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Slavery in the Name of Tolerance: Whether an International Legal Obligation Exists to Criminalize Prostitution

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Comment*

Slavery in the Name of Tolerance: Whether an International Legal Obligation Exists to Criminalize Prostitution

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I. INTRODUCTION

There is little disagreement among people as to whether sex trafficking¹ is a good or a bad practice. Few legal and political issues enjoy more of a consensus of opinion than the abolition of sex trafficking, and it has been generally recognized among people from all cultures and backgrounds as an inherent violation of basic human rights and dignity. But even an issue with as much universal unanimity as the abolition of sex trafficking cannot escape its own form of controversy. There is great debate among policy makers as to the role of law regarding prostitution in the global fight against sex trafficking, and particularly whether criminalizing or decriminalizing prostitution is the best state approach to combatting sex trafficking.

While few argue that criminalizing or decriminalizing prostitution is the sole step required to effectively counter sex trafficking, many argue that either approach would certainly play an important role in a state's ability to investigate and prosecute perpetrators as well as protect victims. On one end of the spectrum, advocates for decriminalization argue that this would offer greater protections to victims through tighter regulation of sex work.² Decriminalization would also expand the rights of consenting men and women who engage in prostitution as a form of legitimate work, allowing them to enjoy the right to control their own bodies as well as occupational benefits such as health care, retirement plans, and unionization.³ These expanded rights would ensure that sex workers are not subject to exploitative work environments and would also allow them to exercise their right to work.

On the other end of the spectrum, advocates for criminalization argue "prostitution can never be a choice and the 'profession' is inherently based on a system of male sexual dominance, appropriating the female body for pleasure and reinforcing the subordination and sexual objectification of women."⁴ Advocates for criminalization further argue decriminalizing prostitution would make it easier for sex traffickers to exploit women by giving them a legitimate front to an

1. Sex trafficking is often generally referred to as "human trafficking" or as "trafficking in persons," although neither are an entirely accurate articulation. Sex trafficking is just one manifestation of human trafficking and trafficking-in-persons, as humans are trafficked for a variety of exploitative purposes, not just sexual. So for the purposes of this Article, the term sex trafficking will refer to trafficking for the purpose of commercial sexual exploitation and any references to "human trafficking" or "trafficking in persons" shall encompass sex trafficking as well as all other forms of trafficking. The definition of trafficking in persons will be discussed below. *See infra* section II.B.

2. SIDDARTH KARA, SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY 100 (2009).

3. *Id.*

4. *Id.*

illegitimate business, which would also make it more difficult for the state to investigate violations.⁵ They further argue that no amount of regulation can protect women from being exploited by their pimps and that as a practical matter, decriminalizing prostitution creates a greater demand for sex for which there is not enough legitimate supply to meet.⁶ This greater demand gives pimps an incentive to traffic women in order to meet this demand.⁷ For these reasons, pro-criminalization advocates hold that decriminalizing prostitution will always lead to a rise in sex trafficking regardless of how many precautionary steps and regulations a state may create.

This Comment does not intend to establish that decriminalization is inextricably linked, empirically, to a rise in the prevalence of sex trafficking as this is an issue best left to social scientists and quantitative researchers. For the purposes of this Comment, however, it will be assumed that this is the case and that the decriminalization of prostitution creates an increased demand for sex, leading to a greater prevalence of sex trafficking through forced prostitution. This assumption is not merely grounded in theory, but is supported by significant scholarly research.⁸ Based on this underlying assumption, this Comment will attempt to answer two key questions: first, is sex trafficking a form of or inextricably linked to slavery, as understood in the international community? Second, if so, does this connection create an obligation to criminalize prostitution in order to take legally adequate steps to address sex trafficking?

In order to answer these questions, it is necessary to examine relevant norms of international law as they relate to sex trafficking and slavery, investigate the interrelationship between norms specifically related to human trafficking and potentially conflicting human rights norms, investigate the scope of the obligation to criminalize sex trafficking, and discuss whether achieving the goals underlying this obligation require criminalizing prostitution. In particular, it is important to establish whether sex trafficking is a form of slavery under international law, and therefore whether its prohibition is a peremptory *jus cogens* norm. This Comment argues that it is. This Comment will then analyze whether domestic laws that decriminalize or legalize prostitution are in conflict with this *jus cogens* norm.

5. Donna M. Hughes, *The "Natasha" Trade: The Transnational Shadow Market of Trafficking in Women*, 53 J. INT'L AFF. (SPECIAL ISSUE) 625, 647–48 (2000).

6. Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. TRAUMA PRAC. 315, 324 (2003).

7. *Id.*

8. Seo-Young Cho et al., *Does Legalized Prostitution Increase Human Trafficking?*, 41 WORLD DEV. 67, 68 (2012) (finding that on average, countries where prostitution is legal experience larger reported human trafficking inflows).

II. BACKGROUND OF APPLICABLE INTERNATIONAL LAW ON SLAVERY AND SEX TRAFFICKING

Sex trafficking, as well as other forms of human trafficking, have generally been referred to as “modern-day slavery” or as a “contemporary form of slavery” in academic and public discourse.⁹ Many prominent anti-trafficking scholars hold to the position that sex trafficking inherently involves slavery.¹⁰ This seems to be a logical connection, as the link between sex trafficking and chattel slavery¹¹ is immediately apparent. Dr. Anne Gallagher articulates this connection well:

Both practices involve the organized movement of individuals, generally across national borders, for exploitative purposes. Both are primarily conducted outside the public realm by private entities for private profit. Both seek to secure control over individuals by minimizing or even eliminating personal autonomy. Neither system can be sustained without massive and systematic violations of human rights. References to slavery in the new international legal framework around trafficking, and vice versa to trafficking in contemporary rules on slavery, have reinforced this connection.¹²

While this connection is well recognized by prominent scholars and in nearly every anti-trafficking community, there is a great amount of uncertainty as to whether a legitimate legal connection exists. In order to address the over-arching question as to whether an international legal obligation exists to criminalize prostitution, it is first necessary to examine the legal connection (or perhaps the lack thereof) between sex trafficking and slavery in international law. From this examination, this Comment will attempt to determine whether the definition of slavery has expanded to include sex trafficking. A finding in the affirmative is necessary to link together legalized prostitution and slavery.¹³ The first step in this process is to understand international law as it relates to each practice.

9. *See generally* KARA, *supra* note 2; KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (3rd ed. 2012); KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979) (equating sex trafficking and slavery as the same practice).

10. *See generally* KARA, *supra* note 2; BALES, *supra* note 9; BARRY, *supra* note 9 (equating sex trafficking and slavery as the same practice).

11. Chattel slavery is what many people would generally think of in relation to the term “slavery,” particularly an institution whereby human beings are considered to be the personal property of another human being. This is generally accompanied by a legal recognition of the owner’s property interest in “his” slaves. The slavery institution which existed in the United States prior to the Civil War would be an example of chattel slavery.

12. ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 177 (2010).

13. That is, legalized prostitution with the underlying assumption that it is inextricably linked to rises in the prevalence of sex trafficking.

