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III Premio AEPDIRI «Adolfo Miaja de la Muela»
a la Mejor Tesis Doctoral en Derecho Internacional Público

**THE HUMAN RIGHTS-BASED APPROACH
TO HUMAN TRAFFICKING
IN INTERNATIONAL LAW:
AN ANALYSIS FROM A VICTIM
PROTECTION PERSPECTIVE**

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ASOCIACIÓN ESPAÑOLA DE PROFESORES DE DERECHO INTERNACIONAL
Y RELACIONES INTERNACIONALES

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MADRID | BARCELONA | BUENOS AIRES | SÃO PAULO
2020

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PALABRAS PREVIAS

La publicación de la obra de Valentina Milano, titulada *The human rights-based approach to human trafficking in international law: an analysis from a victim protection perspective*, constituye un motivo de enorme satisfacción para la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales, ya que ha sido galardonada con el III Premio AEPDIRI «Adolfo Miaja de la Muela» a la mejor Tesis Doctoral en Derecho Internacional Público*. La tesis fue dirigida por la profesora Rosario Huesa Vinaixa, catedrática de Derecho Internacional Público y Relaciones Internacionales, y defendida en la Universitat de les Illes Balears

Desde 2015, con miras a impulsar carreras investigadoras de excelencia de sus miembros más jóvenes, la AEPDIRI decidió premiar las mejores tesis doctorales en cualquiera de las disciplinas cubiertas por la Asociación, defendidas en una Universidad española, pública o privada, convocando bienalmente los premios «Adolfo Miaja de la Muela» a la mejor Tesis Doctoral en Derecho Internacional Público, «Mariano Aguilar Navarro» a la mejor Tesis Doctoral en Derecho Internacional Privado, y «Antonio Truyol y Serra» a la mejor Tesis Doctoral en Relaciones Internacionales. Como consta en las bases (www.aepdiri.org) todas las tesis que concurren a los premios han de haber obtenido la máxima calificación.

A partir de la segunda edición, la AEPDIRI y la editorial Marcial Pons alcanzaron un acuerdo para la publicación de los textos premiados. Así, la tesis de Valentina Milano, defendida en la Universitat de les Illes Balears, es una nueva publicación de esta colección iniciada con las tesis premiadas en la segunda edición de los Premios AEPDIRI.

En esta ocasión el tribunal estuvo integrado por los profesores Rosa Giles Carnero, profesor titular de Derecho Internacional Público y Relaciones Internacionales de la Universidad de Huelva; Susana Borrás Pentinat, profesora contratada doctora (acreditada TU y CU) de la Universitat Rovira i

* El II Premio AEPDIRI «Adolfo Miaja de la Muela» a la mejor Tesis Doctoral en Derecho Internacional Público fue concedido a Esther Jordana Santiago, cuya tesis fue publicada en esta colección con el título *El proceso de institucionalización de Eurojust y su contribución al desarrollo de un modelo de cooperación judicial penal de la Unión Europea*, Marcial Pons, 2018.

Virgili, y Miguel A. Acosta Sánchez, profesor titular de Derecho Internacional Público y Relaciones Internacionales de la Universidad de Cádiz. El premio fue concedido por unanimidad.

La Junta de la AEPDIRI quiere aprovechar estas líneas para felicitar a la autora por el premio obtenido, merecido reconocimiento a la calidad de su trabajo, y para desearle mucha suerte en su carrera académica. También deseamos animar a los jóvenes investigadores, miembros de la Asociación, a presentar sus trabajos a las próximas ediciones de los Premios a las mejores Tesis Doctorales.

Caterina GARCÍA SEGURA
Presidenta de la AEPDIRI

FOREWORD

Among the scourges that the dignity of the human race must still bear in the XXI century, human trafficking is undoubtedly one of the most excruciating. Trafficking supposes the survival of the practice and the ideology of slavery, whose legal abolition in the XIXth century was not an obstacle to the flourishing of other modalities of domination and subjection of some human beings by others, preying on the weakest and most vulnerable victims. In one way or another, these practices survived throughout the past century.

But it seems that the phenomenon of globalization and the increase in inequalities has caused a progressive rise in the number of victims in recent decades¹. It is also disheartening that human trafficking involves, in many cases, the channeling of victims towards societies with a high «Human Development Index» (HDI)², usually in conjunction with migratory flows. This trade in people is undoubtedly due to the existence of a demand that, according to the figures, is only growing.

