Prohibition of Sexual Exploitation of Children
Constituting Obligation *Erga Omnes*
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Farhad Malekian and Kerstin Nordlöf
... for the enforcement of the rights of children...
# Table of Contents

Abstract ......................................................................................................................... xiii

Preface .............................................................................................................................. xiv

Chapter One .................................................................................................................. 1
The Emergence of Obligation *erga omnes* in International Criminal Law
Introduction ..................................................................................................................... 1
What is International Criminal Law ........................................................................... 3
Sources of the Law ......................................................................................................... 7
*Jus Cogens* .................................................................................................................... 12
Normative Function ....................................................................................................... 12
Superiority ....................................................................................................................... 13
Precedence Over National Law ..................................................................................... 14
Precedence Over International Law ............................................................................ 14
Characterization ............................................................................................................. 15
Categories ....................................................................................................................... 16
Criteria of Recognition ................................................................................................. 17
*Jus Cogens* Crimes ....................................................................................................... 18
Obligation *Erga Omnes* ............................................................................................... 19
Function ......................................................................................................................... 19
Definite implementation ............................................................................................... 20
Differences ....................................................................................................................... 24
Enforcement .................................................................................................................... 25
International Law Commission ....................................................................................... 28

Chapter Two .................................................................................................................. 33
Basic Principles of Criminalization of Trafficking in Children
Introduction ..................................................................................................................... 33
*De Lege Lata* ................................................................................................................ 33
*De Lege Ferenda* ......................................................................................................... 34
*Ex Post Facto* Law ....................................................................................................... 35
*Nullum Crimen Sine Lege* .......................................................................................... 37
Criminal Responsibility .................................................................................................. 38
*Mens Rea* ..................................................................................................................... 41
*Ne Bis in Idem* ............................................................................................................. 44
Transnational Organized Crime ..................................................................................... 49
Chapter Three ............................................................................................ 54
The Prohibition of Sex Trafficking in Children within the General
Framework of International Human Rights Law
  Introduction.......................................................................................... 54
  The Message of United Nations Charter .............................................. 54
  The Value of Human Rights Declaration ............................................. 57
  The Legacy of the Vienna Declaration ................................................ 59
  The Origins of the Millennium Declaration....................................... 63

Chapter Four .............................................................................................. 65
Prohibition of the Sexual Exploitation of Children within the Specific
Framework of International Human Rights Law
  Introduction.......................................................................................... 65
  Elimination of Discrimination against Females ................................... 65
  Suppression of All Forms of Discrimination against Females .......... 67
  Elimination of Violence against Females ............................................ 70
  Struggles for the Equality of Females ................................................ 72
  Prevention and Punishment of Violence against Women .............. 74
  Globalization of Commitment on HIV/AIDS ................................. 76

Chapter Five .............................................................................................. 79
Prohibition of Sex Trafficking in Children within the Regional Human
Rights Law
  Introduction.......................................................................................... 79
  African States ..................................................................................... 80
    The Contribution of the African Charter ......................................... 80
    The Protocol to Strengthen the African Charter ............................ 84
  American States .................................................................................. 90
    Protection of the Victims of Trafficking ........................................... 92
  Arab States .......................................................................................... 94
    The Concept of Prohibition in Islamic Law ................................. 94
    Suppression under the Arab Charter ............................................. 96
  European States ................................................................................... 99
    Protection of Human Rights and Fundamental Freedoms ............ 99
    The Council of Europe against Trafficking in Human Beings .... 101
      Purposes .................................................................................... 101
      Scope of Application .............................................................. 103
      Definitions .............................................................................. 104
      Prevention of Trafficking ......................................................... 108
      Substantive Criminal Law ...................................................... 110
      Attempt and Other Acts .......................................................... 112
Prohibition of Sexual Exploitation of Children
Constituting Obligation *Erga Omnes*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joint Criminal Responsibility</td>
<td>113</td>
</tr>
<tr>
<td>Principles of Jurisdiction</td>
<td>114</td>
</tr>
<tr>
<td>Prosecution and its Subjects</td>
<td>116</td>
</tr>
<tr>
<td>Remarks</td>
<td>118</td>
</tr>
</tbody>
</table>

Chapter Six .............................................................................................. 120

**Abolition of Slavery and Suppression of the White Slave Trade on Children**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>120</td>
</tr>
<tr>
<td>Universal Declaration of Human Rights</td>
<td>121</td>
</tr>
<tr>
<td>Abolition of Institutions of Slavery</td>
<td>123</td>
</tr>
<tr>
<td>Development</td>
<td>123</td>
</tr>
<tr>
<td>Efforts</td>
<td>124</td>
</tr>
<tr>
<td>Abolition within the First Slavery Convention</td>
<td>124</td>
</tr>
</tbody>
</table>

**Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The New Convention</td>
<td>126</td>
</tr>
<tr>
<td>Descriptions</td>
<td>126</td>
</tr>
<tr>
<td>Slave Trade</td>
<td>127</td>
</tr>
<tr>
<td>Attempt</td>
<td>129</td>
</tr>
</tbody>
</table>

