



FACULTY OF LAW
Lund University

Paola Onofa

International law on trafficking and
victims' right to education in
Ecuador: whose responsibility?

Master thesis

30 credits

Supervisor:

Karol Nowak

Master's Programme in International Human Rights Law

Spring 2012

*Dedicated to Vivi,
a former victim of trafficking,
whose courage and determination
inspired and guided this research
from the very beginning to the end.*

Contents

SUMMARY	5
ACKNOWLEDGMENTS	8
PREFACE	9
ABBREVIATIONS	10
1 INTRODUCTION	11
1.1. Background	11
1.2. Research Question	12
1.3. Methodology	13
1.3.1. Identification and analysis of the problem	13
1.3.2. The legal issue at stake: state responsibility for the victims' right to education	19
1.3.3. Empirical sources:	20
1.4. Delimitations	21
1.5. Outline	21
2 TRAFFICKING IN INTERNATIONAL LAW	23
2.1. Trafficking: a transnational crime	23
2.1.1. Who is the 'victim' to be protected?	26
2.1.2. What does 'protection' entail?	29
2.2. Trafficking under review	31
2.2.1. Trafficking: a development issue	31
2.2.2. Trafficking: a human rights violation	32
2.2.3. Trafficking, migration: a security concern	37
2.2.4. Trafficking: sexual exploitation and sex work	39
2.3. Conclusions	40
3 THE RIGHT TO EDUCATION IN THE CONTEXT OF TRAFFICKING	41
3.1. Victims' right to education in international human rights law	41

3.2. Enforcement of the right to education	47
3.3. Remedy for a violation of the right to education	51
3.4. Conclusion	55
4 VICTIMS OF TRAFFICKING AND THEIR RIGHT TO EDUCATION IN ECUADOR	56
4.1. Trafficking in the Ecuadorian legal framework	56
4.2. Trafficking in Ecuador under review	59
4.2.1. Trafficking: a development issue	59
4.2.1. Trafficking: a human rights violation	60
4.2.2. Trafficking, migration: a security concern	61
4.2.1. Trafficking: sexual exploitation and sex work	63
4.3. Education for victims of trafficking in Ecuador	64
4.3.1. State responsibility shifts to individual responsibility	64
4.3.2. The Flexible Education Program in Ecuador	66
4.4. Conclusion	73
5 CONCLUDING REMARKS	75
BIBLIOGRAPHY	77
TABLE OF CASES	84

Summary

The analysis and findings in this research provide a nuanced perspective of the interaction between the theoretical underpinnings and content of international law and international human rights law on the one side, and their actual impact on real people's life on the other.

The problem this research tackles is the barriers victims of trafficking face to access to education in Ecuador, which constitute structural injustice. Thus this research focuses on analyzing whether or not the international legal framework on trafficking and on the right to education are adequate tools to eliminate such barriers, by establishing –or not- state responsibility for this issue.

This research highlights the wide gap between provisions on trafficking and education in international law and what victims need from education. In fact, the current trafficking legal framework poses a constraint for full and meaningful reintegration of victims because it does not establish clear and specific state obligations and fails to consider victims as right bearers. Moreover, the Palermo Protocol puts forward a criminal approach to trafficking that is problematic because it silences the inequalities between developed and developing countries, creates a control of migration discourse and focuses on victims as agency-less actors, as opposed to rights bearers. In this context, it is not a surprise that victims' right to education is not constructed as an international legal obligation which breach would give rise to state responsibility.

A victim focus encourages states to use criminal law –a branch of law where states enjoy powers of moral surveillance and regulation- to address women's rights issues; in this sense, the victim-focused anti-trafficking campaign is protectionist rather than liberating. Thus, the victim figure proves to be an inadequate mechanism to understand the complexity and contradictions of the discourses and social practices constitutive of citizenship.

The reflection on victims' right to education brings together three fields of international law: criminal law prosecuting transnational crimes, the rights of victims of human rights violations and specific provisions of economic, social and cultural rights. Together, they do not acknowledge victims' educational needs and consequently establish limited state responsibility on the matter.

It has been established that state regulation on education may vary in time and place according to the needs and resources of the community and of the individuals. However, the nature and content of the right to education clearly assumes prerequisites that are unattainable for victims and thus needs yet to be adapted in order to accommodate their multilayered and complex reality. Moreover, not acknowledging victims' educational needs entails failure to comply with the obligation of non-discrimination. For this reason, adjusting education according to the community and individuals' needs remains a pending task regarding victim's specific needs.

Moreover, available legal avenues for establishing state responsibility for violations to victims' right to education are by definition dependant on the scope of the right to education, where states' obligations are created; such provisions do not acknowledge victims' specific needs. Consequently, victims are deprived from access to hold the state accountable and demand the kind of education they need.

Provisions on remedies for victims and on the right to education as a remedy also fail to tackle in a legally binding fashion education quality and adequacy and for this reason, are not useful to tackle the barriers victims face to access education, as a matter of structural injustice.

Ecuadorian reality corroborates the critical views advanced by the scholarship regarding the international legal framework on trafficking. It is clear that counter-trafficking initiatives in Ecuador have silenced the inequalities between developed and developing countries, which constitute the structures that push individuals to migrate or to exploit other individuals. Trafficking in Ecuador is also presented as a human rights violation in the discourse but combated as a crime in practice, with little attention paid to victims' rights by the government. Moreover, Ecuador presents a complex migratory context where trafficking is strongly linked to an anti-migration and a securitization discourse. The fact that the Ministry of Interior, a branch of the Ministry of Coordination for Security, is in charge of implementing the National Plan to combat trafficking supports this assertion.

In addition, the counter-trafficking discourse clashes with long-standing sex workers movement in Ecuador who have traditionally advocated for a broader understanding of the socio-economic factors involved in prostitution as a social phenomenon beyond the narrow criminal approach.

Individual and organizational actors in Ecuador undertook the task of providing relevant and adaptable quality education for victims of trafficking. To this end, they established the Flexible Education Program. Overall, the program has successfully tackled the barriers victims face to access education as a matter of structural injustice, despite of the inadequacies found in the right to education nature, scope and the legal avenues to enforce it. This interaction shows a clear fracture between the state-centered obligations and standards stated in international human rights law and the initiatives undertaken by individual and organizational local actors to guarantee human rights.

In order to explain why individual and organizational local actors decided to overtake a classically state responsibility for human rights, it can be asserted that individual and organizational actors in the field overcome the legal shortcomings in the right to education and bypass the flawed *lege lata* on trafficking by providing victims with education as a tool to empower them. There is a clear fracture between the way they address trafficking-related issues and the actual provisions and theoretical debates in international law. This is illustrated by their lack of awareness of the legal content of the right to education despite their substantial contribution to its development in the field.

Individual and organizational actors identified a demand in their community and undertook the responsibility to provide an adequate answer, in a display of Young's 'parameters of reasoning': power, privilege, interest and collective action. Following this line of thought, it becomes clear that in order to set up the Flexible Education Program, they also found benefit from resources already organized to respond to them because it is in their interest to contribute to a more equal society and advancement of social justice, and they did so collectively with relevant actors.

The role played by individual and organizational local actors in Ecuador has brought to light the fact that victims, their families and people working with them are better placed and able to meaningfully interpret the right to education and to make current international human rights legal framework work for them in real life.

In doing so, the Ecuadorian experience has contributed to expanding the understanding of trafficking and its structural roots, to bringing down to earth the promise of the right to education for all stated in international human rights law and to re-think the notion of responsibility for human rights.

Instead of law, individual and organizational local actors use their non-legal academic background and exercise their professional responsibility to uphold victims' human rights. Their role is brilliantly explained by Young's framework that conceptualizes responsibility for global structural injustices as participation in and a connection to social-structural problems establishing individually shared responsibilities that can only be discharged collectively. According to Young, such responsibility entails doing whatever it takes to achieve the objective and this is precisely what individual and organizational local actors have done by organizing the knowledge and resources available to them to ensure that victims can access to relevant and meaningful education in Ecuador.

In conclusion, despite the lack of an adequate response by international law, there is still hope in individuals' capability to re-interpret law and make it work for the benefit of those in need. This means that ultimately, individuals in Ecuador may rely on one another to provide creative responses in order to guarantee human rights for the benefit of their communities, when international human law itself fails to establish state responsibility for guaranteeing human rights.

Acknowledgments

My deepest thanks

To my mom and dad, for making every effort to ensure that I could come to Sweden to pursue master studies.

To Wain, whose love and patience were unconditional during our time in Sweden and who gave me the strength and confidence to stay in Sweden and finish what I had started.

To Sergii Masol, fellow student whose very special friendship helped me become a better human being and whose thorough knowledge of international law helped me become a better human rights lawyer.

To Mrs. Shyami Puvimanasinghe, Human Rights Officer at the Office of the United Nations High Commissioner for Human Rights, for her trust, her generosity with her time and knowledge, her belief that human beings can live in global solidarity and her priceless example of what a human rights lawyer can achieve, both as a professional and as a woman.

To Mr. Christian Courtis, Human Rights Officer at the Office of the United Nations High Commissioner for Human Rights, for his patience for listening and guidance without which this research would not have seen the light of the day.

To Karol Nowak, my thesis supervisor, for providing me with everything a student needs: positive attitude, patience with my research anxieties, learned and enthusiastic guidance and his trust that I could get this done.

Last but not least, to Antoine Aigroz for being the wonderful friend who made it to my graduation day.

Preface

After having witnessed the strength and courage with which victims of trafficking walk their path out of exploitation, the author developed a strong personal commitment with victims' human rights. Such commitment has translated into an academic drive to understand the responses international law has to offer and to seek for the agents responsible of due reparation, in particular, regarding the right to education.

The overall aim is to pinpoint how far or close international law is from the actual behavior of individuals. The tangible effects of international law on people's lives depend on how individuals perceive, experience, know, understand –or not- and implement it.

International law establishes limited and ineffective responsibility regarding victims' right to education. Consequently, in practice, the states and their agencies are called to do and actually are doing very little regarding education for victims of trafficking. This lack of response results, perhaps from the complex barriers victims face to access to education, which are not acknowledged by the nature and scope of the right to education and thus are not being fully understood and targeted. There are, however, committed agents in the field in Ecuador who have spotted this need and are providing meaningful answers.

Unless something is done right here and right now for people who have experienced trafficking, societies would lose the opportunity to fully understand –through empirical methods – an important aspect of the problem: the impact trafficking causes on human beings. Moreover, societies would lose individuals who would otherwise be empowered actors contributing to the construction of their communities. Having access to meaningful and relevant education that prepares victims of trafficking to pursue their life goals is a critical tool to empower them.

Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ECHR	European Court of Human Rights
ESCR	Economic, Social and Cultural Rights
HRC	Human Rights Committee
I/A Court H.R	Inter-American Court of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMWF	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ISCED	International Standard Classification of Education
NGO	Non-governmental organization
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN ECOSOC	United Nations Economic and Social Council
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
ZACC	Constitutional Court of South Africa

1 Introduction

1.1. Background

The on-going political transformations and legal developments taking place in Ecuador, together with the local social context provide a rich backdrop to analyze the international framework on trafficking and on the right to education at play.

Ecuador is currently leading the legal and political transformation in South America. The Constitution approved in 2008 changes the national political structure by establishing a five-branch separation of powers model, composed of: the legislature, the executive, the judiciary and indigenous justice, the transparency and social and control and the electoral branch.¹ In addition, the Constitution introduces a revolutionary Latin American perspective through the legal concepts of: i) free mobility of human beings based on the notion of universal citizenship²; ii) “sumak kawsay”³, a belief of the indigenous peoples from the Andes, translated into English as “life in harmony”; and iii) the rights of nature⁴.

Of specific relevance to this thesis is the constitutional prohibition of trafficking and slavery established within the general provision on the right to freedom. The Constitution also establishes a state’s obligation to prevent and eradicate trafficking, as well as to protect and reintegrate victims of trafficking.⁵ These provisions stand out as unique features among the six countries in South America who have also constitutionally prohibited trafficking.⁶

¹ Constitution of the Republic of Ecuador (adopted 28 September 2008 entered into force 20 October 2008) Title IV, Chapters II-VI

² Ibid Articles 40-42 and 391-392. For a sound reflection in Spanish on universal citizenship see María Daniela Dávalos Muirragui, ‘Does Universal Citizenship exist? Analysis of the cosmopolitanism ideas embodied in the Ecuadorian Constitution of 2008’ in Ramiro Ávila Santamaría, ed. *Constitution 2008 in the Andean Context, An analysis from Legal Scholarship and Comparative Law* (Ministry of Justice and Human Rights 2008) 73-110. Title translated by the author.

³ Ibid Preamble para. 1, Articles 14, 250, 275 and 387 (2). For a sound reflection in Spanish on the sumac kawsay see Carolina Silva Portero, ‘What is life in harmony in the Constitution?’ in Ramiro Ávila Santamaría, ed. *Constitution 2008 in the Andean Context, An analysis from Legal Scholarship and Comparative Law* (Ministry of Justice and Human Rights 2008) 111-154. Title translated by the author.