A. International Law Prohibiting Slavery and the Slave Trade

Slavery and the slave trade are two of the few practices whose prohibition is recognized as a *jus cogens* norm of customary international law, and as creating obligations *erga omnes*. These practices are also completely prohibited by the international community in times of peace and in times of war.¹⁴ The Congress of Vienna in 1814 was the first international instrument to recognize the slave trade as an inherent violation of human dignity.¹⁵ While this declaration did not criminalize the slave trade at an international level, it strongly condemned the trade as “repugnant to the principles of humanity and universal morality.”¹⁶ As traditional chattel slavery and the slave trade were abolished around the world throughout the rest of the nineteenth century, many began to question whether slavery and the slave trade should be declared a crime against humanity and criminalized at an international level.¹⁷ These discussions led to several treaties alluding to an ill-defined international prohibition against slavery and the slave trade, but it was not until the Slavery Convention of 1926 that slavery and the slave trade were unambiguously addressed at the international level.¹⁸

Under the Slavery Convention, slavery was defined as “the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised.”¹⁹ Attempts were made to include lesser servitudes in this initial definition, but, for reasons beyond the scope of this Comment, were objected to by the Republic of South Africa.²⁰ The slave trade was defined as including:

all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging 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.²¹

This definition of slavery does not require there to be literal ownership, like in chattel slavery. Rather, the parties to the 1926 Conven-

14. See JEAN ALLAIN, *SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING* 110 (2013).

15. JEAN ALLAIN, *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 91 (2012).

16. *Id.*

17. *Id.* at 99.

18. *Id.* These treaties included the General Act of the Berlin Congo Conference of 1884, the General Act of the Brussels Conference of 1890, and the Convention of St. Germain-en-Laye of 1919, among others.

19. Slavery Convention art. 1(1), Sep. 25, 1926, 60 L.N.T.S. 254 [hereinafter Slavery Convention].

20. ALLAIN, *supra* note 14, at 113.

21. Slavery Convention, *supra* note 19, art. 1(2).

tion understood this to cover more than just chattel slaves.²² The Republic of South Africa articulated this understanding during the convention negotiations:

That definition puts as the test of slavery the status or condition of a person over whom all or any of the powers attaching to the rights of *ownership* are exercised. In other words, a person is a slave if any other person can, by law or enforceable custom, claim such property in him as would be claimed if he were an inanimate object; and thus the natural freedom of will possessed by a person to offer or render his labour or to control the fruits thereof or the consideration therefrom is taken from him.²³

Under Article 2 of the Slavery Convention, the parties undertook an obligation to take every step within their respective jurisdictions to abolish slavery “in all its forms.”²⁴ These obligations will be examined in greater detail below, but for now it is important to note that the inclusion of the language “in all forms” acknowledges that slavery takes on many different forms. This same language was used in the Universal Declaration of Human Rights, which states that slavery and the slave trade shall be prohibited “in all their forms.”²⁵

The 1926 definition is still the accepted definition of slavery in international law, as it was reproduced in substance in both the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery and the 1998 Statute of the International Criminal Court.²⁶ The content of the definition, however, has evolved throughout the twentieth century. At first, the 1926 definition seems to apply only to situations where there was actual ownership, but subsequent treaties and commentaries make clear that it is meant to be broader than such an understanding.²⁷ This is relevant because under Article 31 of the Vienna Convention, subsequent agreements provide context which shall be taken into

22. JEAN ALLAIN, *THE SLAVERY CONVENTION: THE TRAVAUX PREPARATOIRES OF THE 1926 LEAGUE OF NATIONS CONVENTION AND THE 1956 UNITED NATIONS CONVENTION* 55 (2008).

23. *Id.* (quoting League of Nations reply from South Africa). Pre-treaty statements such as these can provide helpful insight into the interpretation of the 1926 definition. Under Article 32 of the Vienna Convention on the Law of Treaties, supplementary means of interpretation, including the preparatory work of the treaty, are recognized as permissible means of interpreting provisions of international treaties. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

24. Slavery Convention, *supra* note 19, art. 2(a)–(b).

25. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

26. ALLAIN, *supra* note 14, at 111.

27. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1(a)–(d), Sep. 7, 1956, 266 U.N.T.S. 3 [hereinafter 1956 Supplementary Convention]; Rome Statute of the International Criminal Court, A/CONF.183/9 (1998), art. 7(2)(c); International Criminal Court, *Elements of Crimes*, art. 7(1)(c), U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter ICC Elements of Crimes].

account when interpreting or applying a particular provision, in this case the definition of slavery.²⁸

The 1956 Supplementary Convention, while not modifying the definition of slavery itself, added state obligations to abolish debt bondage, serfdom, servile marriage, and child trafficking.²⁹ The Convention classified these practices not as slavery themselves, but as practices similar to slavery.³⁰ The 1998 Rome Statute slightly expanded the scope of the 1926 definition of slavery by stating that it also includes “the exercise of such power in the course of trafficking persons, in particular women and children.”³¹ The Rome Statute classified enslavement and other slavery-like practices as “crimes against humanity.”³² These slavery-like practices include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.³³

Finally, slavery is one of the practices considered to be an obligation *erga omnes*.³⁴ These are obligations owed to the international community as a whole and, if breached, allow any state to deem itself injured and thus invoke state responsibility.³⁵ The International Court of Justice identified this obligation as early as 1966.³⁶ The implications of this obligation will be discussed in further detail below.

B. International Law Prohibiting Sex Trafficking

Sex trafficking and trafficking in persons have only recently been seriously addressed in international law. Several twentieth-century conventions condemned the practice, but never specifically defined it.³⁷ These conventions typically only focused on the sex trafficking of women and children and white slavery, doing very little to create a

28. Vienna Convention, *supra* note 23, art. 31(3)(a) (“There shall be taken into account, together with the context: any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . .”).

29. 1956 Supplementary Convention, *supra* note 27.

30. *Id.*

31. Rome Statute of the International Criminal Court, A/CONF.183/9 (1998), art. 7(2)(c).

32. *Id.* art. 7(1).

33. *Id.* art. 7(1)(g).

34. ALLAIN, *supra* note 15, at 101.

35. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Egra Omnes*, 59 *Law and Contemporary Problems* 63, 72–73 (1996).

36. *See* Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

37. These treaties include the International Agreement for the Suppression of the White Slave Traffic art. 1, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; International Convention for the Suppression of the Traffic of Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 53 U.N.T.S. 49; and the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271.

uniform understanding of the issue of trafficking in persons.³⁸ While trafficking in persons was vaguely referred to in the preceding treaties, the practice was not definitively defined until 2000 in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, or as it is more commonly referred to, the Palermo Protocol.³⁹ Article 3(a) of the Protocol defines trafficking in persons as:

The recruitment, transportation, transfer, harbouring or receipt of person, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁴⁰

The Palermo Protocol subsequently states that exploitation “shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁴¹ This classification identifies commercial sexual exploitation as a form of trafficking in persons, as well as forced labor and organ harvesting. Slavery and practices similar to slavery are included as separate forms of exploitation apart from sex trafficking.

This definition of trafficking in persons in Article 3(a) of the Palermo Protocol includes three elements: action, means, and purpose, with the action and means serving as the *actus reus* elements and the purpose serving as the *mens rea* element. In order for there to be trafficking, there must be an action (recruitment, transportation, transfer, harbouring, or receipt of person) secured through a specific means (coercion, force, abduction, fraud, deception, etc.) for a specific purpose (exploitation).⁴² Professor Silvia Scarpa describes these elements as three phases: (a) the movement of the victims from one place to another; (b) the achievement of their consent through improper means; and (c) their final exploitation.⁴³ The “means” element is waived (and

38. Rebecca L. Wharton, Note, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. WOMEN & L. 753, 761–62 (2010).

39. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol] (also commonly referred to as the Trafficking Protocol or the UN Trafficking Protocol).

