PROHIBITION OF SEXUAL EXPLOITATION OF CHILDREN CONSTITUTING OBLIGATION *ERGA OMNES*

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... for the enforcement of the rights of children...

ABSTRACT

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.

PREFACE

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 w 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 fulfilment 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.

[2] Farhad Malekian, Kerstin Nordlöf., *Confessing the International Rights of Children* (2012).

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.[3] 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.

[3] The European Convention uses the terminology "human beings" instead of "person". See Convention on Action Against Trafficking in Human Beings adopted by the Council of Europe in 2005 and entered into force in 2008.