⁴ Ibid supra note 1 Articles 71-74

⁵ Ibid supra note 1 Article 66 (29)(b)

⁶ Out of the twelve countries in South America, 6 countries –including Ecuador– have a constitutional prohibition of trafficking: Bolivia article 15 (V), Colombia article 17, Paraguay article 10, Peru article 24 (b), Venezuela article 54 in Political Database of the Americas, School of Foreign Service, Center for Latin American Studies, Georgetown University available at <http://pdba.georgetown.edu/Constitutions/constudies.html> accessed May 4 2012.

At a public policy level, the aim to combat trafficking was declared in 2004, criminal law reforms were undertaken in 2005 and a National Plan to combat human trafficking was approved in 2006. Financial resources allocated for victims' protection have been substantial. These government-led efforts have earned both recognition and feedback from the international community.⁷

In Ecuador, the trafficking framework coexists with the long-standing sex workers' struggle for positioning prostitution as a problem deeply rooted in society as opposed to being an isolated crime. In addition, the migration dynamics in Ecuador report a significant number of people emigrate to Europe and the United States and an equally significant number of immigrants arrive to Ecuador from all continents.⁸

Finally, over the last decade local NGOs working closely with government agencies and the international cooperation have successfully built expertise and good practices on direct assistance to victims of trafficking. They have tailored psychological, medical, social and educational services guarantee victims' rights.⁹

For these reasons, Ecuador poses an enabling setting to analyze the right to education of victims of trafficking as an empowerment and meaningful reparation measure.

1.2. Research Question

Does the international legal framework on trafficking and on the right to education tackle the barriers victims face to access to education, by establishing state responsibility for this issue, as matter of structural injustice? If not, who and how is undertaking this responsibility?

⁷ CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Ecuador, CEDAW/C/ECU/CO/7, November 21 2008, paras. 22 and 23 and UN HRC, Working Group on the Universal Periodic Review, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 Ecuador, A/HRC/WG.6/13/ECU/1, 8 March 2012, paras. 87-93.

⁸ See Gioconda Herrera, Maria Isabel Moncayo and Alexandra Escobar, *Ecuador's Migratory Profile 2011*, (International Organization for Migrations 2012) 35-74 available at http://publications.iom.int/bookstore/index.php?main_page=product_info&cPath=42&products_id=856; Franklin Ramírez y Jacques Ramírez, *Migratory Stampede in Ecuador: Crisis, transnational networks for migratory action*, (Centro de Investigaciones CIUDAD, UNESCO, ABYAYALA, ALISEI 2005) 47-86 available at http://www.flacsoandes.org/biblio/shared/biblio_view.php?bibid=17554&tab=opac and; Organization of American States, *International Migration in the Americas* 94 available at http://www.flacsoandes.org/biblio/shared/biblio_view.php?bibid=124391&tab=opac. Titles translated by the author.

⁹ Interview with Doctor Verónica Supliguicha, Psychologist, Coordinator of the Direct Assistance Services for Victims of Trafficking Program, Our Youth Foundation in Quito, Ecuador on May 7th, 2012.

1.3. Methodology

In order to answer the research question, **two analytical tools** have been used:

a) A top-bottom approach to implementation of law used to carve out state responsibility for victims' right to education contrasted with a bottom-up approach to implementation of law that aims to pinpoint how far or close international law provisions are from individuals involved in providing education opportunities for victims in the field.

b) Philosopher Iris Marion Young's political theory, in particular her theory of justice, notions of structural injustice and responsibility for justice.

Using these tools and under this framework, the following **three methodological steps** have been followed:

i) Identification and analysis of the problem posed by victims' educational needs, applying Young's concept of structural injustice;

ii) Analysis of how international law and international human rights law respond to victims' educational needs with specific emphasis on their usefulness and adequacy; and

iii) Identification of possible solutions applying Young's concept of responsibility for justice.

1.3.1. Identification and analysis of the problem

Understanding why education is vital for the victims of trafficking¹⁰ requires taking a victim-centered approach. First, it is essential to grasp trafficking not only as a crime but also as a life experience victims have gone through. Second, understanding how education is conceived in the international human rights law discourse is crucial. Finally, it is pivotal to understand from the outset that victims face structural barriers when joining or re-joining the formal education system; such barriers are built within the fabrics of the intricate social, politic and economic processes involved in trafficking and in education. Hence, they amount to structural injustice.

Trafficking as a life experience

Professionals in the field report that the exploitation experience for victims in Ecuador goes along the following pattern¹¹:

i) Before being exploited the majority of victims had been living in unstable family, social, economic, political and even environmental contexts that

¹⁰ On one hand, it has been argued the term "victim" is loaded with underlying notions of "innocence" and lack of agency, which has been extensively criticized and rejected by some feminist scholars whose work is presented in Chapter 2. On the other hand, it has been argued that the term "victim" highlights the wrongness of the crime and helps victims understand that they are not guilty for the wrongness they have suffered. This research will use the term "victims of trafficking" to refer to the people who have experienced trafficking notwithstanding the author's agreement with the position adopted by feminist scholars on this issue.

¹¹ Ibid supra note 9

made them vulnerable to being trafficked. Victims were “recruited” which means forced or deceived into the exploitative situation.

ii) Exploitation could have included sexual exploitation, forced labor, forced commission of minor crimes, forced begging, removal of organs or other forms of exploitation. Victims’ capability to react is usually undermined by daily threats of and/or extreme psychological and physical violence, rape, and unsanitary living conditions among others.

iii) Often the reasons why victims could not stop that situation or run away from it include not feeling like ‘victims’ at all, being kept locked up under the control of the traffickers and serious threats to theirs and their families’ life, integrity and security. Victims’ personal experiences of trafficking suggest that they were being controlled using similar mechanism to those of torture, domestic violence and child abuse.

iv) The ‘recovery’ process after the ‘rescue’ is highly demanding on victims’ personal skills and on the direct assistance services institutions helping them. The final stage consists of leading an independent life and it necessarily entails getting a meaningful job and having the skills to perform it well.

In this context, meaningful and relevant education plays a central role for victims.

Education: the promise of international human rights law

International human rights law discourse declares education as an empowerment right and deems it the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and participate fully in their communities. In fact, education is understood to play a vital role in empowering women and safeguarding children from exploitative and hazardous labor and sexual exploitation. Moreover, education is already recognized as one of the best financial investments states can make and a critical factor for the enjoyment and rewards of human existence.¹²

From the standpoint of victims, as rational decision-makers, the right to education should provide them with increased control over the course of their life and over the state.¹³ In this context, victims of trafficking should benefit from the enormous liberating potential intrinsic to education, which enables individuals to think critically about their lives, examine alternative courses and make rational choices based on their own analysis”¹⁴.

¹² ICESCR, General Comment No. 13, the right to education, 8 December 1999, para. 1.

¹³ Jack Donnelly and Rhoda E. Howard, ‘Assessing National Human Rights Performance: A Theoretical Framework’ HRQ [1998] 215

¹⁴ Klaus Dieter Beiter, *The Protection of the Right to Education by International Law*, (Martinus Nijhoff Publishers 2006) 28-29

Educational barriers as structural injustice

In contrast, victims face structural barriers to access relevant and adequate education. Professionals from diverse disciplines working in the field in Ecuador concur that such barriers consist of: i) the hierarchical nature of the education system; ii) the inflexible and inadequate curricula; iii) rejection and stigmatization by fellow students and teachers; iv) vocational training as the only realistic option; and v) their immediate need of an income.¹⁵ Such are the issues to be tackled by any initiative aiming at improving education institutions' capabilities to respond to victims in Ecuador.

In order to grasp the structural dimension of these five barriers, it is again essential to deviate from the narrow understanding of trafficking as a crime. A structural analysis demands recognizing trafficking, in its broader sense, as a manifestation or as a part of the intertwined social, economic and political processes, which are guided by systems of domination such as patriarchy and imperialism¹⁶.

In building the notion of educational barriers for victims as structural injustice, this research benefits again from Young' work. She asserts that structural injustice¹⁷ exists when:

- i) Social processes have a generalized influence on large groups of people;
- ii) Such generalized influence implies the threat of deprivation of the means to develop and exercise their capacities;
- iii) Such generalized influence enables others to have a wide range of opportunities for developing and exercising capacities; and
- iv) Such social processes occur as a consequence of many individuals and institutions acting to pursue their particular goals and interests, mostly within the limits of accepted rules and norms.

Each of these elements can be applied to the barriers victims face to access to education, as follows:

¹⁵ Interview with Doctor Verónica Supliguicha, Psychologist, Coordinator of the Direct Assistance Services for Victims of Trafficking Program, Our Youth Foundation in Quito, Ecuador on May 7th, 2012 and interview with Ms. Maria Gloria Barreiro and Mr. Luis Montoya, staff in charge of the development and successful implementation of the Flexible Education Program for working children and victims of trafficking in Quito, Ecuador. NGO Desarrollo y Autogestión on April 19th, 2012.

¹⁶ This is an applied reasoning to trafficking of the more general reflections by Eisenberg on the overall influence of systems of domination. See Avigail Eisenberg, 'Education and the Politics of Difference: Iris Young and the politics of education' *Educational Philosophy and Theory* [2006] 10

¹⁷ "Structural injustice (...) exists when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them. Structural injustice is a kind of moral wrong distinct from the wrongful action of an individual agent or the repressive policies of a state. Structural injustice occurs as a consequence of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms." Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2011) 52

i) Social processes have a generalized influence on large groups of people

In the context of trafficking, exploitation is the social process that influences and distorts opportunities for victims¹⁸.

First, the primary, secondary and tertiary education scheme requires students to be of a certain age and successful completion of previous levels. Victims of trafficking in Ecuador have generally been out of school or any other form of education while being exploited. Exploitation itself can last days, months or years. Moreover, the majority of victims have already been out of school by the time the trafficking experience begins. Some of them have not even completed the literacy stage or even been started school at all.¹⁹

Second, it is possible that victims of trafficking will be suffering from or bearing the consequences of post-traumatic stress disorder and or milder psychological conditions. Hence, socializing with classmates and teachers, if reintegrated back into regular school, can involve rejection, stigmatization and ultimately another form of exclusion from the educational system. Rejection and stigmatization could take place even when the victim does not suffer from any psychological condition.²⁰

ii) Such generalized influence implies the threat of deprivation of the means to develop and exercise their capacities

Exploitation as a social process deprives victims from education while it lasts. Furthermore, exploitation as a life experience leaves mark that lessens victims' capacity to perform at regular school. In addition, formal education is not conceived to accommodate students with different life experiences. For instance, standardized curricula for all levels of the educational system is supposed to reflect the contemporary needs of students in a changing world as well as to achieve the objectives of education set out in the ICESCR Article 13(1)²¹. However, victims face difficulties being motivated by regular curricula's content and teaching methods because their life experience is different from that of the standard children in regular schools.²²

In addition, once the exploitation is over, victims are faced with the immediate need of economic means of living for them and for their families. Lack of sufficient income was reported as one of the reasons why families put their own children into exploitative situations in Ecuador²³. Such

¹⁸ This is an applied reasoning to trafficking of the more general reflections by Eisenberg on the overall influence of systems of domination. See Ibid supra note 16

¹⁹ Ibid supra note 9

²⁰ Ibid supra note 9

²¹ Ibid supra note 12 paras. 49-50

²² Interview with Ms. Maria Gloria Barreiro and Mr. Luis Montoya, staff in charge of the development and successful implementation of the Flexible Education Program for working children and victims of trafficking in Quito, Ecuador. NGO Desarrollo y Autogestión on April 19th, 2012.

²³ Ibid supra note 9

immediate need points towards integration of victims in the also hierarchical division of labor for which they have not acquired the adequate academic training. In the division of labor framework, professional occupations tend to bring the best goods society has to offer: income, job stability, high status, workplace autonomy, decision making power, opportunities for recognition and opportunities for developing and using expertise and creativity²⁴. Such benefits are precisely the ones indirectly denied to victims because of the barriers they face to access to empowering education.

Moreover, their role as income generators prevents them from attending full eight hours of school in the morning. When they do attend to regular school, the specific situation they find themselves in affects their attendance, their focus and their performance²⁵ and ultimately excludes them *de facto* from full participation in education on an equal basis.²⁶ Finally, regular curricula are irrelevant for victims because they are not designed to help them generate income in the short term.

Ongoing education or vocational training is said to be the most suitable option²⁷ for victims who bear income-generation responsibilities in their homes. However, certain types of vocational training may not be accessible in a particular region or cannot be provided due to lack of funds.²⁸

iii) Such generalized influence enables others to have a wide range of opportunities for developing and exercising capacities

The fact that victims have experienced exploitation and their fellow classmates at regular school have not gives the latter a comparative advantage to access a wider range of opportunities for developing themselves in the short-term and to dominate in the long-term. Such domination takes place when those who fit into the compartmentalized, 'impartial and neutral' assumptions and notions underlying education become the 'normal' and those who do not fit become 'the deviant', the excluded.²⁹ The result is a normalizing education discourse, a process that constructs experience and capacities of some social segments into standards against which all are measured.