40. *Id.* art. 3(a).

41. *Id.*

42. GALLAGHER, *supra* note 12, at 29.

43. SILVIA SCARPA, TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY 60 (2008). Although this understanding may be helpful, it is arguably not entirely accurate. The UN definition identifies actions that do not involve movement in and of themselves, such as recruitment and harbouring, so trafficking may occur even if there has not been any actual movement. Furthermore, according to the UN defi-

therefore not required to be proved) in situations where the victim is a child,⁴⁴ and the consent of a victim (regardless of age) is irrelevant if it can be shown that any of the “means” laid out in the definition were employed to induce the nominal consent.⁴⁵

There was much debate surrounding this definition during the drafting stages of the Palermo Protocol, and the most divisive debate revolved around the issue of prostitution.⁴⁶ One great point of debate was whether to draft the definition so as to include non-coerced adult migrant prostitution, and the other was whether to include “use in prostitution” (generally understood as “voluntary” prostitution) as an end purpose of trafficking.⁴⁷ Many states argued that drawing distinctions between forced and voluntary prostitution was morally unacceptable and would lend unfounded legitimacy to prostitution.⁴⁸ They argued that all forms of prostitution are considered to be forced and thus amount to collusion with human trafficking.⁴⁹ Therefore, these states wanted “use in prostitution” included as an end means to confirm international legal opposition to all prostitution.⁵⁰ Other states argued that including this language would blur the distinction between trafficking and migrant smuggling and make the definition of trafficking overly broad.⁵¹ They argued it would divert attention and resources away from the real problem and include as trafficking very minor instances of fraud and deception on the part of someone recruiting a person for prostitution.⁵² Ultimately the final version included a narrowly-tailored reference to the “exploitation of the prostitution of others,” recognizing non-coerced prostitution as an end means of trafficking while avoiding an overarching international stance on prostitution itself.⁵³ According to one scholar, this compromise demonstrated states’ willingness to set aside their individual views on prostitution to achieve the greater goals of securing an agreed defini-

tion the “means” element does not indicate that any level of consent has been achieved. Someone can be trafficked through means that have never induced any level of consent on the part of the victim. What it actually indicates is that if there is any consent, it is irrelevant if obtained through improper means such as fraud, coercion, or deception.

44. Palermo Protocol, *supra* note 39, art. 3(c); *id.* art. 3(d) (defining a child as any person under the age of 18).

45. *Id.* art. 3(b).

46. See GALLAGHER, *supra* note 12, at 26–29.

47. *Id.*

48. *Id.* at 26–27.

49. SCARPA, *supra* note 43, at 59.

50. GALLAGHER, *supra* note 12, at 26–27.

51. *Id.*

52. *Id.*

53. *Id.* at 27–29.

tion and maintaining the integrity of the distinction between trafficking and migrant smuggling.⁵⁴

Since the adoption of the Palermo Protocol in 2000, there have been no other world-wide international treaties on human trafficking. The majority of state-parties, however, have enacted comprehensive anti-trafficking laws that generally reflect the definition in the Palermo Protocol.⁵⁵ As of 2014, 146 states have enacted domestic legislation that criminalizes all aspects of trafficking in persons explicitly listed in the Palermo Protocol.⁵⁶ For example, the United States passed the Trafficking Victims Protection Act (“TVPA”) in 2000, the first piece of comprehensive legislation specifically targeting trafficking in persons in the United States.⁵⁷ The TVPA defined severe forms of trafficking in persons as:

Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁵⁸ It subsequently defines sex trafficking as “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”⁵⁹

Several regional treaties have also been adopted.⁶⁰ These treaties did not significantly alter the definition of trafficking in persons, but afforded greater protections for victims. Perhaps the most significant of these treaties is the 2005 European Convention on Action Against Trafficking (“European Trafficking Convention”).⁶¹ This convention, while mirroring the Palermo Protocol definition, expanded on the definition by offering several insights into its provisions.⁶² In the Explanatory Report, the drafters noted that the abuse of a position of vulnerability encompasses “any state of hardship in which a human

54. *Id.* at 28–29.

55. *Id.* at 42.

56. UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2014 at 51, U.N. Sales No. E.14.V.10 (2014) [hereinafter UNODC 2014 Report].

57. Trafficking Victims Protection Act, 22 U.S.C. §§ 7101-13 (2000) [hereinafter TVPA].

58. *Id.* § 7102(8)(A)–(B).

59. *Id.* § 7102(9).

60. SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan. 5, 2002 [hereinafter SAARC Convention], <http://www.saarc-sec.org/userfiles/conv-trafficking.pdf> [<https://perma.unl.edu/2DDA-5J5L>]; European Union Council Framework Decision on Combating Trafficking in Human Beings art. 1(1), 2002 O.J. (L 203) 1 [hereinafter EU Framework Decision]; Council of Europe Convention on Action Against Trafficking in Human Beings art. 19, May 16, 2005, 197 E.T.S. 16 [hereinafter European Trafficking Convention].

61. European Trafficking Convention, *supra* note 60.

62. *Id.*

being is impelled to accept being exploited,” including “abusing the economic insecurity or poverty of an adult hoping to better their own and their family’s lot.”⁶³ It went on to further note that the fact that an individual is willing to engage in prostitution does not mean that she or he has consented to exploitation.⁶⁴ Article 19 of the European Trafficking Convention states:

Each Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a⁶⁵ of this Convention, with the knowledge that the person is a victim of trafficking in human beings.⁶⁶

Finally, the preamble to the European Trafficking Convention states “trafficking in human beings may result in slavery for victims.”⁶⁷ The implications of this statement will be discussed below.

C. Sex Trafficking as Slavery: Overlap of the Practices

Having examined individually the applicable international laws relating to the practices of slavery and sex trafficking, this Comment will now analyze whether the definition of slavery has expanded to include sex trafficking as a legally recognized form of slavery. It is also important to take a moment to discuss the possible implications of such a classification.

If trafficking in persons—which includes sex trafficking—is found to fall under the classification of slavery, then trafficking in persons would reach the status of a *jus cogens* norm of customary international law. Such a status carries with it considerable legal implications. For example, every treaty and other international norm that has not attained the status of *jus cogens* and is in conflict with the abolition of sex trafficking would be void. This rule would apply both prospectively⁶⁸ and retroactively.⁶⁹ Furthermore, all treaty reservations that would be in conflict with this *jus cogens* norm would be inadmissible, states would be obliged to avoid the recognition of an entity that violates this norm, and states may avoid granting international legitimacy to national legislative and administrative acts of

63. Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings art. 4, ¶ 83, May 16, 2005, 197 E.T.S. 16 [hereinafter Explanatory Report on European Trafficking Convention].

64. *Id.* ¶ 97.

65. Article 4(a) states the definition of trafficking in persons, which mirrors the Palermo Protocol definition. See Palermo Protocol, *supra* note 39, art. 3(a).

66. European Trafficking Convention, *supra* note 60.

67. *Id.* pmbl.