**The First International Agreement for the Suppression of the White Slave Traffic**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminalization</td>
<td>129</td>
</tr>
<tr>
<td>Repatriation</td>
<td>130</td>
</tr>
<tr>
<td>Women of Colonies</td>
<td>131</td>
</tr>
</tbody>
</table>

**The Second International Convention for the Suppression of the White Slave Traffic**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Modification</td>
<td>133</td>
</tr>
<tr>
<td>Criminalization</td>
<td>133</td>
</tr>
<tr>
<td>Complicity</td>
<td>134</td>
</tr>
</tbody>
</table>

**International Convention for the Suppression of the Traffic in Women and Children**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Creation</td>
<td>135</td>
</tr>
<tr>
<td>Key Policy</td>
<td>135</td>
</tr>
<tr>
<td>Assistance</td>
<td>136</td>
</tr>
<tr>
<td>Lost Policy</td>
<td>136</td>
</tr>
</tbody>
</table>

**International Convention for the Suppression of the Traffic in Women of Full Age**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminalization</td>
<td>138</td>
</tr>
<tr>
<td>Legislation</td>
<td>139</td>
</tr>
<tr>
<td>Disputes</td>
<td>140</td>
</tr>
<tr>
<td>Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others</td>
<td>140</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Intention</td>
<td>140</td>
</tr>
<tr>
<td>Punishment</td>
<td>141</td>
</tr>
<tr>
<td>Knowledge</td>
<td>142</td>
</tr>
<tr>
<td>Abolition and Disqualification</td>
<td>142</td>
</tr>
<tr>
<td>Extradition</td>
<td>143</td>
</tr>
</tbody>
</table>

| Chapter Seven                                           | 145 |

| Strengthening the Prohibition of Sex Trafficking in Children |
|--------------------------------------------------------------|------|
| Introduction                                               | 145 |
| Geneva Declaration of the Rights of the Child               | 146 |
| Declaration of the Rights of the Child                      | 147 |
| Convention on the Rights of the Child                      | 149 |
| Overview                                                  | 149 |
| Characterization                                           | 150 |
| Definition                                                | 151 |
| Protection                                                | 152 |
| Exploitation                                              | 153 |
| Interchangeable Terms                                      | 156 |
| Problematic Reservations                                   | 157 |
| Inadequacy                                                | 160 |

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Pornography</td>
<td>161</td>
</tr>
<tr>
<td>Overview</td>
<td>161</td>
</tr>
<tr>
<td>Criminalization</td>
<td>162</td>
</tr>
<tr>
<td>Punishment</td>
<td>163</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>165</td>
</tr>
<tr>
<td>Extradition</td>
<td>166</td>
</tr>
<tr>
<td>Prevention of Impunity</td>
<td>168</td>
</tr>
<tr>
<td>Protection of Child Victims</td>
<td>170</td>
</tr>
<tr>
<td>The Advantages of the Optional Protocol</td>
<td>171</td>
</tr>
<tr>
<td>Problematic Reservations</td>
<td>173</td>
</tr>
<tr>
<td>Elimination of the Worst Forms of Child Labour</td>
<td>175</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Rights and Welfare of the Child in Africa</th>
<th>177</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overview</td>
<td>177</td>
</tr>
<tr>
<td>Criminalization</td>
<td>179</td>
</tr>
<tr>
<td>Sexual Exploitation</td>
<td>179</td>
</tr>
<tr>
<td>Sale of Children</td>
<td>181</td>
</tr>
<tr>
<td>Begging</td>
<td>181</td>
</tr>
</tbody>
</table>
## Suppressing and Punishing Trafficking in Persons

Overview .......................................................................................................................... 182
Purposes .............................................................................................................................. 183
Scope and Definitions .......................................................................................................... 184
Criminalization .................................................................................................................... 185
Preventive Measures .......................................................................................................... 187
Protection of Victims ........................................................................................................ 189
Protection of Identity ......................................................................................................... 190
Assistance in Proceedings ............................................................................................... 190
Recovery ............................................................................................................................. 191
Special Need ........................................................................................................................ 191
Physical Safety .................................................................................................................. 192
Compensation ...................................................................................................................... 192
Victims in Receiving State ............................................................................................... 193
Repatriation of Victims ..................................................................................................... 194
Justice .................................................................................................................................. 195

## Chapter Eight

Prosecution of Trafficking at the International Criminal Court (ICC)

Background ......................................................................................................................... 196
Ad hoc Tribunals .................................................................................................................. 198
Cases .................................................................................................................................... 199
The ICC ................................................................................................................................ 203
Crimes against Humanity ................................................................................................. 204
Conditions for Prosecution ............................................................................................... 207
Sexual Violence ................................................................................................................... 208
Rape ..................................................................................................................................... 209
Sexual Slavery ..................................................................................................................... 211
The Geneva Conventions .................................................................................................... 212
Cases ..................................................................................................................................... 212
Requirement for Identification .......................................................................................... 214
Complementarity Jurisdiction ............................................................................................ 217