As explained by Young, it all starts in educational institutions that apply standards according to which performance is evaluated and standardized tests that increasingly and often operate in biased ways.³⁰ Such standards privilege people who are the right age and have developed 'the right skills at the right time'. Such 'right time' is established by the educational system,

²⁴ Iris Marion Young, 'Education in the Context of Structural Injustice: A symposium response' *Educational Philosophy and Theory* [2006] 95

²⁵ *Ibid supra* note 9

²⁶ *Ibid supra* note 24 99

²⁷ International Organization for Migration, *The IOM Handbook on Direct Assistance for Victims of Trafficking* (IOM 2007) 97

²⁸ *Id* *ibid* 83

²⁹ *Ibid supra* note 24 98

³⁰ *Id* *ibid*

which heavily influenced the construction of the right to education in international human rights law: primary, secondary and tertiary education.

Education becomes thus an unfair process because it expects individuals to exhibit certain kind of attributes –i.e. the right age to each level of school– that are assumed as the norm but which victims of trafficking cannot exhibit –or can exhibit at an unfair cost– because the exploitation life experience makes this specific group different.³¹ Nonetheless, what is ‘normal’ for the typical majority of people –a dominant group– shifts into a standard of what is good or right.³²

For victims of trafficking this normality materializes inter alia as the ‘right’ attitude towards teachers and classmates, the ‘right’ amount of focus and dedication, and the ‘right’ responsiveness towards learning. The life experience victims of trafficking have gone through prevents them from easily meeting such demands of normality posed by the education system. Consequently, even though they are different for reasons not of their own making, reintegrated victims of trafficking tend to be stigmatized at schools³³.

iv) Such social processes occur as a consequence of many individuals and institutions acting to pursue their particular goals and interests, mostly within the limits of accepted rules and norms.

The limiting situation victims find themselves in, regarding education, results from many individuals acting to pursue their goals and interests within the limits of the accepted international human rights law on the right to education.

Victims are absent in the primary, secondary and tertiary education discourse found in international human rights law, in contradiction with the empowerment role assigned to education in the very text of the relevant universal³⁴ and regional treaties³⁵. Vocational training is referred to as a realistic option to increase their chances for gainful employment, and to strengthen their confidence and general life skills. However, vocational training is undertaken by, or in cooperation with NGOs, educational institutes, charitable organizations or religious groups³⁶. Thus, not even the limited figure of vocational training is being enforced as a state’s an international obligation which breach could give rise to state responsibility.

³¹ Ibid supra note 24 96

³² Ibid supra note 24 99

³³ Ibid supra note 9

³⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) Article 13 (1)

³⁵ Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (adopted 17 November 1988 entered into force 16 November 1999) Article 13(2)

³⁶ Ibid supra note 27 97

In fact, vocational training is one of the few opportunities international human rights law offers³⁷ for adults who decide that they would like to get education credentials. It is worth mentioning that the very literature on trafficking is very quick to consider victims as part of this ‘excluded’ category³⁸. The problem is that vocational training condemns them to the lower ranks of the occupational hierarchy for the rest of their lives. This illustrates the structural injustice of the division of labor where most positions lack autonomy, significant remuneration, status and opportunities to acquire further skills. Education systems contribute to this injustice to the extent that they encourage people to accept that structure as necessary.³⁹

Second, as argued by Young, education systems are not forgiving and supportive enough of students who for one reason or another do not easily fit into the disciplines and routines that mimic the professional life in the division of labor. Teachers, curricula and school administrative policy do not tackle the tendency for social difference and consequently it becomes a learning disadvantage. Thus, the system helps create lifetime losers by labeling the different ones’ failures.⁴⁰

Understood in these terms, the obstacles victims face present all the features of structural injustice because it entails inequalities of all kinds but mainly that of recognition. Victims are put at unfair disadvantage in fully accessing the benefits of education because they are unable to display the ‘normality’ demanded by school.

In this context, it becomes apparent that educational institutions and education policy are central for disputes about equality and difference, thus ultimately connected to structural injustices in the education field, as asserted by Young⁴¹.

1.3.2. The legal issue at stake: state responsibility for the victims’ right to education

Establishing responsibility for relevant, adequate and accessible education for victims is the central element of the reasoning process in this research. Therefore, the legal issue this research touches on is state responsibility in connection with victims’ right to education; in particular the barriers victims face to access education as a matter of structural injustice. For this purpose, relevant provisions in international law on trafficking and on the right to education are analyzed in search for international obligations that respond to victims’ educational needs, which breach would give rise to state responsibility. The trafficking legal framework is analyzed with special emphasis on the theoretical critiques posed by scholars who underpin the

³⁷ Ibid supra note 34 Article 6 (2) on the right to work and 13 (2)(b) on the right to education

³⁸ Ibid supra note 27 97

³⁹ Ibid supra note 24 96

⁴⁰ Ibid supra note 24 95

⁴¹ Ibid supra note 24 102

shortcomings of the criminal approach. The analysis of the right to education presents an overview of the content and of available justiciability mechanisms. The findings show that both figures are inadequate to respond to victims' educational needs in Ecuador because they do not allow establishment of state responsibility.

In view of the trafficking and right to education legal frameworks' inadequacy to establish responsibility for victims' right to education, possible solutions are explored applying Young's concept of responsibility for justice. The process involved understanding how international law provisions are implemented, interpreted, understood, used -or not- by individual and organizational local actors who are *de facto* guaranteeing victims' right to education in Ecuador.

1.3.3. Empirical sources:

Open-ended one to one interviews with actors involved in counter-trafficking initiatives in the field in Ecuador were identified as the best research tool to obtain empirical information that would help build the arguments presented in this research. The information they provided proved useful because it shows a bottom-up approach to law making as the pattern in the implementation of the trafficking framework. The information obtained from officers at the Office of the High Commissioner for Human Rights was used as reference material.

The interviews undertaken for this research were:

- Ms. Youla Haddadin, Advisor on Trafficking to the United Nations High Commissioner on Human Rights in Geneva, Switzerland on 1 March 2012;
- Mr. Christian Courtis, Human Rights Officer on the Right to Education at the Office of the United Nations High Commissioner on Human Rights in Geneva, Switzerland on 4 April 2012;
- Doctor Verónica Supliguicha, Psychologist, Coordinator of the Direct Assistance Services for victims of trafficking Program, Our Youth Foundation in Quito, Ecuador on January 2010. Skype update on 7 May 2012;
- Ms. Maria Gloria Barreiro and Mr. Luis Montoya, staff in charge of the development and successful implementation of the Flexible Education Program for working children and victims of trafficking, NGO Desarrollo y Autogestión. Quito, Ecuador. Skype interview on 19 April 2012;
- Victims of trafficking and their families assisted by Our Youth Foundation in Quito, Ecuador on 6 November 2009.

1.4. Delimitations

Trafficking is a transnational crime⁴² and an international crime⁴³ under international law. However, the discussion will be limited to trafficking as a transnational crime but will not dwell into theoretical analysis of each of the political, economic, social and cultural structural factors underlying trafficking. It is reasonable to believe that the critical feminist contributions have already made it uncontested that trafficking is engendered by inequality –gender and economic-. Furthermore, the present research will not touch upon data on trafficking i.e. number, location or profile of victims because the issue itself is still being developed⁴⁴ and debated. Hence, a sound pronouncement on this falls outside the scope of the research question.

Furthermore, the discussion focuses on article 13 in the ICESCR, as the most important formulation of the right to education in an international treaty⁴⁵, in connection with specific provisions on some forms of education for victims in the Palermo Protocol⁴⁶ and the Recommended Principles and Guidelines on Human Rights and Human Trafficking⁴⁷.

1.5. Outline

Chapter 2 presents an analysis of the trafficking international legal framework relevance for victims as subjects of rights and elaborates on a comprehensive compilation of the main theoretical critiques to the framework. This section aims to set the complex and multilayered landscape within which discussions on trafficking take place.

Chapter 3 unpacks the right to education in international human rights law, in the light of victims' particular educational. For this purpose, the content of the right to education is explored in search for the specific obligation to

⁴² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000 entered into force 25 December 2003)

⁴³ Rome Statute of the International Criminal Court (adopted 17 July 1998 entered into force 1 July 2002) Articles 7 (c) and (g) and 8 (2)(e)(vi)

⁴⁴ The difficulties of measuring human trafficking stem from the fact that many trafficking victims are never identified nor duly referred for assistance. It is also said that research on trafficking is informed by various assumptions, biases linked to the overemphasis on sex trafficking -over other forms of exploitation- and of female victims -over males and other groups such as the elderly, in Rebecca Surtees and Sarah Craggs, *Beneath the surface, Methodological issues in research and data collection with assisted trafficking victims* (International Organization for Migration 2010) 79-80

⁴⁵ Ibid supra note 14 94

⁴⁶ Ibid supra note 42 Articles 6 (3)(d) and 4

⁴⁷ UN ECOSOC, Recommended Principles and Guidelines on Human Rights and Human Trafficking Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (20 May 2002) E/2002/68/Add.1 Guidelines 6 and 8 <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/401/68/pdf/N0240168.pdf?OpenElement> accessed 4 May 2012

provide relevant and meaningful education to victims of trafficking. Currently viable legal avenues to uphold the right to education are explored. This analysis aims to identify responsibility for and measure the adequacy of the international legal framework to respond to the educational needs of victims of trafficking.

Chapter 4 presents the counter-trafficking initiatives in Ecuador as the scene where the international legal framework on trafficking and the right to education can be seen at play. Hence, the top-bottom and bottom up approach to law implementation, used as analytical tool in this research, become the most visible in this section. The central element is a description of how the trafficking framework has been tailored to fit the Ecuadorian context, and ultimately re-shape the local responses to trafficking.

Chapter 5 presents a synthesized set of concluding remarks.

2 Trafficking in international law

Chapter 2 examines whether or not the criminal understanding of trafficking in international law establishes state responsibility to meet victims' educational needs. For this purpose, it elaborates first on the international law provisions on trafficking as a transnational crime, paying special attention to how it approaches victims' rights. Second, it presents a comprehensive compilation of the main theoretical critiques to the trafficking international legal framework, which confront its criminal approach.

Chapter 2 asserts from the outset that: i) trafficking is a manifestation of complex and multilayered factors in societies hence approaching it as a crime is simplistic understanding; and ii) the trafficking international legal framework does not establish international legal obligations for states regarding victims' rights and assumes them as agency-less and power-less individuals who fall into exploitation undertaken by mean criminals. Hence, the notion of trafficking is insufficient to tackle victims' educational needs as a matter of structural injustice.

2.1. Trafficking: a transnational crime

This section will present the transnational crime of trafficking highlighting the shortcomings within the legal framework that creates it. The assumptions underlying criminalization will be discussed in section 2.2.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children –hereinafter the Palermo Protocol- is part of the United Nations Convention against Transnational Organized Crime - hereafter the Convention- and was signed in 2000. The latter was conceived as a response to the negative economic and social implications of organized criminal activities and their growing links with terrorist crimes. Thus, the Convention is the legal framework that regulates international cooperation to combat transnational organized crime. Its purpose is to become an effective tool to prevent impunity by prosecuting these crimes -wherever they occur-, and by cooperating at the international level⁴⁸.

Such consensus-based standardization of trafficking in international law was intended to provide a basis for uniform domestic criminal offences that would facilitate efficient international cooperation for investigation and prosecution. Moreover, a common definition would also help standardize research and data that would facilitate global understanding of the phenomenon.⁴⁹

⁴⁸ United Nations Convention against Transnational Organized Crime (adopted 15 November 2000 entered into force 29 September 2003) Preamble.

⁴⁹ United Nations, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, New York 2004 269

The specific purposes of the Protocol are: a) to prevent and combat trafficking in persons, paying particular attention to women and children; b) to protect and assist the victims of such trafficking, with full respect for their human rights; and c) to promote cooperation among states to prevent and combat the crime as well as to protect the victims.⁵⁰

The “central mandatory obligation” of states parties is the adoption of criminal offences covering the full range of trafficking and related offences.⁵¹ For this purpose trafficking, in its current format⁵² -as a transnational crime- is defined in Article 3 as composed of three elements: a two-folded actus reus and *means rea*.⁵³

1. The first part of the actus reus can be fulfilled by “recruitment, transportation, transfer, harbouring or receipt of persons” but it is not limited to this list. What exactly amounts to these actions remains undefined. It has been argued that such a wide action element is aimed at making not just recruiters, brokers and transporters accountable but also managers, supervisors, and controllers wherever exploitation takes place. However, there is no evidence in the *travaux préparatoires* that this was the drafters’ intention.⁵⁴
2. The second part of the actus reus is composed by the means elements “force, coercion, abduction, fraud, deception, abuse of power or position of vulnerability, and giving or receiving of payment or benefit to achieve the consent of a person having control over another person”. All of these terms are contained in other international conventions, except “abuse of a position of vulnerability” which is unique to the Protocol. It has been argued that coercion is used together with threat or use of force to establish a separation between direct and less direct means by which individuals can be exploited. However, the required seriousness or extent of these terms remains undefined in the *Travaux préparatoires* and in the Legislative Guide.⁵⁵
3. The third element is a specific or special intent *means rea*, also understood as *dolus specialis*: the undefined and open-ended

⁵⁰ Ibid supra note 42 Article 2

⁵¹ Ibid supra note 49 269

⁵² The notion of trafficking can be found in previous international conventions. For instance, it is first found in international agreements in 1815 connected to the eradication of slavery and evolves throughout XIX and XX centuries in international instruments assessing forced prostitution and sexual exploitation.