68. Vienna Convention, *supra* note 23, art. 53 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”).

69. *Id.* art. 64 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”).

other states authorizing behavior that is contrary to this *jus cogens* norm.⁷⁰ Thus, if trafficking in persons becomes a *jus cogens* norm and an obligation to criminalize prostitution is found, then states may avoid granting legitimacy to prostitution laws that legalize the practice.

While it may seem that slavery and trafficking in persons have been distinguished in international treaties, it is also apparent that the inclusion of references to slavery in trafficking in persons instruments demonstrates an internationally recognized link between the two practices. For example, the Palermo Protocol definition specifically includes slavery as an end means for trafficking in persons,⁷¹ and the European Trafficking Convention states “trafficking in human beings may result in slavery for victims.”⁷² There is no reference, however, to trafficking in persons within slavery instruments.⁷³ Trafficking in persons was not even identified as a practice similar to slavery, and the fact that the international community chose to separately address trafficking in persons lends considerable weight to the argument that the two practices remain mutually exclusive. It is worth noting, however, that the most authoritative slavery conventions were formed in 1926 and 1956, long before the first authoritative convention on the definition of trafficking in persons. Perhaps the inclusion of slavery as a form of trafficking in persons in the latter conventions signifies a development in the international understanding of the two issues. Thus, a determination based solely on treaty law is anything but conclusive. While it appears from the face of international treaties that the two practices were initially thought of as different, an examination of international jurisprudence and deeper analysis of relevant provisions may lead to a different conclusion.

Under the 1926 definition, slavery can only legally exist when any or all the powers attaching to the rights of ownership are exercised over a person.⁷⁴ A power attaching to the rights of ownership does not necessarily mean that the “owner” has legal title to an individual, but is instead simply an indication that the victim is under a degree of control.⁷⁵ In the words of Jean Allain, “A person is a slave if . . . the natural freedom of will possessed by a person to offer or render his labor or to control the fruits thereof or the consideration therefrom is taken away from him.”⁷⁶ In order to determine whether sex traffick-

70. SCARPA, *supra* note 43, at 80.

71. Palermo Protocol, *supra* note 39, art. 3(a).

72. European Trafficking Convention, *supra* note 60, pmbl.

73. Namely, the 1926 Slavery Convention, the 1956 Supplementary Convention, and the 1998 Rome Statute.

74. Slavery Convention, *supra* note 19, art. 1(1).

75. ALLAIN, *supra* note 15, at 320.

76. Jean Allain, *The Definition of Slavery in International Law*, 52 *How. L.J.* 239, 247–48 (2009).

ing falls under this definition, it is necessary to analyze whether any one of these powers are exercised when a person meets the three elements of trafficking in persons for the purpose of commercial sexual exploitation. The United Nations Secretary-General articulated the earliest form of helpful guidance as to what constitutes a power attaching to the rights of ownership for the purposes of slavery in a 1953 memorandum.⁷⁷ He identified six conditions that are each a manifestation of power attaching to the rights of ownership:

1. The individual of servile status may be made the object of a purchase;
2. The master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law;
3. The products of labor of the individual of servile status become the property of the master without any compensation commensurate to the value of the labor;
4. The ownership of the individual of servile status can be transferred to another person;
5. The servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
6. The servile status is transmitted *ipso facto* to descendants of the individual having such status.⁷⁸

In 2012, the Members of the Research Network on the Legal Parameters of Slavery developed the Bellagio–Harvard Guidelines on the Legal Parameters of Slavery.⁷⁹ Within these guidelines, they identified several other individual manifestations of powers attaching to the rights of ownership. These manifestations are buying, selling, or transferring of a person, using a person, managing the use of a person, profiting from the use of a person, transferring a person to an heir or successor, and disposal, mistreatment or neglect of a person.⁸⁰

There are several provisions of international treaties that begin to establish links between trafficking in persons and the powers attaching to the rights of ownership of a person. Perhaps the clearest can be found in an explanatory footnote in the ICC Elements of Crimes.⁸¹ Article 7(1)(c) of this instrument describes the elements of the crime against humanity of enslavement.⁸² The first element of enslavement is met when “the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or person, or by imposing on them a similar deprivation of liberty.”⁸³ In a footnote

77. ALLAIN, *supra* note 14, at 114.

78. *Id.*

79. RESEARCH NETWORK ON THE LEGAL PARAMETERS OF SLAVERY, BELLAGIO–HARVARD GUIDELINES ON THE LEGAL PARAMETERS OF SLAVERY (2012) [hereinafter Bellagio–Harvard Guidelines].

80. *See id.* (referencing guideline 4(a)–(f)).

81. ICC Elements of Crimes, *supra* note 27.

82. *Id.*

83. *Id.*

supplementing this element, the drafters stated, “It is also understood that the conduct described in this element *includes trafficking in persons*, in particular women and children.”⁸⁴ Furthermore, in the actual text of the Rome Statute, enslavement is defined as, “the exercise of any or all of the powers attaching to the right of ownership over a person *and includes the exercise of such power in the course of trafficking in persons, in particular women and children.*”⁸⁵ There can hardly be a clearer link made between the practice of slavery and trafficking in persons.

This understanding has been reflected in recent decisions by international courts. There are two decisions which provide considerable support for this understanding. In 2010, the European Court of Human Rights recognized in *Rantsev v. Cyprus and Russia* that “trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership.”⁸⁶ As part of its reasoning, the court stated:

It [trafficking in human beings] treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions. It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade.⁸⁷

While this case does explicitly state that trafficking in persons inherently involves the exercise of powers attaching to the rights of ownership, it declined to go so far as to say that trafficking in persons is inherently a form of slavery. It merely held that trafficking in persons inherently violates Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states that “No one shall be held in slavery or servitude” and that “No one shall be required to perform forced or compulsory labor.”⁸⁸ The court in *Rantsev* did not indicate whether trafficking in persons constitutes slavery, servitude, or forced and compulsory labor.⁸⁹

In a less clear but certainly applicable case, *Prosecutor v. Kunarac*, the International Criminal Tribunal for the former Yugoslavia (ICTY) explicitly recognized that the definition of slavery has evolved in international law from its original understanding in 1926.⁹⁰ In a case that

84. *Id.* at 10 n.11 (emphasis added).

85. Rome Statute, *supra* note 31, art. 7(2)(c) (emphasis added).

86. *Rantsev v. Cyprus and Russia*, 2010-I, Eur. Ct. H.R. 65.

87. *Id.* at 68–69.

88. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 4, 1950, E.T.S. No. 5.

89. *Rantsev*, 2010-I Eur. Ct. H.R. at 69.

90. *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

involved a defendant charged with the crime against humanity of enslavement, the tribunal identified several factors to consider when examining whether slavery exists. These factors include elements of control and ownership, the restriction or control of an individual's autonomy, restriction or control of an individual's freedom of choice, control of someone's physical movement, control of physical environment, psychological control, measures taken to prevent or deter escape, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor, and the accruing of some gain to the perpetrator.⁹¹ The tribunal went on to hold that "further indications of enslavement include exploitation; the exaction of forced or compulsory labor or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking."⁹² Thus, the tribunal recognized that trafficking in persons serves as an indication of slavery, although it did not go so far as to explicitly state that trafficking in persons *is* slavery.