## Chapter Nine

Reaching Effective Criminalization

Protection of Values ........................................................................................................ 219
Underlying Reasons .......................................................................................................... 221
Conclusion ............................................................................................................................ 226
Appendices

Appendix One .................................................................................................................. 228

Appendix Two .................................................................................................................. 238

Appendix Three .............................................................................................................. 250

Bibliography ..................................................................................................................... 254
 Whilst the value of human integrity within the laws of individual states and the documents of international human rights is being increasingly consolidated and will become, sooner or later, the primary concern of the law, severe breaches of this value are indeed still widespread. In particular the sexual exploitation of children constitutes one of the most serious questions of national, regional, transnational and international law. According to international records, every fifteen seconds a child is raped in Africa alone. Almost half of the cases heard by the ICTY concern the sexual exploitation of women and children during armed conflict. More or less similar conclusions may be reached regarding the ICTR or the SCSL. In Rwanda alone, 500,000 females were raped. Almost 200,000 females and children have been the victims of cruel forms of sexual violence during the conflicts in Congo. Sexual abuse of children by priests cannot any longer be ignored in Australia, Belgium, Canada, Germany, France, Ireland, Mexico, the United Kingdom, and the United States, although it is ignored in most Islamic countries. The sexual exploitation of children is also widely practised in many other countries. Regrettably, 79% of all world trafficking is for sexual exploitation.

The principal subject matter of this book is the legal etymology of sexual exploitation governing minors. The aim is to identify and analyse jus cogens and obligation erga omnes in relation to the sexual exploitation of children and to evaluate the international responsibility of states in relation to the elimination or prevention of the crime, and the prosecution and punishment of offenders.
Whilst the value of human integrity is increasingly developing into the primary concern of the laws of individual states and the documents of international human rights law, severe violations of these laws, provisions, norms, conventions and documents remain commonplace and widespread. A particularly grievous example is the trafficking in persons, which constitutes one of the most serious questions for national and international law. The term “trafficking in persons” does not only deal with the sexual exploitation of females and males, but also applies to the position of persons who have, by one means or another, lost the potential to control their personal integrity through working under conditions of forced labour or services, slavery or practices similar to slavery, or servitude, and extraction of organs, or tissues. Although defining sexual exploitation minutely is a challenging task, it broadly means to impose the interests of a person or persons or an organized group onto the body of the victim who has no right to choose but only to serve her or his master. This is what is also called prostitution, with forcibly given consent being typically characterized as rape.

The principal subject matter of this book is sex trafficking, with a particular concentration on the situation of young females. Unfortunately it has not been possible to produce anything comparable on the situation of boys. The reason for this is that most relevant documents deal with the position of women and girls, while documents dealing with the questions of the sexual exploitation of boys are very few in number. In any case, the sexual exploitation of children is one of the important concerns of the book. The intention is to identify and analyse the existing documents in the field of trafficking and see whether their provisions, norms and principles can be considered under jus cogens norms and consequently obligation erga omnes, which constitute the unavoidable international norms that have to be protected by the legal authorities of governments within the national, transnational and international arenas. Based on this aim, the theoretical understanding of the subject from the point of view of positive law is exhaustively investigated. With this in mind, the chapters of the book present a large number of norms and principles constituting an integral part of the body of international legislation concerning the prohibition of all forms of sex trafficking in children. It is however true
that the law applicable to the trafficking in women and children is a significant part of international human rights law instruments and cannot be studied in isolation. This means that the law governing trafficking should be examined in conjunction with a considerable number of principles of human rights law which have a dominant role within international legal community as a whole.

Since the subject matter of the book falls broadly within the field of international law and particularly international criminal law, the function of this branch of jurisprudence is also one of its fundamental concerns. Throughout the work, we will concentrate on various definitions of the law governing sex trafficking, particularly as it applies to children. The book therefore explores the definitions of sex trafficking which are adopted at a regional and international level. The aim is to examine these different systems and to see whether there are any differences between them. But since the national rules are essentially supposed to be in accordance with regional rules and the latter should not legally be in conflict with international norms and principles, this means that there are certain strong connections between these three systems and that they ought to follow one another in form, phrasing and principles. This is what is required for the fulfillment of the principle of cooperation. By way of introduction, the chapters of the book emphasise the fundamental duties and responsibilities of states to face their international obligations.

Briefly, several principles of criminal law which are also an integral part of international criminal law are examined in scope. These include inter alia the principle of de lege lata, de lege ferenda, ex post facto law, nullum crimen sine lege, nulla poena sine lege, mens rea or 'mental elements', ne bis in idem and individual criminal responsibility. These are internationally recognized as an integral part of criminal systems within the legislations of different states.