⁵³ Ibid supra note 42 Article 3 (1): “Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

⁵⁴ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 29-31

⁵⁵ Id ibid 31-33

“exploitation”, which shall include “at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs”.

The un-definition of “exploitation” is said to leave the door open for interpretation by domestic legislation⁵⁶, which is shaped by the local legal culture and social context. Consequently, the international legal framework provides little certainty regarding what it is actually trying to tackle hence not fitting comfortably with the criminal law principle *nullum crimen sine lege*. For this reason, the term “exploitation” has been considered an empty vessel, a storage place for many cotemporary anxieties, adopted precisely because it is elusive enough and gives states leeway to recast trafficking, and the measures needed to tackle it domestically as they please. In this context, every kind of state measure can be characterized as an anti-trafficking one.⁵⁷

It is worth mentioning that, the definition of trafficking in the Palermo Protocol has been considered as a step backwards from the prohibition of slavery contained in the 1926 Slavery Convention because the elements of the crime of trafficking sanction the means by which a person can be misled into exploitation, and not exploitation itself⁵⁸. However, it has been noticed that the 1926 Slavery Convention definition of slavery focuses on the exercise of the powers attached to the right of ownership but does not specify what such powers are, or which forms of slavery are to be abolished.⁵⁹ Hence, the international legal prohibition on slavery is said to be “less settled and less expansive” than assumed by the critics of the Palermo Protocol.⁶⁰

It is also contended that trafficking is sanctioned only in its transnational nature thus becoming an unjustified discrimination against those enslaved within a country’s borders.⁶¹ These shortcomings in the Palermo Protocol are attributed to the religious and anti-prostitution feminist advocates who apparently lead the nongovernmental voices at the negotiations in Vienna.⁶²

⁵⁶ Travaux Préparatoires of the negotiation for the elaboration of the United Nations Convention against Transnational Organized Crimes and the Protocols thereto at 343 note 22 and at 344 note 30 http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf accessed May 1 2012

⁵⁷ Heli Askola, ‘Awkward Aliens: Female Migrants, Exploitation and the Trafficking Framework’ in Helen Stalford, Samantha Currie and Samantha Velluti, *Gender and Migration in 21st Century Europe* (Ashgate Publishing Limited 2009) 167

⁵⁸ Ibid supra note 49 270

⁵⁹ Anne T. Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’, VA J. INT’L.L. [2009] 800

⁶⁰ Id ibid 810

⁶¹ James C. Hathaway, ‘The Human Rights Quagmire of Human Trafficking’, VA. J. INT’L. L. [2008] 10-11

⁶² Id ibid 44-45

Scholars supporting the Palermo Protocol consider it an important tool to end impunity within domestic criminal legislations and secure justice for victims and a fundamental component of any long-term solution, in full conformity with international law.⁶³ More specifically, the positive aspects are said to include: a) to have made it possible for the affected individuals to be identified legally both as victims of a serious crime and as victims of human rights violations; b) a rapid and wide ratification which can be read as acceptance by relevant actors; and c) clarification on states' obligations regarding victims protection.⁶⁴

However, the elements of the crime undefined nature together with the extremely wide spectrum of ever-changing situations it seeks to tackle results in a multi-layered and historically imbued discussion open to diverse interpretations that will tint every discussion about trafficking.

Provisions on protection to victims and victims' rights are not strictly mandatory. The underlying assumptions on this issue pose two major shortcomings related to the 'who' and the 'how'. Who is the 'victim' to be protected? What does 'protection' -to this victim- entail? The answer to these two questions is critical for this research.

2.1.1. Who is the 'victim' to be protected?

Acknowledging a person as victim is currently understood as 'victim identification'⁶⁵. The requirement to make a determination of 'victim' is not explicitly mentioned in the Palermo Protocol but its interpretative documents recommend legislators to establish a process through which victims can be declared as such by:⁶⁶

- Courts or tribunals who can certify as such victims who have been identified during the proceedings, whether or not they actually participate in those proceedings;
- Judicial or administrative authorities based on the request made by law enforcement, border control or other officials; and
- Judicial or administrative authorities based on a request presented by the alleged victim personally or through some representative.

It has been argued that victim identification is part of the states' legal obligation to provide them with protection and support⁶⁷. Victim

⁶³ Ibid supra note 54 370

⁶⁴ Ibid supra note 59 823-829

⁶⁵ For an international perspective see Ibid supra note 27 Chapter 2 'Screening of Victims of Trafficking'. For a United States perspective see Micah N. Bump and Julianne Duncan, 'Conference on Identifying and Serving child victims of trafficking', *International Migration* [2003] 201-218

⁶⁶ Ibid supra note 49 289

⁶⁷ Ibid supra note 54 280-283. This is true only for state members to the European Trafficking Convention, who are required to timely and accurately identify victims, ensure the appropriate legal framework and competent personnel and cooperate with each and internally direct assistance services, see Council of Europe Convention, Action against Trafficking in Human Beings, signed in Warsaw, May 16 2005, Article 10

identification has also been understood as access to the rights declared in the OHCHR Principles and Guidelines.⁶⁸ Whether a legal obligation or not, declaring victimhood is the practical step that sets human rights law protection in motion.

Several protocols and interview forms have been designed around the world in order to make the identification process smoother and faster, and have proved useful for direct assistance services providers⁶⁹. However, several assumptions underlying the notion trafficking and victimhood step in the way of ‘identification’.

First, the Palermo Protocol inaccurately groups complex and diverse issues that affect different populations in different ways into one single crime. Thus, the framework fails to grasp that trafficking is enhanced by and rooted in structural factors such as poverty, globalization, migration, prostitution, gender inequality, ethnicity issues, and war⁷⁰ shadowing fundamental discussions around each of the topics individually. For instance, strategies to combat trafficking are not duly informed by a gender perspective as it does not acknowledge the different manner in which men and women experience exploitation.

Second, the trafficking framework understands ‘victims’ as one-dimensional victimized figures⁷¹ with little agency⁷² over their destiny. Although the ‘victim’ focus has provided a common platform for women from different cultural and social contexts to speak about violence perpetrated against them, such focus relies on a universal subject that cannot accommodate the multi-layered experiences of women.⁷³ It obscures, for example, women’s agency as traveling subjects, market actors and cultural importers who bring challenging understandings to preconceived norms on gender, sex and culture.⁷⁴

The legal framework demands a determination to be made about who is and who is not a VOT⁷⁵, establishing the ‘victim’, as the base for a conceptual

⁶⁸ Ibid supra note 47 Guideline 2.

⁶⁹ Ibid supra note 9

⁷⁰ Sally Cameron and Edward Newman, ‘Structural factors in Human Trafficking’ in Sally Cameron and Edward Newman (eds.) *Trafficking in Humans* (United Nations University Press 2008) 21-51

⁷¹ Ibid supra note 57 170

⁷² “Agency” in this context refers to the understanding of an individual as capable of making rational decisions and to be fully aware of the consequences.

⁷³ Ratna Kapur, ‘The tragedy of victimization rhetoric, Resurrecting the “naïve” subject in international/post-colonial feminist legal politics’ in Joanne Conaghan, *Feminist Legal Studies Critical Concepts in Law, Volume IV Challenges and Contestations*, (Routledge 2009) 166

⁷⁴ Id ibid 183

⁷⁵ Ibid supra note 57 168

distinction according to which only the ‘innocent’ must be saved.⁷⁶ In real life, as discussed by Aradau⁷⁷, women refuse to accept the victim description in a display of the Foucauldian idea of resistance -immanent to power-: some women refuse to participate in direct assistance programs, to testify in court against their traffickers and to stay in their countries of origin with a less attractive market for sex work. The suffering that non-national victims confess has been interpreted as a strategy to resist deportation, rehabilitation, reintegration and repatriation.

But because only the ‘innocent’ must be saved, such reactions, dealt with mainly by the NGOs providing direct assistance services, are presented as clinical reactions: behavioral patterns, diseases⁷⁸ and mental disorders resulting from the trauma caused by the trafficking experience.⁷⁹ In pathologizing victims’ behavior, the trafficking framework recaptures victims’ resisting forms of agency and even manages to incorporate the expert – and in-good-faith- acquired knowledge by direct assistance NGOs within the dominant mode of governing.⁸⁰

It is worth noticing that stories of exploitation causing physical and psychological harm do happen along with conscious decisions to gain financial benefits in the long term. Hence, it is important not to dismiss either possibility.

Additionally, talking about exploited migrants as ‘victims’ the system implicitly creates the figure of other migrants as ‘law breakers’. The same occurs with exploited women considered ‘innocent victims’ while those who voluntarily engage in prostitution are just ‘whores’. This arbitrary distinction means that only those who are proved to have been coerced, deceived or forced deserve their human rights to be protected and repaired. Meanwhile, those rational and active agents who voluntarily engaged in ‘trafficking’ –perhaps because this is was the best available option- are excluded from the framework and left to their own faith.

What counts about this theoretical reading is the impact it has on initiatives aiming to respond to people affected by trafficking, on the ground. When stakeholders committed with counter-trafficking in Ecuador seek to respond to ‘victims’ educational needs, they have to ask themselves: “Who are the beneficiaries of our program?” In other words “Who qualifies as a ‘victim of trafficking’? The trafficking governmentality subsumes their in-good-faith efforts and answers the question for them:

⁷⁶ This reasoning is based on a women-focused argument in Heli Askola, *Legal Responses to trafficking in Women for Sexual Exploitation in the European Union*, (Hart Publishing 2007) Chapter 2

⁷⁷ Claudia Aradau, *Rethinking Trafficking in Women Politics out of Security*, (Palgrave MacMillan 2009) 108-104

⁷⁸ See Cathy Zimmerman and Rosilyne Borland (eds.), *Caring for trafficked persons, Guidance for Health Providers*, (International Organization for Migration 2009) 15-26

⁷⁹ Ibid supra note 77 96

⁸⁰ Ibid supra note 77 13



Figure 1. Author’s representation of Victimhood vs. Agency

As a result, direct assistance services are left with a security-based model to identify victims. This notion of ‘victims’ is constructed on a proved lack of agency and turns them into a narrowly conceived group and unable to capture the complexity of diverse contexts that serve as background for trafficking.

2.1.2. What does ‘protection’ entail?

The general landscape of victims’ protection provided in the Palermo Protocol is very curious. Its Section II on Protection of victims touches upon three items: i) assistance to and protection of victims; ii) status of victims in receiving states; and iii) repatriation of victims. Provisions in items ii) and iii) establish clear state obligations to send back –for recipient states- and to receive victims –for sending states- as smoothly as possible, silencing the trafficking that occurs within countries. One could expect a lot of item i) but

in contrast, it establishes rather diluting, evasive and conditional obligations regarding victims' protection. States are obliged⁸¹:

1. To protect the privacy and identity of victims, including, inter alia, by making legal proceedings confidential, *in appropriate cases and to the extent possible under its domestic law*;
2. To provide victims, *in appropriate cases* with:
 - (a) Information on relevant court and administrative proceedings;
 - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defense.
3. *To consider* implementing measures to provide for the physical, psychological and social recovery of victims, including, *in appropriate cases*, in cooperation relevant organizations, the provision of:
 - (a) Appropriate housing;
 - (b) Counseling and information, in particular as regards their legal rights, in a language they can understand;
 - (c) Medical, psychological and material assistance; and
 - (d) Employment, educational and training opportunities.
4. To take into account the age, gender and special needs of victims, in particular the special needs of children, including appropriate housing, education and care.
5. To provide for the physical safety of victims of trafficking in persons while they are within its territory.
6. To ensure that its domestic legal system contains measures that offer victims the possibility of obtaining compensation for the damage suffered.

Regarding victim's protection the Palermo Protocol obliges states only in appropriate cases which determination is left for states to make. In other words, it is up to the state to decide when to protect a victim. This is problematic because it makes protection conditional to a state's decision in clear contradiction with the notion of inalienable human rights as stated in the Universal Declaration of Human Rights⁸².

It is clear that the Palermo Protocol emphasizes the 'assistance to and protection of a victim' discourse. Such discourse silences every notion of victims as rational decision makers and as human beings who are right holders under international human rights law. In contrast, it is an empowerment discourse would be not only desirable but also needed from the international legal framework on trafficking in order to advance the understanding of victims as right holders. Consequently, it is clear that the

⁸¹ Ibid supra note 42 Article 6

⁸² UNGA, Universal Declaration of Human Rights (adopted 10 December 1948) Preamble

Palermo Protocol does not establish enforceable international legal obligations regarding victim's rights.

2.2. Trafficking under review

This section will question the assumptions underlying trafficking by pinpointing the complex and intertwined structural factors ignored by the criminal approach. This work capitalizes on the critique posed by widely respected scholars who have unpacked and thoroughly analyze trafficking. In doing so, this section aims to highlight how the narrow criminal understanding of trafficking is inadequate to respond to victims' right to education as a matter of structural injustice.