In this scenario, the reaction of the international community is being insufficient to tackle the phenomenon. From the legal perspective, the most conspicuous manifestation has been the *United Nations Palermo Protocol to prevent, suppress and punish trafficking in persons, especially women and children*, which complements the Convention on Transnational Organized Crime (2000). However, despite the supposed strength of the criminal or punitive machinery, its shortcomings have come to light while the magnitude and unacceptability of the human implications of trafficking became evident.

The victims have always been forgotten, marginalized and even persecuted. In the purely criminal approach, the State protects its interests (public order, morality, public health, ...), but ignores the fate of the vic-

¹ UNODC, *Global Report on Trafficking in persons*, 2018, p. 3 and 34.

² «Western and Southern Europe, the affluent countries of the Gulf Cooperation Council in the Middle East, as well as North America are destinations with significant levels of inbound trafficking from other regions», *ibid.*, p. 42. The States belonging to these areas have a very high HDI, according to the United Nations Development Program (<http://hdr.undp.org/en/content/human-development-index-hdi>).

tims, who are made invisible, especially if they are not useful for the purpose of an effective investigation and prosecution by the police and judicial authorities (an effectiveness that is, on the other hand, meager, when considering the flourishing nature of the businesses linked to this criminal activity)³.

The author of this book, doctor Valentina Milano, started addressing these shortcomings early on. From the outpost that provided her position under the mandate of the United Nations Special Rapporteur on trafficking in persons, she was able to apprehend first-hand the deficiencies of an exclusively criminal law approach in addressing trafficking. Therefore, when she decided to undertake a change in her professional career, she had no doubts as to what would be the subject and focus of her doctoral thesis. And the result, based on her experience on the ground and on her capacity for legal analysis and reasoned criticism, could not have been more satisfactory.

At the center of her research is the «human rights-based approach» (HRBA), as opposed to a merely criminalistic approach. The thesis investigated the contribution of this approach in the construction of an international regime on trafficking in human beings. Among other remarkable results of the research are: a better knowledge of the HRBA as a crosscutting paradigm of international law that contributes to the convergence of separate international law regimes; a clarification of how this approach adapted to the requirements of the international fight against trafficking; the identification of the gaps in the current international human trafficking regime in relation to the effective incorporation of the HRBA, in particular in relation to the protection of victims; and the extent to which the HRBA modified the content and scope of States' obligations in this field.

The applicability in practice of these achievements is also relevant: the author highlights the existing dysfunctions in international instruments and case law and in States' practice, which result not only in the lack of adequate protection of the rights of victims, but also in the ineffectiveness of anti-trafficking policies. Consequently, she makes numerous proposals *de lege ferenda* (both internationally and domestically), as well as on mechanisms and protocols for States' authorities to enhance the protection of victims in their fight against trafficking.

The thesis, which I had the satisfaction of supervising, obtained the highest qualification (*cum laude*) by a panel composed of professors Anne Lagerwall, Maria Dolores Bollo Arocena and Ana Salinas de Frias, and obtained the *Adolfo Miaja de la Muela award* for the best doctoral thesis in Public international law in Spain in the period 2017-2018, awarded by the Spanish Association of Professors of International Law and International Relations.

³ In Europe alone, criminal groups obtain about 3 billion \$ a year from trafficking (<https://www.unodc.org/toc/es/crimes/human-trafficking.html>).

Even if it contains only part of the thesis, this book constitutes in my opinion an essential contribution not only to the knowledge of the international law applicable to human trafficking, but also to the development of the concept of «human rights-based approach» and its contribution to the interaction and integration of different international law regimes.

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University of the Balearic Islands
Palma, Mallorca (Spain), October 10, 2020

INTRODUCTION

Human trafficking is a global phenomenon that consists in the transfer and forced exploitation of women, men and children within a country or across different countries or continents. While slavery has been abolished, the trafficking of human beings for a number of purposes, including slavery, continues. Human beings continue to exploit human beings in an illicit business that tramples on the most essential values of dignity and liberty that conform our modern societies. Indeed, this illicit business in continuous expansion represents the third most lucrative criminal activity in the world behind drug and arms trafficking¹, with a profit of 150 billion US dollars yearly². Exploitation into prostitution and pornography remains the most prominent form of exploitation (59 %), but human trafficking can also force victims into forced labour (34 %) and other not less hateful exploitative activities such as begging, criminal activities including theft or drug dealing, forced and/or sham marriages, the removal of organs or the selling of new-born babies (7 %)³. Trafficking also has a strong gender component: women and girls represent 72 % of the victims worldwide and 94 % of the victims trafficked for sexual exploitation⁴.