Furthermore, the United Nations Human Rights Committee has linked trafficking in persons with violations of Article 8 of the International Covenant on Civil and Political Rights (ICCPR) on several occasions.⁹³ Article 8 of the ICCPR states that "[n]o one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. . . . No one shall be held in servitude. . . . No one shall be required to perform forced or compulsory labor."⁹⁴ The Committee usually interpreted this provision in the context of evaluating whether states parties to the ICCPR have taken adequate steps to criminalize trafficking and protect trafficked persons. While the Committee has not gone so far as to explicitly state that trafficking is slavery under international law, it has recognized the shifting understanding of the two practices and that some judiciaries are beginning to treat sex trafficking offences as acts which can be assimilated to slavery.⁹⁵

Despite the absence of an explicit statement by any court or tribunal referring to trafficking in persons as slavery, the trajectory in international understanding of the issues seems to be moving in that direction. Based on the decisions and views examined above, it seems clear that it will only take a very minor step to reach this conclusion.

91. *Id.* at ¶¶ 542–43.

92. *Id.* at ¶ 542.

93. Anne Gallagher, *Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor and Debt Bondage*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI*, 397, 416–17 (Laila Nadya Sadat et al. eds., 2008).

94. International Covenant on Civil and Political Rights art.8, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

95. *Id.* at 416.

There is well-established precedent directly linking trafficking in persons to an essential element of slavery, namely, the “powers attaching to the rights of ownership.”⁹⁶ The language of the slavery conventions only requires *any* power attaching to the rights of ownership to exist. This connection was explicitly made both in the footnotes of the ICC Elements of Crimes and in the European Court of Human Rights ruling in *Rantsev*.⁹⁷ This connection was also implicitly made in the ICTY’s ruling in *Kunarac*.⁹⁸ If trafficking in persons clearly meets this element, than it is hard to see how it does not meet the entire definition of slavery.

The well-recognized definition of slavery is, “the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised.”⁹⁹ According to this definition, slavery exists as a status or condition of a person when the powers attaching to the rights of ownership have been exercised over him or her. If trafficking in persons inherently includes at least one of the powers attaching to the rights of ownership, then it follows that when trafficking is inflicted on a person, the status or condition of slavery is imputed with respect to that person. Because trafficking in persons is, by its very definition, exercised in a way that exploits a person, it is hard to imagine a situation where trafficking in persons takes place that would not meet this definition of slavery.

Some may argue that trafficking in persons is merely an institution or a practice similar to slavery and should not be classified as slavery itself. The Bellagio–Harvard Guidelines on the Legal Parameters of Slavery, however, draw a distinction between slavery and institutions and practices similar to slavery.¹⁰⁰ These guidelines indicate that slavery exists whenever any power attaching to the rights of ownership exists, and that an institution or practice similar to slavery becomes actual slavery when any of these powers are present.¹⁰¹ There is significant legal precedent indicating that trafficking in persons inherently includes powers attaching to the rights of ownership. This would immediately elevate it to a status above that of being an institution or practice similar to slavery.

96. ICC Elements of Crimes, *supra* note 27, art. 7(1)(c); *see also* *Rantsev v. Cyprus and Russia*, 2010-I, Eur. Ct. H.R. at 65; *Kunarac et al.*, Case No. IT-96-23-T, Judgment at ¶ 543.

97. ICC Elements of Crimes, *supra* note 27, art. 7(1)(c); *Rantsev*, 2010-I Eur. Ct. H.R. at 65.

98. *Kunarac et al.*, Case No. IT-96-23-T, Judgment ¶ 543.

99. Slavery Convention, *supra* note 19, art. 1(1).

100. Bellagio–Harvard Guidelines, *supra* note 79, Guideline 9.

101. *Id.*

**D. An Alternative Way to Think About the Issue:
Commercial Sexual Exploitation as Slavery**

This Comment argues that trafficking in persons is legally a form of slavery worthy of protection under international law. Many, however, may not yet be willing to make that connection; thus, this Comment proposes an alternative perspective. There has been much debate as to whether trafficking in persons is a form of slavery, but trying to equate these two practices as one in the same has created much confusion and conflict. Whereas the end means of sex trafficking is commercial sexual exploitation, usually in the form of forced prostitution, perhaps it is more accurate to think of commercial sexual exploitation as a form of slavery. Such an understanding is implicit in the preamble to the European Trafficking Convention, which states “trafficking in human beings may *result* in slavery for victims.”¹⁰² This understanding also erases questions as to whether classifying trafficking in persons as slavery would subsequently mean that every end means of trafficking is also slavery. There are several exploitative end means of trafficking in persons that are less likely to be classified as slavery, such as organ harvesting. Finding that commercial sexual exploitation is slavery would remove this uncertainty by specifying which end means of trafficking constitutes slavery, and provides a framework to explore whether an obligation to criminalize prostitution exists.

The question becomes whether the powers attaching to the rights of ownership are exercised in commercial sexual exploitation. Siddarth Kara is an investigator who has spent his career documenting the global trade in human beings, and he offers the following description of commercial sexual exploitation based on his documentations of the practice: Generally, commercial sexual exploitation involves the violent coercion of unpaid sex services. Once the victims have reached their destination, the exploiter, usually a pimp, confiscates all their possessions. This includes their passports, money, cell phones, and whatever else they may be carrying with them. The victims are then raped, tortured, starved, humiliated, and drugged by their exploiters in order to condition them to provide sexual services to buyers submissively and to deter them from trying to escape. Victims are usually kept in a brothel, club, massage parlor, or similar establishment where they are sold to buyers several times a day and not permitted to leave. Usually, all of the profits from these services go to the pimp. If the victims are not submissive then they are drugged, beaten, and sometimes killed in order to set an example for the others. A similar fate awaits those who try to escape, as those who attempt escape are often killed in front of the other victims, who are subsequently forced

102. European Trafficking Convention, *supra* note 60, pmbl. (emphasis added).

to clean up the mess. This conditioning and exploitation will persist for years. Pimps will eventually choose some victims to sell themselves on the street, but only those victims that they can trust will do so submissively and without trying to escape. Those victims are given quotas for each night, and failure to meet that quota results in torture and starvation. Escape is unlikely because the victims are generally far from home in a country the language of which they do not know. They are also without their passport, money, or any other form of identification, so they risk incarceration or deportation. Going to the police is usually not an option because the police are often buyers or have been bribed to return any escapees to their pimp.¹⁰³

The above description encompasses just one end means of trafficking in persons and describes the realities of commercial sexual exploitation. When considering the reality of commercial sexual exploitation in light of what has been discussed, it is difficult to see how this cannot fall within a classification as slavery. It is worth repeating that the internationally recognized definition of slavery only requires *any* of the powers attaching to the rights of ownership to exist, not necessarily all of them.¹⁰⁴ Thus, if the preceding description contains anything that might be considered a power attaching to the rights of ownership, then a strong argument could be made that slavery exists in these circumstances.