This extensive critique points mainly towards:

2.2.1. Trafficking: a development issue

The counter-trafficking strategy posed by the Palermo Protocol does not address the structural causes that allow for exploitation of individuals, namely: the global socio-political and economic structures, and migration policies designed to counteract the economic advantage in developed countries that lures migrants. Instead, it advances a strategy that brings attention to the developing world deficiencies to pursue effective criminalization of trafficking. In fact, it overemphasizes the role of 'bad criminals' who exploit people silencing the role that inequalities play in facilitating such exploitation. Moreover, the strategy allots the responsibility to prevent trafficking to developing countries, who must strive to reduce the pool of potential trafficking victims.⁸³

A comprehensive strategy should tackle the socio-political and economic foundations of the current system with particular focus on: targeting gender inequality⁸⁴, gender discrimination⁸⁵ and eradicating poverty by reducing the wealth disparities⁸⁶. Such strategy can capitalize on the notion of the

⁸³ Ibid supra note 57 178

⁸⁴ Gender inequality can be tackled through 'female empowerment' aimed at transforming existing power relations by expanding the range of options available to women through: access to more and better education and living conditions, decent work and working conditions and effective non-discrimination policies. Such measures must recognize local realities and the inevitable diversity and complexity in the setting of priorities. It would be necessary also to bear in mind the potential for cultural imperialism and change the understanding that the role of the EU is to impose judgments about what women in poorer countries should want and how their lives could be improved. Furthermore, empowering women economically and socially would prove a durable solution to tackle the supply side of trafficking, in Ibid supra note 76 172-177

⁸⁵ The connection between discrimination against women and vulnerability to trafficking has been extensively documented by the UN policy organs, its treaty bodies and the Human Rights Council Special Procedures. For a detailed list of these documents, please refer to Ibid supra note 54 424 footnotes 40-42

⁸⁶ It has been argued that the only sustainable way ahead is to reduce the global wealth disparities by challenging the established divisions and priorities between trade and development. Measures need to be taken regarding: a) The EU undermining local growers and manufacturers in the developing world through the dumping of subsidized goods on their local markets and imposing import tariffs. Such measures reduce the potential for

right to development as an inalienable right under international law⁸⁷. Within the logic of the right to development, every individual –as a central subject-, all peoples and states are entitled to and have the responsibility to: participate in, contribute to, and enjoy economic, social, cultural and political development. Such development must be oriented towards the constant improvement of the well-being of the entire population, on the basis of a fair distribution of the benefits resulting from development. Moreover, states bear the primary responsibility for creating favorable – national and international- conditions for the realization of the right to development. The narrow understanding of trafficking as a crime is in clear contradiction with these international law provisions.

2.2.2. Trafficking: a human rights violation

It has been argued that trafficking emerged in international law as part of a security concern and within an anti-organized crime strategy but has been increasingly treated as a human rights concern⁸⁸. The main argument advanced on this point is that trafficking as a crime is partial understanding which conflicts with the core human rights goals by silencing its structural causes: poverty, globalization, migration, prostitution, gender inequality, ethnicity issues, and war⁸⁹.

The United Nations undertook efforts to bring international human rights law to work along with the flawed criminalization approach. To this end, two years after the signing of the Palermo Protocol, the Economic and Social Council issued the Recommended Principles and Guidelines on Human Rights and Human Trafficking⁹⁰ –hereafter “the Principles and Guidelines”. This document declared the primacy of human rights in counter-trafficking endeavors and touched upon fundamental victim protection issues not included in the Palermo Protocol.⁹¹

developing countries to export their products, especially those in competition with the EU products; b) The EU continuous distortion of production and trade through considerable levels of public aid; it makes it impossible to talk about free trade in agricultural products with agriculturally dependent developing countries; and c) The downgrading or dismantling of equal opportunity programs, women’s policies and social services that stems from the gendered politics of neo-liberalism and restricts the freedom of choice of those most dependent on them. Failing to do so, would reveal the incoherence and patchiness of the EU commitment to fight poverty and gender equality, which are the root causes of trafficking, in *Ibid supra* note 76 180

⁸⁷ UNGA, Declaration on the Right to Development (adopted 4 December 1986) A/RES/41/128, Articles 1-3

⁸⁸ *Ibid supra* note 77 98

⁸⁹ *Ibid supra* note 70 21-51

⁹⁰ *Ibid supra* note 47

⁹¹ These issues were elaborated in 11 thematic guidelines: Promotion and protection of human rights, Identification of trafficked persons and traffickers, Research, analysis, evaluation and dissemination, Ensuring an adequate legal framework, Ensuring an adequate law enforcement response, Protection and support for trafficked persons Preventing trafficking, Special measures for the protection and support of child victims of trafficking,

On 8 October 2004, the Commission on Human Rights appointed Ms. Sigma Huda as Special Rapporteur on trafficking in persons, especially women and children.⁹² In her first report, Ms. Huda declared trafficking to be the denial of virtually all human rights⁹³ and highlighted that trafficking continued to be treated as a “law and order” problem despite its human rights dimension. Hence, it was established that her task as Special Rapporteur was to underpin the human rights implications and causes of trafficking. To this end, she issued recommendations for a human rights based approach to prevention and base her reporting on the Guidelines and other relevant human rights treaties and conventions including the Palermo Protocol.⁹⁴

A detailed Commentary on the Guidelines was published in 2010 by the Office of the High Commissioner for Human Rights, –hereafter OHCHR-. The publication was presented in order to advance the human rights based approach to trafficking. Understood as an OHCHR-led process, it aimed at furthering the understanding of trafficking as a violation of human rights disproportionately affecting women, children, migrants, refugees and persons with disabilities. The Commentary highlighted the legal responsibility of Governments to protect and promote the rights of all persons within their jurisdiction, including non-citizens by eliminating trafficking and related exploitation.⁹⁵

Putting into practice the political intention to bring a human rights element to trafficking required a technical tool that would facilitate this merge. Such tool is called ‘the human rights based approach’–hereafter HRBA-. In general terms, the HRBA is understood as “a vision and practice of

Access to remedies, Obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel, and Cooperation and coordination between States and regions.

⁹² UN ECOSOC, Official Records 2004 Supplement No. 3, Decision 2004/110 Special Rapporteur on trafficking in persons, especially in women and children, (19 April 2004) E/2004/23 E/CN.4/2004/127 <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/162/00/pdf/G0416200.pdf?OpenElement> accessed 5 May 2012 p. 330. Ms. Sigma Huda from Bangladesh was appointed for a three-year period.

⁹³ Including “the right to liberty and integrity and security of the person; the right to freedom from torture and other cruel, inhuman or degrading treatment; the right to freedom of movement; the right to home and family; the right to the highest attainable standard of health; the right to education” in UN HRC, Integration of the Human Rights of Women and the Gender Perspective, Report of the Special Rapporteur on trafficking in persons, especially women and children, (22 December 2004) E/CN.4/2005/71 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/169/28/PDF/G0416928.pdf?OpenElement> accessed 5 May 2012 para. 9.

⁹⁴ Id *ibid* paras. 55-59

⁹⁵ OHCHR, “Recommended Principles and Guidelines on Human Rights and Human Trafficking”, United Nations New York Geneva 2010, Foreword by Navanethem Pillay, United Nations High Commissioner for Human Rights.

development” that guarantees essential human entitlements with the purpose of expanding choices and promoting wellbeing and empowerment.⁹⁶

HRBA is said to help underpin the global inequalities and injustices that form the fabric where trafficking takes place. Moreover, HRBA is said to play a central role in any credible and effective response to trafficking by ensuring that states do not violate or circumvent international obligations regarding all individuals under their jurisdictions. However, it has been argued that applying the HRBA to trafficking prevents uncritical acceptance of the legal fictitious difference between trafficking –as a crime involving innocent and virtuous victims- and smuggling –as a crime involving imprudent or greedy fortune hunters⁹⁷.

Applying the HRBA to trafficking would imply using international human rights law to inform the counter-trafficking responses. In order to shed some light on this matter in connection with this research, it is essential to identify trafficking related provisions in the core human rights treaties and analyze whether or not they address VOTs’ right to education as a matter of structural injustice.

International human rights law contains the prohibition of slavery and servitude⁹⁸ since 1948 and case law has established it as an obligation *erga omnes* and as a right in which every state has a legal interest to protect⁹⁹. International human rights law further creates explicit state obligations regarding specific groups, for instance: i) to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women¹⁰⁰; ii) to secure that no migrant worker or member of his or her family is held in slavery or servitude;¹⁰¹ iii) to protect children and young persons from economic and social exploitation¹⁰², sexual exploitation, sexual abuse and all other forms of exploitation prejudicial to any aspects of their welfare¹⁰³, and; iv) to

⁹⁶ Noheleen Heyzer, ‘Combating Trafficking in Women and Children, A Gender and Human Rights Framework’ in Than-Dam Tuong, Saskia Wieringa and Amrita Chhachhi, (eds.) *Engendering Human Security Feminist Perspectives* (Zed Books 2006) 112

⁹⁷ *Ibid supra* note 54 3-5

⁹⁸ Universal Declaration on Human Rights Article 4 and International Covenant on Civil and Political Rights (adopted 16 December 1966 entered into force 23 March 1973) Article 8

⁹⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*; Preliminary Objections, International Court of Justice (ICJ), 24 July 1964, paras. 33-34

¹⁰⁰ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979 entered into force 3 September 1981) Article 6

¹⁰¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990 entered into force 1 July 2003) Article 11 (1)

¹⁰² *Ibid supra* note 34 Article 10 (3)

¹⁰³ Convention on the Rights of the Child (adopted 20 November 1989 entered into force 2 September 1990) Articles 34, 35 and 36

punish by law the employment of children in work harmful to their morals or health, dangerous to life or likely to hamper their normal development.¹⁰⁴

Moreover, international human rights law provides for preventive and appropriate national, bilateral and multilateral measures regarding: i) the inducement or coercion of a child to engage in any unlawful sexual activity; ii) the exploitative use of children in prostitution or other unlawful sexual practices; iii) the exploitative use of children in pornographic performances and materials; and iv) the abduction of, the sale of or traffic in children for any purpose or in any form.¹⁰⁵

More recently, international human rights law tackled trafficking affecting persons with disabilities¹⁰⁶. Since then states are obliged to:

- i) Ensure that they are not held in slavery or in servitude;
- ii) Protect them on an equal basis with others, from all forms of exploitation, forced or compulsory labor including their gender-based aspects take by means of all appropriate legislative, administrative, social, educational measures;
- iii) Provide them with protection services that: a) are age-, gender- and disability-sensitive; b) promote their physical, cognitive and psychological recovery, rehabilitation and social reintegration; and c) foster their health, welfare, self-respect, dignity and autonomy and takes into account gender- and age-specific needs;
- iv) Prevent their exploitation by means of ensuring: a) appropriate forms of gender- and age-sensitive assistance and support for them, their families and their caregivers; b) provision of information and education on how to avoid, recognize and report instances of exploitation; c) facilities and programs designed to serve them effectively, monitored by independent authorities; and
- v) Enforce effective legislation and policies -including women- and child-focused- to identify, investigate and prosecute exploitation.

Notwithstanding the abovementioned explicit references to trafficking in international human rights law, the HRBA to trafficking has been criticized for being closely linked to the inherent political, legal and structural weaknesses of international human rights law itself. Critics highlight that trafficking has remained within the realm of human rights for over fifty years, without states being able to agree on a definition and or elaborate on the attached legal obligations. Consequently, trafficking could rarely be successfully raised as a violation of any of the human rights treaties.¹⁰⁷

¹⁰⁴ Ibid supra note 34 Article 10 (3)

¹⁰⁵ Ibid supra note 103 Articles 34, 35 and 36

¹⁰⁶ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006 entered into force 3 May 2008) Articles 16 and 27 (2)

¹⁰⁷ Ibid supra note 54 4

Second, it has also been argued that trafficking is fundamentally a matter of criminal law albeit with a human rights dimension. Piotrowicz¹⁰⁸ elaborates on this argument asserting that in international law, states are the only subjects legally obliged to protect human rights; individuals do not have such power or duty.¹⁰⁹ Hence, a criminal act perpetrated by an individual against another individual does not amount to a breach of human rights.¹¹⁰ Calling trafficking a human rights violation would mean that states have an obligation to deal with trafficking as a crime and take responsibility for compensation for the victims.¹¹¹ Moreover, treating victims of trafficking as victims of a crime does not require reliance on human rights. In fact, prevention of trafficking and protection of victims can be best achieved through effective criminal laws¹¹².

The third critique, posed from a feminist perspective¹¹³, points to the problematic centrality of the ‘victim’ used by the HRBA. It is blamed for offering an emotional narrative of the victim’s pain and suffering in order to promote sympathy with their experience, supporting the myth. In this paradigm, victims are provided with direct assistance services who report them as doubly-traumatized by the experience of trafficking and by earlier exposure to either poverty, lack of opportunities, violence, abuse, abandonment and incest, amongst others.¹¹⁴ Telling the story of suffering and harmed bodies is said to create ‘bio-legitimacy’, a social recognition of last resource when all other modes have failed.¹¹⁵

In doing so, the HRBA creates a victimhood-based category of human rights bearers¹¹⁶ while neglecting debate on the rights victims hold as sex workers, migrants or asylum seekers, for example. This implies that women as illegal migrants and sex workers are only entitled to human rights protection if they have been victimized. The notion of the exploited migrant as victim is introduced as if one could forget, as Askola has pointed out, that migrant workers have a right to the same protections against discriminations and abuse enjoyed by citizens.