In this tragic context of large-scale exploitation, the response of the international community has been largely ineffective, allowing trafficking to continue to flourish as a low-risk, high-profit activity for criminals⁵. Impunity still prevails in large parts of the globe⁶ and States are still to take appropriate measures to reduce demand⁷. Also, very few victims are identified in relation to the magnitude of the phenomenon⁸, and those who are detected continue

¹ UNODC, *Transnational organized crime: the globalized illegal economy*, 2020, available at <https://www.unodc.org/toc/en/crimes/organized-crime.html>.

² ILO, *Profits and Poverty: The Economics of Forced Labour*, 2014, p. 13.

³ UNODC, *Global Report on Trafficking in Persons*, 2018, pp. 29-31.

⁴ *Ibid.*, pp. 25 and 33.

⁵ UNODC, *Global Report on Trafficking in Persons*, 2014, p. 1.

⁶ UNODC, *Global Report on Trafficking in Persons*, 2018, pp. 8 and 13; and European Commission, *Report on the progress made in the fight against trafficking in human beings* (European Commission Progress Report 2018), 2018, COM(2016) 777 final, p. 11.

⁷ European Commission Progress Report 2018, pp. 6 and 11.

⁸ GRETA, *Ninth General Report on GRETA's activities*, 2020 (GRETA Ninth General Report), para 133.

to face obstacles in exercising their rights to non-punishment, protection, assistance and compensation⁹.

Why has the international law response been that ineffective? Traditionally, trafficking activities have been exclusively categorized as crimes and tackled with law enforcement strategies focused solely on criminalization and punishment, without addressing the aspects related to the prevention of this phenomenon and to the protection of its victims. While trafficking is certainly a criminal activity that requires a criminal law response, it is also a human rights issue. Human rights violations occur during the entire trafficking cycle. Firstly, human rights violations cause human trafficking in the first place: poverty, gender and racial discrimination, armed conflict or humanitarian crisis trigger people to move in unsafe conditions and makes them vulnerable to trafficking. Secondly, once trafficked, victims find themselves trapped into forced labour, servitude and/or slavery, where their freedom of movement and their right to liberty and security and to be free from torture and inhuman and degrading treatment are almost systematically denied. Their right to life and that of their family members is also at risk. Finally, victims who manage to exit this ordeal are frequently revictimized at the hands of governments: they are subjected to detention, prosecution and speedy deportation to their country of origin, are denied access to effective remedies, are pressed to cooperate with prosecution authorities and are not adequately protected from reprisals.

In spite of this, States have failed to integrate the perspective and tools of human rights law into their international anti-trafficking responses. The consequences of this narrow criminal law approach in terms of lack of protection have been—and continue to be—devastating for victims, as will be explored in more detail in this study. Also, the failures of this approach in terms of traffickers' prosecution are patent: very few convictions have resulted from this limited approach. Aware of the need for a change of perspective, at the beginning of this century a number of States and organizations finally developed new instruments that significantly broadened the perspective from which trafficking should be addressed, referred to as the "human rights-based approach" to trafficking. Examples of these instruments are the Principles and Guidelines on Human Rights and Human Trafficking, the European Trafficking Convention and the EU Trafficking Directive.

The analysis of the human rights-based approach (HRBA) to trafficking in the area of victim protection is the object of this book, which is based on the doctoral thesis I presented in 2018. In essence, this approach introduces a new paradigm for addressing human trafficking. According to its main underlying idea, adding to the traditional criminal investigation and prosecution component a strong focus on human rights protection and prevention will be key to address the ineffectiveness of the anti-trafficking response, since this will trigger two essential changes. First, it will promote respect for victim's rights, which is a fundamental objective *per se*. International law

⁹ European Commission Progress Report 2018, p. 11.

requires States to fulfil their basic international human rights law obligations *vis-à-vis* victims, departing from the current trend of re-victimization at the hands of State authorities. And second, it will be key in order to achieve more effective results in terms of prevention and prosecution. In terms of prevention, because the vulnerability of victims triggered by the lack of protective measures is what allows traffickers to recruit, exploit and maintain victims in a situation of exploitation: the fact that what awaits victims when turning to authorities is far from constituting a safe option, plays into the hands of traffickers. And in terms of prosecution, because only guarantees of meaningful protection will enable victims to take the risks that are inherent to escaping from and possibly pressing charges against their traffickers.