To see if any of the powers attaching to the rights of ownership exist in the circumstances described above, this Comment considers the conditions identified by the UN Secretary-General as individual manifestations of powers attaching to the rights of ownership. The victims in these circumstances are the objects of purchase, commodities to be bought and sold for sexual service. The master, in this case the pimp, may use the victim's capacity to work in an absolute manner. The products of the victims' labor, in this case the money paid for their sexual services, becomes the absolute possession of the pimp with no compensation offered to the victims. The status of the victims is permanent, that is to say, it cannot be terminated by the will of the individual subject to it. This meets four out of the six considerations offered by the UN Secretary-General in the 1953 memorandum.¹⁰⁵ Furthermore, most of the time the victims have no freedom of movement, as their movement is usually exclusively controlled by their pimp. Frequently, police will even return escaped victims to their pimps, despite the fact that forced prostitution is illegal in almost every country.¹⁰⁶ This conduct, which is intrinsic in commercial sex-

103. *See generally* KARA, *supra* note 2, at 11–16 (describing the general practice of commercial sexual exploitation).

104. *See supra* note 19 and accompanying text.

105. *See supra* note 77 and accompanying text.

106. *Id.*

ual exploitation, reveals a general understanding that pimps enjoy rights of ownership over victims.

The elements of the crimes of enslavement and sexual slavery under the ICC Elements of Crime are identical, except that sexual slavery includes the additional element that the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.¹⁰⁷ The Rome Statute, however, identifies the crime of enforced prostitution as a separate offence from sexual slavery, and the elements of enforced prostitution are very different than those of sexual slavery.¹⁰⁸ It is unclear whether commercial sexual exploitation is classified as sexual slavery or as enforced prostitution, and it is likely require a case-by-case analysis rather than a *per se* classification. However, the practice itself seems to involve several manifestations of powers attaching to the rights of ownership, so regardless of whether it is classified as sexual slavery or enforced prostitution under the Rome Statute, it can be classified as a form of slavery.

III. INTERNATIONAL LEGAL OBLIGATIONS TO CRIMINALIZE AND PREVENT SLAVERY AND SEX TRAFFICKING

The implications of classifying trafficking in persons or commercial sexual exploitation as slavery are extremely substantial. The most significant of these implications relates to the obligations arising out of a newly achieved status as a *jus cogens* norm and the obligations *erga omnes* that slavery carries with it. Specifically, classifying trafficking in persons as slavery would impose an obligation on states to take any and all steps necessary to abolish trafficking in person or commercial sexual exploitation (depending upon which practice is considered slavery). This Part will examine the obligation to abolish slavery more closely in light of the conclusion that trafficking in person and commercial sexual exploitation is slavery and in light of the underlying assumption for this Comment. In particular, these obligations will be examined with the intent of determining whether they create a subsequent obligation to criminalize prostitution.

A. Obligation to Criminalize and Prevent Sex Trafficking

Aside from the obligation to criminalize and prevent slavery, there exists an international legal obligation to criminalize trafficking in persons. These obligations arise primarily out of treaty law. Article 5 of the Palermo Protocol provides that “[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 of this Protocol,

107. ICC Elements of Crimes, *supra* note 27, art. 7(1)(g)(2).

108. *Id.* art. 7(1)(g)(3).

when committed intentionally.”¹⁰⁹ Article 9 of the Palermo Protocol states that “State Parties shall establish comprehensive policies, programs and other measures to prevent and combat trafficking in persons and to protect victims of trafficking in persons, especially women and children, from revictimization.”¹¹⁰ The European Trafficking Convention contains an identical provision to Article 5 of the Palermo Protocol,¹¹¹ as well as a provision that provides that “[e]ach Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in [Article 4(a)]¹¹² of this Convention”¹¹³ Article 1 of the European Union Council Framework Decision on Combating Trafficking in Human Beings (“EU Framework Decision”) obligates member states to take the necessary measures to ensure that trafficking in persons is a punishable offense, including a specific provision to criminalize trafficking in person “for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.”¹¹⁴ Such an obligation can also easily be inferred from the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), which provides that “State parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women.”¹¹⁵

It is important to understand what this obligation actually requires of states. It requires states to criminalize trafficking in persons as it has been defined by international law.¹¹⁶ While it does not require states to reproduce the legal definition laid out in treaties and other instruments, it does require certain core features be included in order to satisfy the obligation.¹¹⁷ Some of these features are the difference between trafficking in adults and in children, the criminalization of trafficking in persons for all exploitative purposes, gender-neutrality, no requirement that exploitation actually take place, and a provision that the consent of the victim does not alter the offender’s criminal liability.¹¹⁸

109. Palermo Protocol, *supra* note 39, art. 5(1).

110. *Id.* art. 9(1)(a)–(b).

111. European Trafficking Convention, *supra* note 60, art. 18.

112. Article 4(a) provides the definition for trafficking in persons as discussed above. *Id.* art. 4(a).

113. European Trafficking Convention, *supra* note 60, art. 19.

114. EU Framework Decision, *supra* note 60, art. 1(1).

115. Convention on the Elimination of All Forms of Discrimination against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

116. GALLAGHER, *supra* note 12, at 373.

117. *Id.* at 373–74.

118. *Id.* at 374.

Perhaps more important than what this obligation requires of states, is a consideration of what this obligation does *not* require of states. No major trafficking in persons instrument imposes an obligation to criminalize anything other than the conduct set out in the treaties themselves. This includes the criminalization of some or all of those separate elements identified in the international legal definition of trafficking in persons or any similar or related conduct.¹¹⁹ Under this understanding, it is very difficult to argue that any trafficking in persons instrument requires the criminalization of collateral practices such as prostitution (even under the assumptions made for this Comment).

Article 9 of the Palermo Protocol requires states to take steps to prevent trafficking in persons and to protect victims from re-victimization.¹²⁰ The actual provision only requires states to “establish comprehensive policies, programs and other measures” to prevent trafficking in persons, it does not say anything about requiring states to take legislative measures.¹²¹ Legislative requirements, however, could be inferred under the phrase “other measures.”¹²² A much stronger inference can be made from the provision in CEDAW¹²³ that provides *all* appropriate measures must be taken to suppress trafficking in women including legislation.¹²⁴ This lends strength to the argument that prostitution must be criminalized by the parties to CEDAW, considering that the overwhelming majority of sex trafficking victims are women.¹²⁵ If states must take all appropriate measures to suppress sex trafficking under CEDAW, and if legalized prostitution is inextricably linked to rises in the prevalence of sex trafficking, then it follows that states have an obligation to criminalize prostitution in order to take appropriate measures to suppress sex trafficking.

This conclusion is contingent on two findings. First, one must definitively conclude that legalized prostitution and rises in the prevalence of sex trafficking are inextricably linked. There is significant research to support this conclusion,¹²⁶ but it remains unsettled, and this Comment does not intend to argue one way or the other. Second, one must conclude that criminalizing prostitution is an *appropriate* measure to suppress sex trafficking. This comes down to a policy argument, and would require an analysis as to whether the rights of

119. *Id.* at 376.

120. Palermo Protocol, *supra* note 39, art. 9.

121. *Id.*

122. *Id.*

123. CEDAW, *supra* note 115, art. 6.

124. *Id.* (emphasis added).

125. UNODC 2014 Report, *supra* note 56, at 37 (reporting that approximately 97% of sex trafficking victims are women).

126. Cho, *supra* note 8, at 67.

legitimately consenting sex workers outweigh the rights of sex trafficking victims. In other words, this would be a conflict of rights analysis.