One important orientation of the subject will be on the progressive development of the law governing the sex trafficking in persons within the law of different international criminal tribunals/courts. These include the Nuremberg Charter, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and, most importantly, the Statute of the International Criminal Court in The Hague.

Our hope is that the work opens a window onto a vast array of legal materials which are not only today a part of national, regional, and international legislation, but are also an integral part of customary international criminal law, all of which have to be respected by all states regardless of their political, economic, military, cultural and religious
situations. This does not only include Western states, but also those states which, while claiming to implement Islamic law and its principles, are seriously violating international law by misinterpretation and mistreatment of its jurisprudence. The main argument throughout the book is to emphasise the primary responsibility of governments, individually and together, for the prevention of sexual exploitation of children within and outside their territories. The book argues that the exploitation constitutes one of the heinous national, international, and transnational *erga omnes* crimes, the perpetrators of which should be prosecuted under the principle of universality of jurisdiction.

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CHAPTER ONE

THE EMERGENCE OF OBLIGATION *ERGA OMNES* IN INTERNATIONAL CRIMINAL LAW

Introduction

The very rapid development of global sex trafficking and its serious infringements of the provisions of international human rights law have raised basic questions regarding the relationships between the laws of individual states, regional law and international criminal law as a whole.\(^1\) This is because an examination of various international conventions, agreements, treaties and other documents concerning sex trafficking in human beings proves that they have, in one way or another, some connection with the system of international criminal law, and almost none of these instruments applicable to trafficking may be treated without a proper examination of the systems of regional and national law. This is particularly significant in the case of provisions governing children who are subject to comparatively differing statutes under various national systems. Although one cannot deny that the system of international criminal law strongly protects the rights of children through various international conventions such as the Convention on the Rights of the Child, the position of the child is relatively unstable due to the policy of most states of the world, and the child is one of the most vulnerable subjects of sex trafficking under international social or economic systems.\(^2\)

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1. Human trafficking has long existed within human civilization but has not until recently been identified as a crime.
In this section we are focused on the foundations of the system of international criminal law with particular consideration of the question of sex trafficking. The purpose is here to analyse the relevant laws and to see to what extent the system prevents, prohibits, eliminates, prosecutes and punishes acts concerning sex trafficking with a special focus on children. We have therefore taken into examination various developments in international criminal law, including the statutes of the ad hoc tribunals, and the ICC. Certain practices of the ad hoc tribunals have been focused on with the intention of emphasizing the development of the principle of obligation erga omnes. This section includes, therefore, a discussion on the legal validity of the principle of jus cogens in the system of international criminal law and its effect concerning the position of the principle of obligation erga omnes. The section will stress the role of governments in the prevention, elimination, application and prosecution as well as punishment within the law of trafficking in persons.  

The principle of obligation erga omnes is also of vital importance in laying the groundwork for all other sections of this book. They will discuss various legislations on trafficking issued by different regional and international instruments constituting an integral part of jus cogens or general international law and therefore obligation erga omnes. In addition, both principles – jus cogens and obligation erga omnes – are integral to the structure of all sections of this book. The purpose is to examine their validity within the relevant instruments applicable to the trafficking in persons and, particularly, children.

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What Is International Criminal Law?

The system of international criminal law has been defined differently. All of these definitions agree that the system has several functions which cannot be isolated from its nature. Thus, the definition of the term “international criminal law” has to be examined with its functions. This is because any law has to have a particular function; otherwise its legal validity will be weakened. That is why we have different laws with different functions. Examples include civil law, criminal law, procedural law, tax law or medical law. In fact, the functions of a law demonstrate the limits of its applicability. In this regard, the functions of international criminal law are criminalization, protection, prevention, prohibition, elimination, extradition, implementation, prosecution, jurisdiction, rehabilitation and also implementation of judgment. Consequently, the system of international criminal law is an integral part of public international law which aims at the deterrence of criminal conduct. This

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means that the whole body of law deals with criminal matters and what comes under its framework is generally called “international crime”. Therefore, the key focus of international criminal law is crime/offence and its scope of definition. These include offences such as aggression, genocide, war crimes, crimes against humanity, piracy, crimes against internationally protected persons, terrorism, hijacking, unlawful medical experimentation on human subjects, slavery, prostitution, narcotic offences, postal offences, and for our purposes here, trafficking in persons, including sex trafficking relating to the child. This is a person who is under 18 years, although, we may encounter different age limits for the recognition of the child. There may still be legislations that do accept a higher and lower age limit for the protection of the state of childhood.

It must however be stated that the term “prohibition of sex trafficking” may fall within two different legal systems which have basically the same aim and purpose for the prevention of trafficking. Thus, prevention of sex trafficking may not only be carried out under international criminal law, but also under the provisions of transnational criminal law. While the former is a broader aspect of the international criminal law system, the latter may fall into the legal capacity of the former. The core reason is that the international criminal system is a legal system which has the capacity to deal with most criminal systems and their regulations. In other words, international criminal law is empowered with different theories of national criminal law and therefore most criminal provisions have some connections with international criminal law. Consequently, when we speak of international criminal law we also speak of transnational criminal law which has similar functions to the former, with several functions *inter alia* with the intention of prevention of trafficking in persons.