¹⁰⁸ Notwithstanding the fact that the author does not share this point of view, it has been included in this research for the sake of academic rigor.

¹⁰⁹ Ryszard Piotrowicz, ‘The legal nature of trafficking in human beings’ *Intercultural Hum. Rts. L. Rev.* [2009] 8

¹¹⁰ *Ibid* 2-6

¹¹¹ *Ibid* 10

¹¹² *Ibid* 12

¹¹³ *Ibid supra note 77* 33-39

¹¹⁴ *Ibid supra note 77* 100 – 101

¹¹⁵ *Ibid supra note 77* 108

¹¹⁶ It is argued that entitlement to human rights through victimhood is problematic also because the very universality of human rights and the notion of subject it promotes have been criticized for silencing or dismissing diversity and for being related to ideologies of imperialism. In such a scenario, victims can only be protected but cannot claim rights, in *Ibid supra note 77* 36

In addition, this rationalization of who the victims are allows for the constitution of ‘authoritative forms of knowledge’ presenting a gendered representation of women as innocent, passive and in need of protection. From this perspective, women are perceived in the trafficking framework as easily deceived or coerced into sex work.¹¹⁷

Finally, attention is called to the absence of claims to freedom within the human rights-based approach¹¹⁸. Non-national victims’ freedom of movement or freedom to choose a better life is not being claimed by their defendants. Such freedoms are not being upheld in the trafficking discourse against states who restrict the movement of, locate and deport victims.

To sum up, the main shortcoming of the HRBA is victimization of the people affected by trafficking. Why is this important? The acknowledgment of people affected by trafficking either as ‘victims’ or as individuals entitled to human rights influences the ways the problem is dealt with. If the trafficking discourse perceives victims as individuals in a position of vulnerability -due to poverty, gender discrimination and lack of opportunities in countries of origin- the strategy to combat trafficking should include a commitment to specifically tackle the conditions that foster such vulnerability.¹¹⁹ Instead, the international response has been framed within the notions of safeguarding security, where the HRBA is used to present victims as risky ‘dangerous others’.¹²⁰ The focus is shifted away from addressing structural causes to ‘aiding’ the powerless.

2.2.3. Trafficking, migration: a security concern

Counter-trafficking initiatives have been blamed for being part of the “securitization of migration”¹²¹ because the definition of trafficking departs from a self-evident point that raises inequality and migration as sensitive subjects for discussion. Consequently, the whole regime emphasizes the inequality between the trafficker and the trafficked, silencing the debate about inequality between migrants and receiving states.

Criminalization and security discourses employ human rights selectively to legitimize the concept of trafficking. In fact, the factors that make migrants vulnerable to traffickers are usually already well-defined human right violations, such as poor labor conditions, lack of access to education and health, poor standards of living –for which states should assume responsibility- but are absent in the trafficking discourse. Instead, the trafficker is portrayed as the only violator of human rights.

¹¹⁷ Ibid supra note 76 33

¹¹⁸ Ibid supra note 77 186-187

¹¹⁹ This reasoning builds on a women-centered argumentation in Ibid supra note 57 178

¹²⁰ Ibid supra note 77 118

¹²¹ Gregor Noll, ‘The insecurity of trafficking in International Law’ in Vincent Chetail, ed., *Globalization, migration and human rights: international law under review* (Bruylant Bruxelles 2007) 343-361

Furthermore, the migrant's consent is immaterial; the migrants' agency is limited to serving as a witness during the criminal proceedings against the trafficker. In contrast, for example, adult migrant sex workers in Italy have used two key venues to achieve social and legal recognition. They have either established a relationship to an Italian boyfriend or applied for the residence permit for victims of trafficking. How they portray their own stories –either negating they knew they would be involved in sex work before their new partners and presenting themselves as suffering victims before Italian migration authorities- in order to gain social and legal recognition is an exercise of agency¹²² neglected by the victim figure.

It has also been argued that the criminalization approach has increased the risk of trafficking by driving migration into the black market. In doing so, it imposes indiscriminate obstacles for refugees, for instance, who need to cross borders in order to access international protection.¹²³ However, it has been contested that the trafficking framework has actually contributed to the expansion of the protection provided by international refugee law because there is currently an open door for trafficked persons to qualify as refugees if the acts committed by the traffickers amount to persecution.¹²⁴

In addition, criminalization of trafficking in international law through the Palermo Protocol and Convention has portrayed it as a security issue, along with organized crime, migration and prostitution. Consequently, security has influenced what is done and said about trafficking.¹²⁵ This argument, put forward by Aradau, consists of two main premises¹²⁶:

First, representations of social problems are used as a permanent incentive for interventions that will tackle these problems. Thus, it is the framing of trafficking within the security sphere that has generated security-oriented strategies to combat it, like migration laws and border control strategies. For instance, in Ecuador, the Colombian internal conflict has influenced the perceptions against migrants and asylum seekers whose presence is linked with increasing unemployment, drug trafficking, crime and expansion of armed groups. These perceptions translate into social tensions that demand further measures and policies to protect homeland security and the national workforce¹²⁷, in contradiction with the inclusive and progressive constitutional concept of "universal citizenship"¹²⁸.

¹²² Rutvica Andrijasevic, *Migration, Agency and Citizenship in sex trafficking* (Palgrave Macmillan 2010) 107

¹²³ Ibid supra note 61 5-7

¹²⁴ Ibid supra note 59 844

¹²⁵ Ibid supra note 77 37

¹²⁶ Ibid supra note 77 Chapters 1, 2 and 4.

¹²⁷ Martha Cecilia Ruiz, 'Cross border migrants in the sex trade: integration, migration control and new forms of inequality', paper prepared for the 2009 Congress of the Latin American Studies Association, Rio de Janeiro Brazil, 11-14 June 2009, 6. Title translated by the author.

¹²⁸ Ibid supra note 1 Articles 40-42 and 391-392

In this context, immigration laws and procedures are thought to have contributed notably to the construction and reproduction of identities, norms and sexual categories *inter alia*, which are then used to regulate the admission and exclusion of certain groups of migrants.¹²⁹ In fact, migrant sex workers are one of the groups defined as a "threat" to the nation, and excluded, overtly or subtly, through laws and immigration procedures unless they are 'victims' of trafficking. This is exemplified by the way migrants' rights organizations deal with migrant sex workers: migrant sex workers are either invisible, only make them visible to draw differences between "good" and "bad" migrants, or upheld as "victims" of human trafficking.¹³⁰

Second, security contains the promise of order and of ordering things and people; such order is based on categorization –thus division and exclusion- of individuals. Female victims for example, are portrayed as risky beings, whose agency is obscured, always 'in danger' of being re trafficked, who need to be 'rehabilitated' through victim assistance, in the same fashion drug and alcohol addicts have been dealt with. Security is born from the idea of protection of the state and strongly connected to citizenship.

In conclusion, 'victims', women in particular, are constructed as agency-less beings and irregular migrants -and sex workers- are categorized by immigration laws and border control policies as excessive elements of a social situation: those who should not be there. Hence, combat against trafficking limits the legal channels for migrant workers by providing a platform for more restrictive immigration measures, instead of the much-needed access to employment opportunities. Consequently, victims of trafficking –along with irregular migrant sex workers- are not considered rights-bearing individuals, and their agency is denied by the legal framework.

2.2.4. Trafficking: sexual exploitation and sex work

Last but far from least, the feminist scholarship calls for a broader understand of sex work as opposed to the narrow crime-focused understanding¹³¹. It is argued that the trafficking discourse views women as victims lacking control over their own destiny and is loaded with arguments for the protection of innocent women. The myth in this case is 'white slavery' as a political cause, which persists and is still powerful, despite the lack of evidence of women being kidnapped and forced into prostitution. The myth persists due to the inability of the middle class to understand women as agents or to see how women might have exercised 'choice' regarding sex work. In this sense, the myth of trafficking is constructed through a differing understanding of consent and performs the function of

¹²⁹ Ibid supra note 127 8

¹³⁰ Ibid supra note 127 15

¹³¹ For a discussion of this issue in the U.S. context see Kathleen Kim and Grace Chang, 'Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)', *Stanford Journal of Civil Rights and Civil Liberties* [2007]

appearing as a description or reality, while actually being an ideological narrative aimed at achieving specific effects. In the words of Doezema, the myth of white slavery was resurrected in the Palermo Protocol negotiations.¹³²

The feminist critique ultimately demands a comprehensive approach to trafficking that addresses the broad range of factors that create, sustain and encourage it, in full recognition that trafficking for sexual exploitation exists as a continuum of and –mostly- mundane everyday use of power and control.¹³³

2.3. **Conclusions**

It is clear that the Palermo Protocol puts forward a criminal approach to trafficking that is problematic because it creates a control of migration discourse and focuses on victims as agency-less actors and not as rights bearers. The presumption of return of foreign victims to their country of origin as a standard solution established in the Palermo Protocol¹³⁴ supports this argument. A victim focus encourages states to use criminal law –a branch of law where states enjoy powers of moral surveillance and regulation- to address women’s rights issues; in this sense, the victim-focused anti-trafficking campaign is protectionist rather than liberating.¹³⁵ Thus, the victim figure proves to be an inadequate mechanism to understand the complexity and contradictions of the discourses and social practices constitutive of citizenship.¹³⁶

In addition, international human rights law provisions tackle prevention of and protection from exploitation but do not touch upon victim’s human rights as an empowerment measure either. In this context, it is not a surprise that victims’ right to education is not constructed as an international legal obligation which breach would give rise to state responsibility.

For these reasons, the Palermo Protocol and the relevant international human rights law provisions do not establish state responsibility for victims’ right to education as an empowerment measure and thus are not adequate to tackle the issue as a matter of structural injustice.

¹³² Jo Doezema, ‘Now you see her, now you don’t Sex workers at the UN Trafficking Protocol negotiations’ in Joanne Conaghan, “Feminist Legal Studies Critical Concepts in Law”, Volume IV Challenges and Contestations (Routledge 2009) 137

¹³³ *Ibid supra* note 76 41

¹³⁴ *Ibid supra* note 42 Article 10

¹³⁵ *Ibid supra* note 73 165 and 186

¹³⁶ *Ibid supra* note 24 16

3 The right to education in the context of trafficking

Education has proven to be an essential empowerment measure to break the cycle of re-victimization¹³⁷ and to play a key role for victims to assess their realistic possibilities to lead an independent life.¹³⁸ However, victims face serious barriers to access to education, which were extensively proved to constitute structural injustice in section 1.3.1. As such, the barriers victims face pose a quest for the right to education as stated in international law: is education relevant and accessible for victims of trafficking? Chapter 3 examines the right to education to determine whether or not it can serve this purpose.

To achieve this objective, the nature and scope of the right to education in the international legal framework is unpacked by analyzing whether or not it acknowledges victims' specific educational needs, as a matter of structural injustice. In addition, this chapter analyzes whether or not international human rights law establishes sufficient state responsibility for the victims' right to education. Finally, this chapter presents the available legal avenues to demand states to fulfill such responsibility and analyzes whether or not they are adequate to guarantee victims' right to education.

3.1. Victims' right to education in international human rights law

Education as a human right is recognized by the UDHR¹³⁹, the ICESCR¹⁴⁰, the CRC¹⁴¹, the CEDAW¹⁴², the ICMWF¹⁴³ and, of relevance for Ecuador, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights "Protocol of San Salvador"¹⁴⁴.

The right to education needs to be interpreted daily in the light of a multitude of situations bearing in mind that clarifying its nature and scope can be achieved through identifying corresponding states' obligations.¹⁴⁵ The discussion focuses on article 13 in the ICESCR, as the most important

¹³⁷ Ibid supra note 49 379

¹³⁸ Ibid supra note 27 82

¹³⁹ Ibid supra note 82 Article 26

¹⁴⁰ Ibid supra note 34 Article 13

¹⁴¹ Ibid supra note 103 Articles 28 and 29

¹⁴² Ibid supra note 100 Article 10

¹⁴³ Ibid supra note 101 Articles 12 (4), 30, 43 (1) (a) and (c), 45 (1)(a)(b) and (4)

¹⁴⁴ Ibid supra note 35 Article 13

¹⁴⁵ Tomasevski, Katarina, *Human Rights obligations: making education available, accessible, acceptable and adaptable, Right to Education* (Primers 3 2001) 8-9

formulation of the right to education in an international treaty¹⁴⁶, in connection with specific provisions on some forms of education for victims in the Palermo Protocol¹⁴⁷ and the Recommended Principles and Guidelines on Human Rights and Human Trafficking¹⁴⁸. Article 13 provisions are broad and general¹⁴⁹, thus do not shed much light on the issue of victims, unless read together with relevant parts of interpretative documents such as the ICESCR General Comments 3, 9 and 13, and the UNESCO International Standard Classification of Education ISCED¹⁵⁰.