At this stage in the analysis, it is quite a stretch to say that the international obligation to criminalize sex trafficking includes an obligation to criminalize prostitution. Treaties regarding trafficking in persons only obligate states to criminalize sex trafficking and all the elements of trafficking in persons. Furthermore, no customary norm exists which would indicate that states are obligated to take all measures to abolish sex trafficking. The only treaty that extends an obligation beyond that of merely criminalizing sex trafficking is CEDAW, and this is only binding on the parties to the treaty. If an obligation to criminalize prostitution exists, it must arise from an obligation to prevent slavery.

B. Obligation to Criminalize and Prevent Slavery

Unlike sex trafficking, slavery carries with it significant obligations that are covered in both treaties and in customary international law. The earliest international legal obligation regarding slavery can be found in the 1926 Slavery Convention. Article 2 of the Convention compels the parties to the treaty to “prevent and suppress the slave trade” and “to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.”¹²⁷ This is incredibly strong language, obligating states to completely abolish slavery in every form in which it manifests itself. Thus, the provision leaves no room for any tolerance of slavery. Unlike the obligation to criminalize sex trafficking, the obligation regarding slavery extends beyond mere criminalization and stretches to abolition. This provision also takes into account the understanding that slavery can take many different forms, calling for parties to abolish slavery “in all its forms.” It left slavery open to embrace an ever-widening range of practices, allowing for every possible manifestation of slavery to be abolished.¹²⁸ Viscount Cecil stated in his Report to the Assembly of the League of Nations that the obligations in the 1926 Convention “were to bring about the disappearance from written legislation or from the custom of the country of everything which admits the maintenance by a private individual of rights over another person of the same nature as the rights which an individual can have over things.”¹²⁹

127. Slavery Convention, *supra* note 19, art. 2(a)–(b).

128. ALLAIN, *supra* note 15, at 99.

129. ALLAIN, *supra* note 14, at 113 (quoting Reports Presented to the Assembly by the Sixth Committee, League of Nations Doc. A.1104 1926 VI (1926)).

The 1956 Supplementary Convention builds upon the obligation in Article 2 of the 1926 Convention and identifies four manifestations of slavery-like practices that this obligation extends to, stating that:

Each of the State Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices [debt bondage, serfdom, servile marriages, and child trafficking], where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed as Geneva on 25 September 1926.¹³⁰

The prohibition on slavery was reiterated in Article 8 of the ICCPR, which states, “no one shall be held in slavery; slavery and the slave-trade *in all their forms* shall be prohibited.”¹³¹ Article 4 of the ICCPR provides that no state may deviate from this prohibition at any time.¹³²

These obligations clearly articulate what they require of states, which is that states must do everything they can to abolish every form of slavery within their jurisdiction. These obligations are *erga omnes*,¹³³ meaning they are universal in character and owed to the entire international community.¹³⁴ This gives every state an incentive to comply with the obligation to abolish slavery and the capacity to bring suit against another state in the International Court of Justice regardless of whether it has suffered direct harm.¹³⁵ Thus, the obligation to prevent and abolish slavery extends to all states, regardless of whether they have become parties to the 1926 or 1956 Conventions. The fact that slavery is a *jus cogens* norm also prevents any state from excusing themselves from these obligations as a persistent objector.¹³⁶

Therefore, an obligation to criminalize prostitution exists under the international obligation to abolish slavery. The obligation to abolish slavery requires all states to take every step necessary to eradicate the practice of slavery in all its forms. Because trafficking in persons and commercial sexual exploitation are both forms of slavery under international law, states are obligated to take every step necessary to

130. 1956 Supplementary Convention, *supra* note 27, art. 1.

131. ICCPR, *supra* note 94, art. 8. (emphasis added).

132. *Id.* art. 4(2).

133. *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

134. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 902 (Am. Law Inst. 2000).

135. *Id.*

136. Generally, a state may show that they are not bound by a customary rule of international law by showing that they have been a persistent objector during the time of the rules formation. However, this exception does not apply when the customary norm is a *jus cogens* norm. Dino Kritsiotis, *On the Possibilities of and for Persistent Objection*, 21 DUKE J. COMP. & INT'L L. 121, 133–34 (2010).

abolish these practices. It follows that if legalized prostitution is inextricably linked to rises in the prevalence of sex trafficking, then one of the steps that states are required to take is to criminalize prostitution. Otherwise, states will be unable to fulfill their obligation to abolish slavery in all its forms.

As mentioned at the beginning of this Comment, the underlying assumption is that the legalization of prostitution will always lead to an increase in the prevalence of sex trafficking.¹³⁷ The obligations discussed above impose sweeping and clear requirements for states: They must bring about progressively, and as soon as possible, the *complete* abolition or abandonment of slavery,¹³⁸ and must take *every measure necessary* to abolish slavery within their jurisdiction. Thus, prostitution, because it always leads to an increase in slavery, must be criminalized in order to fulfill this obligation. Of course, future research showing no causal link between legalization of prostitution and an increase in sex trafficking would call this conclusion into question.

IV. CONFLICT BETWEEN OBLIGATION TO CRIMINALIZE AND OTHER HUMAN RIGHTS

Concluding that a legal obligation exists to criminalize prostitution has significant implications. One major implication is that criminalization would infringe on the rights of sex workers who engage in the practice of prostitution as a legitimate form of work. Many people may object that an international legal obligation to criminalize prostitution violates the basic human rights of sex workers, and should be ignored or diminished due to these infringements. Due to the gravity of the repercussions following from an obligation to criminalize prostitution, a brief discussion of the conflicting rights of the sex workers and sex trafficking victims must be had at this point. To provide guidance in this analysis of competing human rights, the Ontario Human Rights Commission (“OHRC”) released a policy on competing human rights that provides a helpful framework for analyzing this issue.¹³⁹ The policy includes a three-step process: The first step is to recognize the competing rights claims and determine whether they are legitimate rights. The second step is to try and reconcile the competing rights claims and evaluate whether there is a solution that allows enjoyment of each right. The third and final step is to make a decision, and determine what the best course of action would be.¹⁴⁰

137. See *supra* note 8 and accompanying text.

138. Gallagher, *Using International Human Rights Law to Better Protect Victims of Human Trafficking*, *supra* note 93, at 406.

139. Ontario Human Rights Commission, *Policy on Competing Human Rights* (January 26, 2012), http://www.ohrc.on.ca/sites/default/files/policy%20on%20competing%20human%20rights_accessible_2.pdf [hereinafter Conflict of Rights Policy].

140. *Id.* at 6.

Recognition of the human rights of sex workers has made considerable progress in recent years, leading many human rights agencies to reevaluate their stances on the criminalization of prostitution.¹⁴¹ Most recently, Amnesty International modified its position, moving from advocating for the criminalization of prostitution to instead advocating for the full decriminalization of prostitution.¹⁴² The organization articulated their position in a draft policy that was circulated among members before their 2015 International Council Meeting, highlighting the various human rights considerations of sex workers that led to their decision to modify their policy. Among these human rights were the sex workers' right to security of person, their right to work and to just and favorable conditions of work, their right to health, to consent to sex and to consent to the sale of sex, and to be free from discrimination and arbitrary detention.¹⁴³ These are all well-recognized and legitimate human rights, most which can be found in the Universal Declaration of Human Rights.¹⁴⁴

If it is true, however, that legalized prostitution is inextricably linked to rises in the prevalence of sex trafficking, then these rights would be in direct conflict with those of men, women, and children who are exploited through sex trafficking and commercial sexual exploitation. These rights are immediately apparent, including the very same rights considered for sex workers, as well as the right to life, the right to liberty, the right to be protected from inhuman and degrading treatment, the right to freedom of movement, and the right to a standard of living adequate for the health and well-being for himself, among others.¹⁴⁵ Perhaps the most important right for purposes of this discussion is the right to not be held in slavery or in servitude.¹⁴⁶ This right is articulated in Article 4 of the Universal Declaration of Human Rights, and has been one of the rights most universally affirmed by the international community.¹⁴⁷ This is evidenced by the

141. These human rights agencies include the World Health Organization, UNAIDS, the Global Alliance Against Trafficking in Women, Human Rights Watch, the International Labor Organization, and several others.