Transnational criminal law is a legal system which applies to criminal activities which are committed within and/or over national borders. The criminal conducts may be carried out with the complicity, assistance or direct engagement of the perpetrators in the commission of the crime. Transnational crimes are committed by an organized group or by several persons. Therefore, trafficking of humans for slavery or the like constitutes a transnational criminal enterprise which is typically carried out in countries suffering from poverty, corruption of law enforcement and weakness of government.\(^5\) Those engaged in these crimes entice vulnerable

\(^5\) However, the crime is also a problem in countries which have relatively strong economies and well-organized legislation. For example, “Sweden is a destination, source, and, to a lesser extent, a transit country for women and children subjected to sex trafficking and a destination country for men, women, and children subjected to forced labour. Women, men, and children are subjected to forced
women, men, and children with promises of good jobs, education and social stability. Thus, human trafficking may be in the form of domestic servitude, involuntary servitude, forced debt bondage, and, perhaps most serious of all, sex slavery. In the case of children, human trafficking includes child sex tourism, various child services, and sex services combined with heavy labour.

One chief difference between transnational crimes and international crimes is that the former are more often committed by private individuals while the latter are committed by governmental or non-governmental bodies or groups of individuals. Crimes coming under the framework of transnational crime include narcotic offences, trafficking in persons, or terrorism. Crimes coming under the scope of international crime include war crimes, crimes against humanity and genocide. It is yet to be asserted that there are also certain crimes the nature of which overlaps with the nature of transnational or international crimes. Such is the legal characterization of sexual abuse of children, child pornography and child sex services which may vary from case to case depending on war or peacetime.

International crimes denote the criminalization of an internationally wrongful conduct which is recognized as a crime by the international legal community as a whole. These are crimes recognized as such within conventions, treaties, agreements, declarations, arrangements, protocols, pacts, covenants and any other legal instrument. A particular recognition within these instruments is their criminalization of certain acts. It must however be stated that not all international crimes are based on the provisions of an international criminal convention. They may be found within other international conventions in which some aspects of labour and forced criminal behaviour, including begging and stealing.... Foreign victims of sex trafficking originate from Central and Eastern Europe (Romania, Russia, Bulgaria, Hungary, the Czech Republic, the Slovak Republic, Albania, Estonia, Lithuania, and Armenia), Africa (Nigeria, Tanzania, Kenya, Ghana, Uganda, Sierra Leone, Gambia, Kenya), and Asia (Thailand, China, Uzbekistan, Kazakhstan, and Mongolia). Swedish girls were also vulnerable to sex trafficking within the country, which mostly occurs in apartments, houses, and hotels. Other sex trafficking victims are exploited in massage parlors. Both victims and perpetrators of forced begging and stealing originate primarily in Romania, Belarus, and Bulgaria.” See UNHCR | Ref world | 2012 Trafficking in Persons Report - Sweden, www.unhcr.org/refworld/country,SWE,4562d8b62,4fe30c91c,0. html; See also Sex Trafficking of Children in Sweden, ecpat.net/EI/Publications/Trafficking/Factsheet_Sweden.pdf. Since purchase of sex services is prohibited in Sweden, many individuals purchase sex services in Denmark which is legally permitted. Ibid.
international criminal law are regulated, such as the Universal Postal Union conventions, which in certain articles deal with the prohibition of sending of certain materials such as weapons, narcotics, or obscene materials, in particular pornographic representations of children.\footnote{Moreover, in the United States, it is a federal crime to send obscene material to a child who is under age 16. This is under condition that the sender knows that the child is under 16. Federal Law, 18 U.S.C. § 1470 (2008). § 1470. Transfer of Obscene Materials: “Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfers obscene matter to another individual who has not attained the age of 16 years, knowing that such other individual has not attained the age of 16 years, or attempts to do so, shall be fined under this title, imprisoned not more than 10 years, or both.”}

The provisions of the system of international criminal law may also be examined within the principles of customary international criminal law. This means that all provisions of the law are not necessarily based on a conventional approach. They may be rules of customary law that, because of certain important functions for the maintenance of humanitarian or other laws, have been integrated into the system of international criminal law. It is also possible that the same rules of conventional international criminal law may be found within the rules of customary international criminal law or the contrary. This is because those two sources of the law complement one another and may adopt rules from each other. A customary rule may enter into the provisions of an international convention and a conventional rule because of its very important and significant effect may become a part of customary international criminal law. For instance, a considerable number of provisions of international humanitarian law of armed conflict may be found within both sources of international criminal law. At the same level is the prohibition of trafficking in persons which is not only a part of conventional law, but is also, a significant part of customary international criminal law which has been developed steadily since the start of twentieth century.\footnote{See Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23-T, Judgment, ¶ 520 (Feb. 22, 2001). For the development of the customary prohibition, see also M. Cherif Bassiouni, Enslavement as an International Crime, 23 New York University Journal of International Law and Politics, 445 (1991).}