Together these documents provide puzzle pieces to determine states' obligations regarding the right to education in connection with victims of trafficking.

“Everyone has the right to education.”¹⁵¹ A general philosophical critique on such universality of the system of rights argues that believing that the system of rights was made for all in the name of all is naive. It would be more prudent to recognize that it was made for the few and is brought to bear upon others.¹⁵² Professor Tomasevski argues that calling all human rights universal is a bombastic statement, portraying artificial global consensus where there is none.¹⁵³ More specifically, the right to education in international law contains the assumption that equality should be the natural consequence of such statements. On this point, it is reasonable to believe that “the passage to absolute equality is each time the result of a belief, of a presumption or a speculation which Aristotle already considered unjustified”¹⁵⁴.

The particular situation of the victims of trafficking show that such universality cannot be assumed but needs to be constructed. For this purpose, such aspiration of justice, in the context of trafficking, demands explicit acknowledgment of victims' differences and specific educational

¹⁴⁶ Ibid supra note 14 94

¹⁴⁷ Ibid supra note 42 Article 6 (3)(d) and 4

¹⁴⁸ Ibid supra note 47

¹⁴⁹ Ibid supra note 34 Article 13

¹⁵⁰ The International Standard Classification of Education was designed by UNESCO in the early 1970's to serve 'as an instrument suitable for assembling, compiling and presenting statistics of education both within individual countries and internationally'. It was approved by the International Conference on Education held in Geneva in 1975 and was subsequently endorsed by UNESCO's General Conference in Paris in 1978 in UNESCO, International Standard Classification of Education ISCED, 1997, Preface.

¹⁵¹ Ibid supra note 34 Article 13 (1)

¹⁵² Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (Vintage 1979) in Daniel Lechner, 'The dangerous human right to education', *Studies in Philosophy and Education* [2001] 280

¹⁵³ Tomasevski, Katarina, *Human rights obligations in education: the 4-A scheme*, (Wolf Legal Publishers Nijmegen 2006) 7

¹⁵⁴ Yviva Bergstrom, *The Universal Right to Education: Freedom, Equality and Fraternity*, (Springer Science+Business Media B.V. 2009) 14

needs as well as a commitment to accommodate to them so that everyone will be able equally to achieve the desirable well-being.¹⁵⁵

The following paragraphs will examine whether or not the right to education discourse accommodates the differences posed by victims of trafficking.

The **aims**¹⁵⁶ of education are:

- a. The full development of the human personality and their sense of dignity;
- b. Strengthening respect for human rights and fundamental freedoms;
- c. Enabling all persons to participate effectively in a free society; and
- d. Promoting understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.

It has been argued that these aims must be understood within the historical context they were created: the Second World War. During this period, it was believed that the false ideals of blind obedience and racial hatred entrenched in the corrupted but well-organized German education system had substantially contributed to the War. Hence, the aims of education have both an individualistic nature –the full development of the human being- and a social nature –the contribution to a free society, peace and tolerance among diverse groups-. In addition, they reflect the fundamental purposes and principles in the UN Charter.¹⁵⁷

The responsibility to educate populations has shifted from that on the parents and church to the state during the last few centuries.¹⁵⁸ Currently, promotion, protection and respect of the right to education fall within the realms of **state responsibility**. Such responsibility consists of some general obligations applicable to all the economic, social and cultural rights guaranteed by ICESCR¹⁵⁹. Accordingly, in order to fully guarantee the right to education states must:

- Take appropriate economic and technical steps;
- Take legislative measures;
- Allocate the maximum of its available resources;
- Progressively achieve the full realization of the right to education;
- Guarantee that the right to education is exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status which includes sexual orientation or gender identity¹⁶⁰;
- Take steps, individually and through international economic and technical assistance and co-operation; and

¹⁵⁵ This is an applied reasoning to trafficking of the more general reflections by Young on normalizing discourse of education. See *ibid supra* note 24 99

¹⁵⁶ *Ibid supra* note 34 Article 13 (1)

¹⁵⁷ *Ibid supra* note 14 463

¹⁵⁸ *Ibid supra* note 14 21

¹⁵⁹ *Ibid supra* note 34 Article 2

¹⁶⁰ *Ibid supra* note 12 para. 32

- Ensure the equal right of men and women to the enjoyment of the right to education¹⁶¹.

The right to education is an “obligation of result”¹⁶² which although realizable over time should not be misinterpreted as an obligation without all meaningful content. The notion of progressivity has been conceived as a flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring resources for the full realization of economic, social and cultural rights. In addition, progressivity must be read in the light of the *raison d'être* of the Covenant imposing an obligation to act as expeditiously and effectively as possible.¹⁶³

The established goals regarding the right to education are not immediate, but ultimate goals. In this sense, progressivity is inherently problematic for victims of trafficking mainly in developing countries who are permanently faced with a limited amount of resources to respond to an ever-increasing number of needs. In this context of prioritizing needs, the educational needs of victims of trafficking risk being left unattended in favor of issues perceived as more urgent.

States have discretionary powers to decide which means are the most appropriate under the circumstances and they may include the provision of judicial remedies.¹⁶⁴ However, the CESCR makes the ultimate determination on whether or not all appropriate measures have been taken.¹⁶⁵

In addition, education must comply with the essential features established in the **4A's scheme**¹⁶⁶ originally conceived for the right to education by Professor Katarina Tomasevski:

- *Availability*: institutions and programs must be available in sufficient quantity within the jurisdiction of the state, with everything they require to function, which will depend on the developmental context.
- *Accessibility*: guaranteeing non-discrimination, within safe physical reach and affordable to all.

¹⁶¹ Ibid supra note 34 Article 3

¹⁶² The International Law Commission has characterized as "international obligations of conduct" those obligations which require a State to adopt a specific course of conduct, whether an action or an omission, and "obligations of result" as those which impose on the State the generic requirement that it should bring about a certain result but leave to it the choice of the ways and means by which the results are to be achieved, in ILC, *Yearbook of the International Law Commission*, Vol. II (1977) Part One, 8

¹⁶³ CESCR, General Comment 3, The nature of States parties obligations, 14 December 1990, para. 9

¹⁶⁴ Ibid para. 5

¹⁶⁵ Ibid para. 4

¹⁶⁶ Ibid supra note 12 paras. 6-7 and Commission on Human Rights, Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33, E/CN.4/1999/49, 13 January 1999, paras. 42-74

- *Acceptability*: curricula and teaching methods must be relevant and culturally appropriate.
- *Adaptability*: education provided needs to be flexible so it can adapt to the changes that societies and communities go through.

Furthermore, education in international human rights law is inherently **institutionalized and levels-based**. Thus, states must secure education is provided according to the following format:

- a. *Primary education* is the beginning of systematic apprenticeship of reading, writing and mathematics, and is provided for children not younger than five years or older than seven years and covers in principle six years of full-time schooling.¹⁶⁷ Conceived in these terms, primary education must be compulsory and available free to all.
- b. *Secondary education* in its different forms, including technical and vocational secondary education, must be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education. Completion of basic education is the foundation for lifelong learning and human development and prepares students for vocational and higher educational opportunities.¹⁶⁸ The entry into secondary education is after 6 years of primary education, and the end of this level is after 9 years of schooling including primary education.¹⁶⁹
- c. *Technical and vocational education*, which despite being explicitly mentioned as part of secondary education in Article 13, is also mentioned in Article 26 (1) of the UDHR, and is thus widely understood as an integral element of all levels of education.¹⁷⁰ International human rights law elaborates on vocational training specifically for children¹⁷¹ and for migrant workers and their families¹⁷². It consists of all forms of the educational process including the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life.¹⁷³ Moreover, it is understood to be a means of preparing for occupational fields and for effective participation in the world of work, an aspect of lifelong learning and preparation for responsible citizenship, an instrument for promoting environmentally sound sustainable development and a method of facilitating poverty alleviation.¹⁷⁴ This kind of education can be theoretically or practically

¹⁶⁷ UNESCO, International Standard Classification of Education ISCED, 1997, paras. 45-46

¹⁶⁸ Ibid supra note 12 para. 12

¹⁶⁹ Ibid supra note 167 para. 53

¹⁷⁰ Ibid supra note 12 15

¹⁷¹ Ibid supra note 103 Article 28(1)(b)

¹⁷² Ibid supra note 101 Articles 43 (1)(c) and 45 (1)(b)

¹⁷³ UNESCO, Convention on Technical and Vocational Education, Article 1 (a)

¹⁷⁴ UNESCO, Revised Recommendation concerning Technical and Vocational Education, November 2 2001, para. 2

oriented and its successful completion leads to a labor-market relevant vocational qualification recognized by the competent authorities.¹⁷⁵

- d. *Higher education* must be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education. Capacity should be assessed by reference to all students' relevant expertise and experience.¹⁷⁶ It has been argued that "capacity" can be understood in two contexts: a *qualitative criterion*, as the intellectual ability of the applicants, and states are allowed to establish methods for ascertaining such capacity; and a *quantitative criterion* according to which states may want to restrict the number of students to be admitted to a particular field of study, for example.¹⁷⁷

The high costs of university studies forces direct assistance organizations to evaluate victims wishing to complete their university education and select strong candidates who show a certain level of independence and reliability and the potential to successfully complete the degree course and secure employment."¹⁷⁸

- e. *Fundamental education* shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education. Fundamental education extends to all those who have not yet satisfied their basic learning needs¹⁷⁹. Moreover, because this is not limited by age or gender, curricula and delivery systems must be devised which are suitable for students of all ages¹⁸⁰.

A **system of schools** must be developed and actively pursued at all levels. States must establish an adequate fellowship system as well as continuously improve the material conditions of teaching staff. The fellowship system should enhance equality of educational access for individuals from disadvantaged groups¹⁸¹.

It is worth noticing that victims of trafficking are not present in the right to education discourse even in the provisions regarding non-discrimination, despite the alarming official data on the increasing number of victims. Such data is certainly conflicting and gathering reliable data has been widely acknowledged as a challenging task¹⁸². Nonetheless, some of the commonly spread figures are:

¹⁷⁵ Ibid supra note 167 para. 59.

¹⁷⁶ Ibid supra note 12 para. 19

¹⁷⁷ Ibid supra note 13 524

¹⁷⁸ Ibid supra note 27 96

¹⁷⁹ Ibid supra note 12 para. 23

¹⁸⁰ Ibid supra note 12 para. 24

¹⁸¹ Ibid supra note 12 para. 26

¹⁸² The experts explain that the difficulties of measuring human trafficking stem from the fact that many trafficking victims are never identified and referred for assistance. It is also said that research on trafficking is informed by various assumptions, biases linked to the

- In 2002, the United States Government -based on 1997 data- estimated that 700,000 persons, mainly women and children, are trafficked across national borders worldwide each year.¹⁸³
- UNICEF is worldwide cited as the source stating that two million children are subjected to prostitution in the global commercial sex trade¹⁸⁴.
- According to the most recent data, gathered in 2010, 12.3 million adults and children are involved in forced labor, bonded labor, and forced prostitution around the world with only 49,105 victims identified during 2009-2010.¹⁸⁵

It is surprising that given such numbers, the United Nations Special Rapporteur on the right to education has assessed the situation of people with disabilities¹⁸⁶, emergency situations¹⁸⁷, persons in detention¹⁸⁸ and migrants and refugees¹⁸⁹ but not the one of victims of trafficking. Since the situation of victims of trafficking and their specific education needs described in section 1.3.1. have not yet been taken into account by the Special Rapporteur, there is very little international standards on their right to education.