Despite being recurrently referred to in anti-trafficking documents, the HRBA to trafficking has not been examined in-depth and is thus not fully understood. While international and scholarly studies have essentially focused on one aspect of this approach—the need to address the prevention of trafficking, the protection of victims and the prosecution of traffickers (the so-called 3Ps) in a comprehensive and balanced way—there are other aspects to this approach that make it a more complex and powerful concept and that have generally been overlooked. The objective of this study is to provide more clarity on the meaning and scope of this approach, in relation to both its theoretical foundation and its practical translation into legal standards as currently reflected in the most advanced anti-trafficking international instruments, with a focus on the protection of victims. In particular, this study aims to respond to the following overarching questions:

— What is a HRBA to trafficking in international law? What are its core elements and corresponding requirements?

— What are the main contributions and weaknesses of this approach in the area of trafficking victims' protection as currently reflected in international law at the universal and regional level? To what extent can this approach be considered as sufficiently consolidated in the current state of development of international law?

Chapter I responds to the first question. It explores the concept of HRBA to trafficking in international law, its theoretical foundation, constituent elements and ensuing requirements. It starts by examining the theoretical concept of HRBA in international law, based on the UN Common Understanding that emerged in the area of development cooperation in 2003, and identifies the constituent elements of this approach. It then examines how the concept of HRBA has been understood and reflected in the main international anti-trafficking instruments both at the universal and regional level, focusing on whether these instruments incorporate the core elements of this approach as previously identified. At this point, a clarification needs to be introduced. As mentioned earlier, this book derives from my doctoral thesis. However, due to its extension and to editorial restrictions, this book essentially includes the second part of my thesis (reflected in Chapters II to IV of this book), while the first part, devoted to an in depth analysis of the concept of HRBA and of the way it applies to human trafficking, has only been briefly summarized in

Chapter 1 of this book. However, the detailed analysis of the concept of HRBA and how it applies to human trafficking that I developed in the first part of my thesis will be the subject of a separate book, to be published soon.

Chapter II to IV respond to the second question. These chapters include a detailed analysis of trafficking victims' protection aspects which is aimed at identifying the extent to which the core elements of the HRBA identified in Chapter I are adequately reflected in the most advanced anti-trafficking international instruments, as well as in the interpretations and recommendations made by international judicial and monitoring bodies. At this point, we shall introduce another clarification: why victim protection? Inevitably, the extension of this subject led us to circumscribe the object of this study to a particular aspect of the anti-trafficking legal framework. In that context, we chose to focus our analysis on the second of the 3Ps that make up this framework: the protection of trafficking victims. Two main reasons should be highlighted. Firstly, it is the most distinctive aspect of this approach: as opposed to the law-enforcement approach that focuses on prosecution, a HRBA to trafficking requires giving priority to the protection of victims, who are to be placed at the centre of all anti-trafficking interventions. Protection is thus the pivotal element of this change of approach. And secondly, relevant international reports and pronouncements show that this is the aspect that shows the most lacunae both in law and in practice. It is thus the area that requires more attention and where recommendations, including *de lege ferenda*, are more necessary.

From a methodological perspective, the analysis conducted in Chapters II to IV is based on the study of two categories of legal materials. First, the obligations included in international anti-trafficking instruments, with a particular focus on human rights-based instruments, although instruments that do not take that approach will also be referred to in order to highlight the differences between provisions that take a criminal law approach and those that reflect a HRBA. And secondly, the pronouncements by international bodies with a judicial or monitoring function in the area of human trafficking. In this context, this research explores to a possibly unprecedented extent the contribution of international bodies to the interpretation, consolidation or weakening of this approach, providing detailed insight on the way bodies such as the UN Working Group on Trafficking, UN special procedures, UN treaty bodies, GRETA, the EU Expert Group on trafficking and the European Court of Human Rights have interpreted the scope of States' obligations in this area.