Yet, certain provisions of conventional international criminal law may because of their very high value for the maintenance of international peace, equality, justice and security of humankind shift into the provisions of customary international criminal law. For instance, the provisions of the international Convention on Genocide are today an integral part of customary law. Other clear examples are the provisions of international
criminal conventions applicable to the crimes of apartheid, discrimination, slavery and also the sex trafficking and sexual exploitation of women and children.\(^8\) International criminal law has fundamentally been created and permitted to evaluate many internationally wrongful conducts which are seriously destructive of the international relations of states and may jeopardize political or legal agreements between states.

### Sources of the Law

In order to prove the thesis of this book, namely that sex trafficking falls under the principle of obligation *erga omnes*, we have to examine the sources of the law to see in which sources the concept of sex trafficking is prohibited within the national, regional and international legal community. Sources of public international criminal law may be found within the provisions of Article 38 of the International Court of Justice. The relevant article refers to the following sources: international conventions; international customary law; decisions of national, regional and international courts; decisions of international arbitration tribunals; general

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\(^8\) It should be stated here that trafficking in persons is somewhat different from people smuggling. This is because human trafficking is a typical modern form of slavery. It concerns the illegal exploitation and trade in persons through the use of force or coercion, including threats, fraud, deception and debt bondage. As such, it inflicts upon the victim(s) the deprivation of liberty, the violation of social or economic integrity and the total deprivation of both natural and positive rights. The chief difference between people smuggling and trafficking in persons is that in the former case the person who is being smuggled has given his/her consent and has often paid a large amount of money in order to enter another country’s borders. Therefore, human smuggling denotes the illegal transportation or facilitation of transportation of persons from one county to another. In addition, it often involves the presentation of false documents to cross an international border. However, the trafficking in persons almost always involves acts of force and the victim does not necessarily need to express consent or present any authorized papers. It violates all human rights conventions or declarations. Nevertheless, it must be stated that in particular situations a person who is being smuggled may also be recognised as the victim of human trafficking if she/he is then forced or coerced into working in degrading or exploitative conditions. However, this argument is much stronger in the case of persons who are under 18 years of age and are treated under the provisions of international conventions governing the rights of the child. The legal status of minors broadly differs from that of adults in the case of smuggling or trafficking. In both cases minors are the victims of people smuggling or trafficking in persons. This means that they should be treated differently and should not be considered as guilty of the commission of transnational crimes because of their illegal crossing of an international border.
principles of law; the opinion of publicists and also certain resolutions of the United Nations. Although the article does not specifically enumerate all of these sources they are generally understood from its content.9

Thus, in order to understand the legal characterization of the prohibition of sex trafficking and its prevention one has to examine the above sources and to see whether these sources have particular rules, regulations, principles, norms, provisions or other instructions applicable to the conduct in question which also simultaneously criminalize the relevant conduct. In short:

*International conventions* are those rules or regulations which have been formulated into written instruments and are signed and ratified by states parties. Examples are the conventions applicable to slavery, trafficking in persons, discrimination, and the suppression of sexual slavery, as well as support for the victims of crime and the establishment of the rights of children. These can be seen within the provisions of the Convention on the Rights of the Child which is formulated to recognize and enumerate the rights of children. The Convention strongly condemns the exploitation of children for various purposes including their employment as soldiers, sexual objects, slaves, or in other inhuman and degrading labour. One chief difference between international conventions and other sources of the law is that the provisions formulated into those agreements constitute *pacta sunt servanda*. They have, therefore, a binding effect on contracting parties and should be respected in their various national or international relations. This is because the merit of *pacta sunt servanda* is to demand the implementation of conventional provisions and this is regardless of the authority of the parties. That is to say the principle of *pacta sunt servanda* creates a legal obstacle against parties who do not respect the established norms of international law and violate them. International criminal conventions or treaties should therefore be considered as the most effective source for the prevention of trafficking in

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9 The Statute of the ICC, article 38 reads that “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequoet bono*, if the parties agree thereto.”
persons and the enforcement of *jus cogens* law and the principle of *erga omnes*.

*International customary law* sets forth rules, provisions, principles and norms that are not written within an international instrument but because of long and systematic duration in the practice of states have received the status of custom. Examples are provisions regarding the prevention of sexual slavery. The two most recognized components in international customary law are uniform and consistent state practice as well as evidence of *opinio juris*. State practice demands the presentation of state consent to the given rule. This requires the engagement of the state in constant and uniform conduct characterizing its behaviour. The *opinio juris* which presents the second component demands that the conduct of states has been based on a legal obligation. The rules of customary international criminal law have without doubt encouraged the prohibition of trafficking in persons and therefore create obligations on states to accept international legal standards regarding the prohibition of sex trafficking and the sexual exploitation of children, men and women. Customary law also helps to clarify the significant values of conventional international criminal law governing the implementation of an international system which can prevent states, groups and individuals from engaging in trafficking or avoiding effectively preventing the relevant international crime.

