the International Criminal Court (ICC) expressly recognize slavery, under the term "enslavement" as a crime against humanity. These international judicial mechanisms have rendered precedent-setting jurisprudence, starting with the enslavement in the *Kunarac* or *Foća* case from the Yugoslav Tribunal to the International Criminal Court's *Ongwen* case concerning the Lord's Army in Uganda that recently received its appellate decision on enslavement and sexual slavery as crimes against humanity and sexual slavery as war crimes. However, the slave trade, as an international crime, has disappeared from recent constitutive international statutes and receded from our legal understanding of slavery crimes.

Now, I return to trafficking in persons. I sense that the backgrounding of the racialized experiences of the Trans-Atlantic Slave Trade, the denial of the Comfort Women's capture, recruitment, transport, i.e., slave trade of the Comfort Women, or the ignoring of the legal precedents of the

deportation of women under occupation to slave labor has become tangled in the laws of trafficking which, in turn, has become synonymous with the term "modern slavery."

Today, trafficking in persons is a transnational crime applicable to all persons—including grown men—as per Article 3 of the the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, commonly called the Palermo Protocol. Trafficking is actionable in national jurisdictions. Trafficking in persons refers to the exploitation of individuals for economic or some gain that can occur within a country or involve crossing borders. Women, men, and children can be trafficked for forced labor, slavery, sexual exploitation, removal of organs, and forced marriage.

The three key elements of human trafficking are: (1) action, (2) means, and (3) purpose (exploitation). Trafficking requires that an accused's purpose is for a form of exploitation to occur, thus human trafficking criminalizes the transfer of individuals into exploitative practices. Acts of slavery or the slave trade is a recogned form of exploitation under trafficking.

An important legal difference between trafficking and the slave trade, other than their status under international law, are that consent can be legally relevant as a defense to trafficking, if there is not proof of coercive circumstance and the victim is an adult. Only a child victim's consent is considered *per se* illegal under trafficking. The slave trade, as I said, deems the victim's consent irrespective of age, as legally irrelevant. Also, to prove trafficking there must be proof that exploitation occurred. With the slave trade, even if the eventual slavery does not occur, it is the intent of the slave trader to reduce a person that is relevant, not the occurrence of the enslavement.

As stated previously, enslavement is a provision under crimes against humanity in Article 7 of the Rome Statute of the International Criminal Court. Under the Rome Statute, the definition of enslavement refers to acts of "trafficking, especially women and children." Notwithstanding, trafficking is not a crime under the Rome Statute. Respectively, no elements of trafficking, neither its *actus reus* nor its *mens rea*, are provided in the Elements of Crimes document. In the Rome Statute's definition of enslavement, the term trafficking describes actions or conduct that if accomplished while exercising any or all of the powers attaching to the rights of ownership over a person, would constitute proof of the crime of enslavement.

The ICC Office of the Prosecutor (OTP) affirmed that it had no authority to pursue the crime of trafficking. Notwithstanding, the OTP acknowledged in its strategic plan that ICC crimes are typically linked to other forms of criminal activity, such as organized crimes. The Palermo Protocol addresses trafficking in the context of organized crime.

The conflation of slavery, the slave trade, and trafficking is legally detrimental, but the absence of any express provisions for the slave trade and slavery is a grave omission.

From the Special Court for Sierra Leone, the *AFRC* and *Charles Taylor* cases, or the International Criminal Court's *Lubanga*, *Ntaganda*, and *Ongwen* cases, child soldiers cannot have acts of slavery or the slave trade legally characterized under Article 8's war crimes provisions, even though the same acts might cumulatively have been charged with Article 7's enslavement as crimes against humanity. The Rome Statute's structural deficiencies created by the absence of slavery and the slave trade as war crimes and the slave trade as crimes against humanity facilitates or rather ensures impunity.

What emerges is the perpetuation of a mythical narrative that delinks the slave trade, especially the internal slave trade, from slavery. A percentage of persons trafficked or smuggled by organized crime, passing from smuggler to smuggler, are legally being slave traded. Child soldiers are enslaved children. Those children, when redistributed among the militia groups, are being slave traded. In *Ongwen*, the Prosecutor has proven a higher burden of showing exercise of ownership—hence slavery, since there is no availability of the slave trade in the Rome Statute.

The slave trading, of vulnerable victims/survivors, are barred from automatically receiving peremptory norm protections, as a person who was tortured more readily would. Also, there is no ability to develop jurisprudence regarding reparations for the slave trade as a crime against humanity or as a war crime.

Whether it entails the incredibly named "Slave Trade Administration" established by ISIS for the Yezidis, the Boko Haram abductions of school children, kidnapping, the migrant smuggling through Ethiopia and Djibouti or Sudan and Libya, these express legal provisions of slavery and the slave trade forged by the suffering of past slaves demands recognition.

Therefore, to conclude, I ask ASIL, within the coming year according to Section XI of the ASIL Constitution, to formulate an ASIL Resolution that states:

1) Slavery, a peremptory norm, is an international crime, a crime against humanity, a war crime, and a human rights violation.
2) The slave trade, a peremptory norm, is an international crime, a crime against humanity, a war crime, and a human rights violation.

An ASIL Resolution restating the status of slavery and the slave trade, under international law, especially as international crimes, that merit express inclusion in today's leading international criminal law instruments, would carry significant weight. Externally, the Society could reiterate their fundamental importance. Internally, the Society could view the Resolution as an aspect of reparations and non-repetition, within the vision of the Richardson Report.

At this Annual ASIL meeting you have asked: "What is the Reach?" This could be our collective "Reach"—to "Reach" beyond the commemoration of slavery and the slave trade, away from backgrounding of race when it actually informs international law and toward reviving, the intended protections and safeguards of slavery and the slave trade as international crimes.

This is my ask, to which only ASIL can respond.

While awaiting the response, I will chant the name of Goler T. Butcher, to keep me sane.

Thank you