On the basis of this analysis, the study reaches conclusions on the main contributions of the international human rights-based response to trafficking in the area of victim protection, but also on its main shortcomings, and formulates a number of proposals on how these shortcomings can be addressed in order for such legal framework to more effectively comply with the requirements of a HRBA to trafficking.

CHAPTER I

THE CONCEPT OF HUMAN RIGHTS-BASED APPROACH AND ITS LEVEL OF INCORPORATION IN THE INTERNATIONAL LAW OF HUMAN TRAFFICKING

1. THE CONCEPT OF HUMAN RIGHTS-BASED APPROACH: ORIGINS AND CORE ELEMENTS

1.1. Origins

Until the nineties, the international cooperation for development «lived in perfect isolation, if not ignorance, of the human-rights system and its implications for development»¹. Indeed, the linkages between human development and human rights only started to be highlighted in the World Conferences in Vienna (1993), Cairo (1994) and Beijing (1995). The UN Secretary-General Kofi Annan took these advances further in its program for UN reform, where he referred to human rights as a crosscutting issue to be integrated in all areas of the UN², an approach that was taken on board by Member States at the 2005 World Summit³.

Recognizing the need for coherence of approaches in the context of the UN inter-agency collaboration, a UN common understanding on a HRBA to development cooperation was adopted in the UN system in 2003⁴. This is the first and only UN agreement on what a HRBA means⁵. The concept of HRBA

¹ P. UVIN, «From the right to development to the rights-based approach: how “human rights” entered development», in A. CORNWALL and D. EADE (eds.), *Deconstructing Development Discourse: Buzzwords and Fuzzwords*, Practical Action Publishing, 2010, p. 163.

² UN Secretary-General, *Renewing the United Nations: A Programme for Reform*, A/51/950, 1997, paras. 78-79; *Strengthening the UN: An Agenda for Further Change*, 2002, A/57/387, and *In Larger Freedom: Towards Development, Security and Human Rights for All*, 2005, A/59/2005.

³ UNGA, Resolution 60/1, 2005, para. 126.

⁴ United Nations Development Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among the United Nations Agencies*, Inter-Agency Workshop, Stamford, United States of America, 2003 (UN Common Understanding).

⁵ See A. CLARKE, «The Potential of the Human Rights-Based Approach for the Evolution of the United Nations as a System», *Human Rights Review*, vol. 13(2), 2012, pp. 225-248.

is increasingly referred to and used in other fields such as education⁶, health⁷, labour migration⁸ or data management⁹. But what does it really mean and require? Considering that there is no definition of HRBA in international law, an analysis of the 2003 UN agreement and the theoretical framework it sets out is required.

1.2. The core elements

The HRBA is a conceptual and methodological framework that provides guidance on how to design, implement and evaluate policies and interventions in order to ensure that they respect and enhance human rights. In the agreement reached in 2003 by UN agencies and programmes in the area of development cooperation, this approach includes three core aspects that have been captured as follows:

1. All programmes of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Programmes of development cooperation contribute to the development of the capacities of «duty-bearers» to meet their obligations and of «rights-holders» to claim their rights¹⁰.

If we take away the references to development cooperation in order to extract the essence of this concept and obtain a general, non-thematic version of the core elements, we find out that the UN Common Understanding requires that policies:

1. Further the realization of human rights as enshrined in international human rights law.
2. In all phases, from the design until the evaluation, are guided by the core principles and standards derived from international human rights law.
3. Are directed towards strengthening the capacities of «duty-bearers» to meet their obligations and of «rights-holders» to secure their rights.

As far as point 2 is concerned, the relevant human rights principles and standards derived from international human rights law are: universality, indivisibility and interdependence; equality and non-discrimination; participa-

⁶ UNICEF/UNESCO, *A Human Rights-Based Approach to Education for All. A framework for the realization of children's right to education and rights within education*, 2007.

⁷ World Health Organization and OHCHR, *Human Rights Based Approach to Health*, 2009.

⁸ ILO, *International Labour Migration. A Rights-based Approach*, 2010.

⁹ OHCHR, *A Human Rights-Based Approach to Data. Leaving No One Behind in the 2030 Development Agenda*, 2016.

¹⁰ UN Common Understanding, p. 35.