*General principles of law* are those rules that may generally be found within the law of most states, such as provisions regarding the prevention of violations against women and children or provisions governing rape as

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10 In *Prosecutor v. Kunarac, Kovac & Vukovic*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia specified charges of “enslavement as a crime against humanity” by quoting the international definition of slavery within customary international law. The court stated that the definition formulated in the 1926 Convention applies to enslavement under customary international law. “Enslavement as a crime against humanity in customary international law consist[s] of the exercise of any or all of the powers attaching to the right of ownership over a person.” *Prosecutor v. Kunarac, Kovac & Vukovic*, Case No. IT-96-23-T, Judgment (Feb. 22, 2001), para. 539. The Court defined enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person.” *Kunarac*, Case No. IT-96-23-T, para. 540 According to the Trial Chamber, the following reasons are examined in correctly deciding whether enslavement was carried out. These are such as “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.” *Kunarac*, Case No. IT-96-23-T, paragraphs 542–43.
a serious crime. The provisions of general principles of law simplify the recognition of certain rules of law that have achieved national recognition within the internal laws of most nations and have long been consolidated. This means that “general principles of law” help in the prohibition of sex trafficking through their recognition as being obligation *erga omnes.* Although there may be some controversy about what does and does not constitute a general principle of law, this cannot and should not inhibit the legal effect of general principles of law in the prevention of sex trafficking by the legal authorities of states. Therefore, the role of this source is to minimize the gap between different cultures and find certain rules and provisions which are similar to one another within the structure of most civilizations in the world. For example, the illegality of the sexual abuse of children is a principle that can be found within all civilizations of the world.

*Decisions of courts* refers to the judgment of national, regional, and international courts which may be considered appropriate for the settlement of a conflict or may be regarded as the creation of certain new norms within different schools of jurisprudence. These are rulings such as the decisions of International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) concerning rape as an international crime or the strict prohibition of violence against women during wartime. However, it must be underlined that the decisions of all courts cannot have a legal effect on the prevention of sex trafficking and cannot create binding effects on different states. This is because the applications of most decisions of national courts are limited to certain cases and territories and therefore the scope of their applicability is restricted. However, certain decisions of national, regional or international courts which make reference to international rules and standards of law may be recognized as effective and significant. Thus, decisions of regional Human Rights Courts, decisions of national courts which deal with international cases and international regulations may be used for the prevention of sex trafficking in persons and demand the implementation of the principle of obligation *erga omnes.*

*Resolutions* of the General Assembly or the Security Council of the United Nations may be vitally significant for the development of the rules of law. Some of the resolutions are therefore considered an integral part of sources of public international law and are therefore authoritative. This source of the law is not only important in the consolidation of the system of international customary law, but also, for the provisions of conventional international criminal law. Examples of these resolutions are those of the General Assembly which refer to the prohibition, elimination, prevention,
prosecution and punishment of trafficking in persons or sex trafficking. A clear example is the resolution called the United Nations Global Plan of Action to Combat Trafficking in Persons.\footnote{Resolution of the General Assembly 64/293.} This resolution condemns trafficking in persons with particular emphasis on women and children. However, it must be added that there are rules concerning the recognition of certain relevant resolutions of the General Assembly as authoritative sources of law. The functions of those rules are to identify the relevant resolution as an authentic source of law.\footnote{For recognition of these rules see Farhad Malekian, The Monopolization of International Criminal Law in the United Nations: A Jurisprudential Approach (1995).} Despite this, most relevant resolutions of the General Assembly extensively contribute to the development of rules preventing trafficking in human beings and the prohibition of various types of slavery.

National law constitutes another source of law. This means that the provisions of different legal systems within different states have a very significant effect in the recognition of acts of sex trafficking or sex slavery. Regulations within national criminal systems may also create a representation of regional and international understandings of sex trafficking in human beings. They are also bound to fulfil the provisions of international human rights documents, otherwise, they may be asked to formulate those provisions within their legal system by the regional authorities, i.e., the European Commission and the European Court of Human Rights. For example, the European Court of Human Rights in its judgment of the case of Rantseva who was sexually exploited and died after jumping from a balcony concluded that the principles of human rights law had, on several occasions, been violated by Cyprus and Russia.\footnote{See Opinion No. 6/2010 - On the Decision of the European Court of Human Rights in the Case of Rantseva v. Cyprus and Russia.} The decision of the Court was a historic decision concerning the duties of states regarding the provisions of their national laws.