142. Amnesty International Draft Policy on Sex Work, Memorandum from Amnesty International International Board to Sections and Structures (July 7, 2015), <https://amnestysgprdasset.blob.core.windows.net/media/10243/draft-sw-policy-for-external-publication.pdf>.

143. *Id.*

144. *See generally* Universal Declaration of Human Rights, *supra* note 25 (identifying internationally recognized human rights). The only right not found in this declaration is the right to consensual sex and to consent to sell sex, although there is jurisprudence to lend weight to the argument that these are legitimate rights. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 529 U.S. 558 (2003).

145. Universal Declaration of Human Rights, *supra* note 25.

146. *Id.* art. 4.

147. *Id.*

fact that the prohibition of slavery is a *jus cogens* norm of customary international law. If sex trafficking and commercial sexual exploitations are legally forms of slavery, then this right carries with it considerable weight in this discussion.

After recognition of the various human rights at play, the question thus becomes whether there is a way to reconcile these rights in a manner that allows them to all be enjoyed. As noted by the OHRC, no rights are absolute.¹⁴⁸ A strong argument could be made, however, that the right to not be held in slavery or in servitude is almost absolute. This is evidenced by the fact that it is recognized as a *jus cogens* norm of customary international law and as creating obligations *erga omnes*. An international legal obligation exists to not only criminalize slavery, but to abolish it completely. This is also one of the few obligations that cannot be waived under any circumstances, including in times of war. Unlike all the other rights discussed above, the right to not be held in slavery is so fundamental that the international community will not tolerate violations. If the underlying assumption for this Comment and the conclusions reached in this Comment are correct, then it is hard to see how the rights of sex workers can be reconciled with the rights of sex trafficking victims to not be held in slavery.

The implications of this conclusion would be that legitimate sex workers will not be allowed to exercise their right to engage in this form of work because doing so will inevitably lead to the exploitation of others. This is no doubt an unpopular position, but the question is whether we are willing to tolerate slavery under any circumstances. If the answer is no, and if the underlying assumption and the conclusions reached in this Comment are correct, then prostitution must be criminalized. This would not be the first time certain actions are *per se* criminalized, even when there are certain situations where the conduct being criminalized does not lead to the undesired results. For example, in the United States, failure to stop at a red light is a criminal offense, even in situations where there is no cross-traffic.¹⁴⁹ This is based on the policy decision that it is better to inconvenience some drivers than to allow them to decide on their own when to stop at a red light and potentially cause an accident. Another example is laws in the United States which criminalize driving under the influence of alcohol. This is based on the policy decision that the dangers of driving under the influence of alcohol are so great, that it should *per se* prohibited even if a driver can show that he was not actually a danger to anyone. Likewise, it would be a wise policy decision to criminalize prostitution even though some people engage in prostitution as a legitimate form of work, because it is better than decriminalizing it alto-

148. Conflict of Rights Policy, *supra* note 139, at 6.

149. NEB. REV. STAT. §§ 60-6,123(3)(a), 60-6,119(1) (Reissue 2010).

gether and thus leading to an increase in the exploitation of people through slavery.

One concern raised by advocates for the decriminalization of prostitution is that criminalized prostitution leads to genuine victims being treated as criminals. This is a legitimate problem, as many sex trafficking victims find themselves not in the care of social workers, but in the custody of law enforcement officers. Thus, it may become necessary to implement a model that protects victims of sex trafficking, while also deterring the practice by criminalizing prostitution. Sweden has attempted to address this issue, and has introduced what has come to be known as the “Nordic Model.”¹⁵⁰ In 1999, the Swedish Law that Prohibits the Purchase of Sexual Services entered into force and criminalized the purchasing of sex.¹⁵¹ This law targeted the buyers of sexual services, exempting the sex workers from being targeted by law enforcement officials. Thus, buyers can be arrested, but the sex workers cannot. There is still much debate as to whether this is an effective model, but it may serve as an excellent starting point for developing a policy that protects victims and deters the buying and selling of sexual services.

V. CONCLUSION

Under international law, there is a legal obligation to criminalize prostitution in order to fulfill the universal obligation to abolish slavery. This conclusion is contingent on two findings. First, it must be shown that laws decriminalizing or legalizing prostitution inevitably lead to a rise in the prevalence of sex trafficking within that particular jurisdiction. This Comment does not argue that this is true or attempt to prove whether this is true. This theory is supported by at least one major study, but is far from being regarded as a fact, thus more research must be done in this area. Second, sex trafficking or commercial sexual exploitation must be recognized as a form of slavery under international law. Both of these practices are indeed forms of slavery under international law and that the trajectory of international understanding is heading towards classifying sex trafficking as slavery. This would have major implications, elevating these practices to *jus cogens* norms of customary international law and creating obligations *erga omnes* in regards to these practices. One of the implications would be that states must take all necessary steps to abolish these practices within their jurisdictions, and if prostitution allows these practices to flourish, then it must be criminalized.

150. Mary Ann Peters, *Nordic Model Key to Beating Exploitation of Sex Workers*, CNN (April 18, 2016) <http://www.cnn.com/2016/04/18/opinions/prostitution-nordic-model-peters/>

151. Act that Prohibits the Purchase of Sexual Services, BROTTSBALKEN [BRB] [Penal Code] 1998:408 (Swed.).

Such a conclusion inevitably creates issues. Perhaps the most prevalent issue is how to reconcile this obligation with the infringement of basic human rights enjoyed by sex workers who engage in prostitution as a form of legitimate work. No right, however, is absolute. If legalized prostitution really does perpetuate slavery, then it must be criminalized, even if it denies sex workers the right to participate in prostitution as a legitimate form of work. Otherwise, a form of slavery would be tolerated, which is something that international law does not permit. Criminalizing prostitution would not represent the first time a certain conduct was criminalized in order to protect people even if that conduct does not always result in the undesirable outcome. A policy would need to be developed that protects victims of sex trafficking while also deterring the practice by criminalizing prostitution. Sweden provides an excellent example of such a policy, and an examination of the “Nordic Model” may serve as a starting point for developing appropriate criminalization laws.

In regards to combatting sex trafficking and commercial sexual exploitation, the criminalization of prostitution must be one of many steps taken. There are countless other variables to take into account, including examining the circumstances which make individuals vulnerable to these practices in the first place and addressing the demand which drives this illegal business. If it true, however, that legalized prostitution perpetuates this injustice, then criminalization must be at least one of the steps taken. Sex trafficking cannot be abolished as long as there are systems in place that allow for it to flourish, and we cannot tolerate a form of slavery under any circumstances.