The teaching of publicists may be considered to be a source of international law. There is no special condition for this. Article 38 of the Statute of ICJ speaks about highly qualified publicists but does not give any definition of what is meant by qualified. This means that the level of qualification may vary from country to country. The opinion of one person which is accepted in his/her country may be rejected by the legal and political authorities in another country. That is why the opinion of jurists of international law is considered as being a secondary source which may be helpful in certain circumstances. This does not mean that the opinions...
of publicists are not effective in the recognition of trafficking in persons and the very question of *jus cogens* and obligation *erga omens*.

Yet, the problem is also a matter of understanding language and its interpretation. For instance, the fact that the works of a very highly qualified publicist in China, Japan or Persia may not have been translated into other languages does not diminish his position as a highly qualified writer. While one has to exercise a considerable degree of caution regarding the recognition and the effect of this source in international legal cases, this source has been effective in the formulation of new provisions relating to trafficking in persons and in the creation of international criminal courts.

It must be admitted that the most powerful source of law prohibiting the trafficking in human beings is conventional and national law and this is based on the fact that their provisions are codified and cannot easily be dismissed by those who are engaged in trafficking in persons for sexual exploitation. This is especially important when considering the position of children who are the most vulnerable victims of sex trafficking.

*Jus Cogens*

**Normative Function**

Within the provisions of the systems of public as well as international criminal law there are certain principles or norms which are important and essential foundations. They have received a wide recognition within the framework of international justice and human morality and consequently occupy a fundamental position in the body of the law. In other words, the international legal community as a whole and international human rights law consider the full respect of certain norms as comprising norms from

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14 The very important position of *jus cogens* norms for the protection of human rights or protection of men, women and children from unlawful human rights violations can even be examined in the provisions of Articles 55 and 56 of the United Nations Charter. It is for this reason that the organization has the purpose of promoting human rights based on multilateral conventions such as the Convention on the Prevention and Punishment of Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Convention on the Rights of the Child (1989).
which no derogation is permitted. This means that the values of these norms cannot be devalued or ignored by the provisions of law-making treaties. The 1969 Vienna Convention, which is considered one of the most important instruments in the field of the international law of treaties, recognizes these norms of the system of general international law under the term “peremptory” norms. It reads that “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” It further continues that “For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” In the practice of the system of public and international criminal law these norms are acknowledged by the term “jus cogens”.

**Superiority**

The provisions of conventional international criminal law are enforceable as long as they have not been modified or terminated by another international convention. This element is however rather restricted concerning certain norms that have peremptory function. This is because with the peremptory function we mean those norms that have achieved a certain high level of recognition and are considered essential (a) for the maintenance of peace, (b) for the implementation of justice, (c) for the application of the principle of human rights law, (d) for the recognition of equality between men and women, (e) for the elimination of discrimination and (f) for the prevention of various forms of violation. It is for these and many other reasons that the *jus cogens* norms or the peremptory norms of general international law have superiority over other provisions of the systems of the international legal community.

In general, superiority applies to certain values and interests which have legal, political, economical and social priority over other principles. This means that when we speak about the prohibition of sex trafficking of children in conjunction with the norms of *jus cogens* or those peremptory norms of general international law, we simply mean that they have come to a certain stage of characterization that cannot be ignored by giving priority to other principles of law. They should always be accorded the

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15 The Vienna Convention was signed in 1969 and came into force in 27 January 1980.
highest privilege by the relevant authorities of states. In other words, the prohibition of sex trafficking of children should not be interpreted differently or be subordinated to certain cultural norms. This means that even countries in which the law permits a marriageable age as low as 9, cannot dispute internationally recognized norms regarding the age of majority.

**Precedence over National Law**

The normative function of the system of *jus cogens* norms creates for them precedence over the provisions of national law. This means that the legislative authorities within a state have to give a clear recognition to the *jus cogens* norms within the national legal system and whenever they are formulating or enacting a law should take all due consideration that the new legislation, not only does not conflict with the *jus cogens* norms, but also, takes precedence over those new regulations. In other words, states should not and cannot pass legislation which violates one of the norms of *jus cogens*. Hence, the sovereignty of states is practically limited by the normative principle of *jus cogens* law.

**Precedence over International Law**

Since *jus cogens* norms or the peremptory norms of general international law protect the most important provisions of the system of the international legal community, they have, in all circumstances, precedence over international regulations. This means that states of the world should not and cannot regulate mutual, multilateral and unilateral conventions by which certain peremptory norms of international law are limited, ignored or abolished. Even assuming that states do regulate certain provisions contrary to the legal characterization of *jus cogens* norms, these new rules of individual states are practically invalid. This is due to the very high international legal validity of *jus cogens* norms and their automatic virtue of applicability. Those norms invalidate all international treaties that are in contradiction with the normative force of *jus cogens* law. In other words, the international legal personality of states is seriously limited by the norms of *jus cogens*, in so far as they may act against normative principles.

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16 However, one cannot deny the fact that there may be many rules under national legislations that are essentially against *jus cogens* norms. For instance, although marriage of girls who are nine years old is against all human rights norms, is practically permitted in some of the Islamic states.