3.2. Enforcement of the right to education

The current understanding of education under human rights law places the international obligation to provide education on the state. Failure to comply with such obligation would give rise to international state responsibility, ultimately allowing for the state to be held accountable. Establishing state responsibility for a breach of a duty related to economic, social and cultural rights, requires the adoption of a “violations approach”¹⁹⁰ which: a)

overemphasis on sex trafficking -over other forms of exploitation- and of female victims -over males and other groups such as the elderly- in ibid supra note 44 79-80

¹⁸³ Trafficking in Persons Report June 2002, Department of States United States of America 4 <http://www.state.gov/g/tip/rls/tiprpt/2002/10653.htm> accessed May 24

¹⁸⁴ Trafficking in Persons Report June 2009, Department of States United States of America 22 <http://www.state.gov/documents/organization/123360.pdf> accessed May 24

¹⁸⁵ Trafficking in Persons Report June 2010, Department of States United States of America 7 <http://www.state.gov/documents/organization/142979.pdf> accessed May 24

¹⁸⁶ UN HRC, The right to education of persons with disabilities, Report of the Special Rapporteur on the right to education, Vernor Muñoz, A/HRC/4/29, 2007

¹⁸⁷ UN HRC, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development The Right to education in emergency situations Report of the Special Rapporteur on the right to education, Vernor Muñoz, A/HRC/8/10, 2008

¹⁸⁸ UN HRC, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development The Right to education of persons in detention, Report of the Special Rapporteur on the right to education, Vernor Muñoz, A/HRC/11/8, 2009

¹⁸⁹ UN HRC, The right to education of migrants, refugees and asylum seekers, Report of the Special Rapporteur on the right to education, Vernor Muñoz, A/HRC/14/25, 2010

¹⁹⁰ As originally proposed, the “violations approach” focused on three types of violations: (1) violations resulting from actions and policies on the part of governments; (2) violations

contributes to ending and rectifying abuses; b) helps the monitoring of human rights go beyond an academic exercise and move into being a tool for reducing the human suffering that results from serious violations of human rights; and c) is a more effective way to conceptualize the positive content of economic, social, and cultural rights than the more abstract legal or philosophical analyses attempted thus far.¹⁹¹ Finally, -and most important for the present research- identifying a violation results in victims being entitled to access to remedies, and adequate reparation.¹⁹²

The first step in establishing state responsibility consists of determining what constitutes a violation of the right to education, bearing in mind the difficulty posed by the discretionary nature of the measures states can take to comply with the ICESCR and –until recently- a lack of complaints procedures.¹⁹³

A state incurs in a violation when its acts are not in conformity with what is required in the ICESCR.¹⁹⁴ Such acts can consist of an action or an omission¹⁹⁵ which can result in “failures to comply” or go further and become “violations”; the difference is one of degree determined by the state’s intentionality. States can however, demonstrate that such violation is reasonably justified by factors beyond their reasonable control¹⁹⁶ or a lack of means despite having allocated the maximum available resources.¹⁹⁷ It is worth noting that a failure to exercise due diligence in controlling the behavior of non-state actors -i.e. private entities or individuals and transnational corporations- gives rise to state responsibility.¹⁹⁸

Dieter Beiter has established the following categories of hypothetical violations to the right to education, which include states actions and omissions:

1. A failure to comply with the **minimum core** of the right to education. The minimum core is the fundamental aspect, without which the right

related to patterns of discrimination; and (3) violations taking place due to a state's failure to fulfill the minimum core obligations contained in the Covenant, in Audrey Chapman, ‘A “violations approach” for monitoring the International Covenant on Economic, Social and Cultural Rights’, Human Rights Quarterly, Vol. 18, 1996, p. 24.

¹⁹¹ Audrey Chapman, ‘A “violations approach” for monitoring the International Covenant on Economic, Social and Cultural Rights’, HRQ [1996] 37

¹⁹² ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’, HRQ [1998] paras. 16, 22-23

¹⁹³ Ibid supra note 14 639

¹⁹⁴ UNGA, Resolution 56/83, International Law Commission Draft Articles on State Responsibility, 12 December 2001, Article 12.

¹⁹⁵ Id ibid Article 2, Ibid supra note 163 para. 58 and Ibid supra note 192 paras. 14-15

¹⁹⁶ Ibid supra note 192 para. 13

¹⁹⁷ ‘The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’, HRQ [1987] para. 71

¹⁹⁸ Ibid supra note 192 para. 18

loses its meaning¹⁹⁹ and is said to apply irrespective of the availability of resources²⁰⁰. The minimum core of the right to education is to²⁰¹:

- i) Ensure the right of access to public educational institutions and programs on a non-discriminatory basis; to
- ii) Ensure that education conforms to the objectives set out in article 13 (1);
- iii) Provide primary education for all in accordance with article 13 (2) (a);
- iv) Adopt and implement a national educational strategy which includes provision of secondary, higher and fundamental education; and
- v) Ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards” in article 13 (3) and (4).

Scholarship has contributed to these criteria with additional elements of the minimum core²⁰²:

- i) Free compulsory primary education with special facilities for persons with an educational deficit, i.e. people who are faced with an educational deficit, or who would otherwise have no access to education at all, like girls in rural areas, street and working children, displaced people, and people with disabilities.

The CESCR has established that among all the stages and forms of education only the right to free and compulsory primary education is capable of immediate application by judicial and other organs²⁰³ because the terms “compulsory” and “free” are sufficiently precise. In contrast, victims of trafficking are in need of education that replaces primary or lower secondary education –known as education for adults. It has been argued that this kind of education should also be part of the minimum core; however, this argument cannot be sustained because Article 13 (2) (d) does not require fundamental education to be made generally available and accessible.²⁰⁴ Moreover, vocational guidance and training and higher education -so relevant for the victims of trafficking- have been considered a peripheral element of the right to education²⁰⁵ not giving rise to state responsibility.

- ii) Education in the language of one’s own choice.

2. **A failure to take a deliberate, concrete and clearly targeted step** towards realizing the right to education regarding obligations of

¹⁹⁹ Ibid supra note 14 643

²⁰⁰ Fons Coomans, ‘In search for the core content of the right to education’ in Daniel Brand and Sage Russel (eds.), *Exploring the core content of socio-economic rights: South African and international perspectives*, (Protea Book House 2002) 178

²⁰¹ Ibid supra note 163 para. 57

²⁰² Ibid supra note 200 166-178

²⁰³ Ibid supra note 163 para. 5

²⁰⁴ Ibid supra note 14 645

²⁰⁵ Ibid supra note 200 175

immediate effect.²⁰⁶ The example Dieter Beiter uses is Article 14 providing for the design and implementation, within two years, of a detailed plan of action for the progressive implementation of compulsory free primary education.

3. A failure to **promptly remove obstacles** to permit the immediate fulfillment of the right to education. For example, a failure to remove existing legislation that promotes discrimination in education.
4. A **failure to implement the right to education without delay**.
5. **Deliberately retarding or halting the progressive realization** of the right to education or deliberately taking retrogressive measures, unless the state is acting within a limitation permitted. For example it has been argued that a failure to make secondary or higher education progressively free qualifies as a violation of this kind.
6. A **failure to fulfill the obligation to progressively realize** the right to education.

It is worth mentioning that the notion of “minimum core” has been severely criticized. It has been argued that despite the clear advantages of clarity and legal certainty, when human rights monitoring focuses on the minimum border two major drawbacks occur: i) the minimal guarantees are established as the norm, and the minimum limit in practice often becomes a measure for accountability assessed outside of its context; and ii) the minimum core leaves no room for degrees of good and evil because the uniform term ‘violation’ hides the distinctions between more and less serious violations and obscures the differences between good and excellent practices.²⁰⁷ It has also been argued that due to the normative foundations being open to disagreement over competing values, the minimum core will look different to an advocate of human flourishing in comparison with an advocate of basic survival, just as the core will look different in the various shades of survival and dignity; such disagreement has been analyzed through constitutional comparison.²⁰⁸

Moreover, the Constitutional Court of South Africa has openly rejected the “minimum core” doctrine in the emblematic *Grootboom case* regarding the right to adequate housing. The Court gave specific weight to the context in which ESCR rights exist by ruling that it is not possible to determine the minimum threshold without first identifying the needs and opportunities for the enjoyment of the right, which will vary according to factors such as income, employment, availability of land and poverty. Variations ultimately depend on the economic and social history and circumstances of a country. These elements illustrate the complexity of the task of determining a minimum core obligation for the progressive realization of the right.²⁰⁹

²⁰⁶ Ibid supra note 163 para. 43

²⁰⁷ Eva Brems, ‘Human Rights: Minimum and Maximum Perspectives’, HRLR [2009] 350-354

²⁰⁸ Katharine G. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’, YJIL [2008] 138

²⁰⁹ Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19 para .32

Alternatively, the Court introduced the “reasonableness standard” which has been upheld in subsequent cases where the Court ruled that fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context.²¹⁰ The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government program is indeed reasonable.²¹¹

It is notable that the South African Constitutional Court has gone as far as to declare individual responsibility for the right to education in the form of a negative constitutional obligation not to impair the learners’ right to a basic education.²¹²

3.3. Remedy for a violation of the right to education

The right to remedy for violations of human rights is well established in international law²¹³. Effective remedy does not need to be a judicial remedy but could also include administrative remedies provided they are accessible, affordable, timely and effective; judicial appeal of administrative procedures can also serve as a remedy.²¹⁴ While the development of remedies for violations of the right to education is an arid area in the jurisprudence of the human rights international bodies, it has seen some progress in emblematic cases before domestic courts²¹⁵.

The UN Special Rapporteur has established that trafficking is the denial of virtually all human rights, including *inter alia* the right to education”.²¹⁶

²¹⁰ *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28 para. 57

²¹¹ *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28 para. 60

²¹² *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, Case CCT 29/10 [2011] ZACC 13, para. 60.

²¹³ *Ibid supra* note 82 Article 8, *Ibid supra* note 98 Article 2, *Ibid supra* note 163, and *Ibid supra* note 192 paras. 22-23 and the American Convention on Human Rights (22 November 1969 entered into force 18 July 1979) Article 25 (2)

²¹⁴ CESCR, General Comment 9, the domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para. 9

²¹⁵ For example, the 1954 landmark case of *Brown v Board of Education* in which Supreme Court of the United States ruled racial segregation in schools as unconstitutional. Also *Rose v Council for Better Education*, in which the Kentucky Supreme Court declared the state's entire school system unconstitutional thanks to the moral consensus built by a social movement involving local teachers, learners and other ordinary citizens who designed and campaigned for particular standards of educational reform. However, the finding of breaches in ESCR emblematic cases is weak unless harnessed to a practicable and appropriate remedy. Thus, the formulation of creative and participatory remedies is increasingly important and allows courts to formalize standards. This is referred to in the United States as the 'non-court-centric remedy' and in South Africa as 'meaningful engagement' in Doron Isaacs, 'Realising the right to education in South Africa: lessons from the United States of America', *South African Journal on Human Rights* [2010] 356-385

²¹⁶ *Ibid supra* note 93 para. 9

Scholarship has acknowledged that responses to trafficking have been so far “inadequate, incomplete and problematic in human rights terms”²¹⁷ However, it has been argued that should there be any failures in terms of human rights accountability in the Palermo Protocol, the human rights system is there to ensure that violations are properly addressed in terms of state responsibility.²¹⁸

This reasoning is based on the assumption that states having voluntarily obliged themselves to protect human rights contained in the treaties they have ratified, implies the legal obligation to provide adequate reparation for the harm caused by the breach of its international obligations.²¹⁹ Reparation is a generic term that includes all the ways in which a state can redress victims and be held internationally responsible.²²⁰ Reparation that arises from state responsibility over the breach of an international obligation includes: a) restoration of the legal condition enjoyed before the violation; b) fair compensation²²¹; c) rehabilitation; d) satisfaction; and e) guarantees of non-repetition.²²² It is worth noticing that reparation in this sense is dependent on the *locus standi* of the individual in international law. The right of individual petition is a definitive conquest of the international law of human rights and it means the historical rescue of the position of the human being as a subject of international law.²²³

The Inter-American Court on Human Rights has established educational measures as reparation in the form of measures of satisfaction and guarantees of non-repetition. It ruled that the state should comply with its obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special protection that must be provided to children.²²⁴ The Court has further ordered the creation of education programs for all children in detention and of a special education program for affected people; such measures aim at redressing intangible harm by *inter alia* the recognition of the dignity of victims and prevention of the recurrence of violations.²²⁵

²¹⁷ Ibid supra note 59 830

²¹⁸ Ibid supra note 59 840

²¹⁹ I/A Court H.R., Case Velazquez Rodriguez v. Honduras, Reparations and Costs, Judgment of 21 July 1989 para. 25

²²⁰ I/A Court H.R., Blake v. Guatemala, Reparations and Costs, Judgment of 22 January 1999, para. 49

²²¹ It refers to actual damages which comprise material and moral damages, Ibid supra note 219 para. 38

²²² IACHR, Annual Reports 1997 662 in Jo M. Pascualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, (Cambridge University Press 2003)

²²³ Cancado Trindade, *The Access of Individuals to International Justice*, (Oxford University Press 2011) 18

²²⁴ I/A Court H.R., Case Yean and Bosico v. Dominican Republic, Judgment of 8 September 2005 para. 244

²²⁵ I/A Court H.R., Case Instituto de Reeduación del Menor vs. Paraguay, , Judgment of 2 September 2004 paras. 310, 317 and 321

This legal avenue is insufficient in the context of trafficking because it remains silent regarding the quality, the content and the relevance of the education needed by victims.

It has also been argued that victims of trafficking are victims of human rights violations who have an “international legal right to adequate and appropriate remedies”.²²⁶ Under this assumption, states shall ensure that victims of trafficking are given access to effective and appropriate legal remedies²²⁷ by providing them with legal and other material assistance. For this purpose, states should consider²²⁸: a) ensuring an “enforceable right to fair and adequate” criminal, civil or administrative remedies, including the means for as full rehabilitation as possible; b) providing information in a language they understand; and c) enabling victims to remain safely in the country in which the remedy is being sought for the duration of the legal proceedings.

The right to effective remedies is composed of *inter alia* the right to reparation²²⁹ and arises from gross violations of international human rights law. Reparation for harm suffered should be adequate, effective, prompt and proportional to the gravity of the violations and the harm; it aims to promote justice by redressing gross violations.²³⁰ Full and effective reparation includes: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²³¹ Among these measures, compensation is of particular relevance for the present research; compensation should be paid for any economic damage, appropriate and proportional to the gravity of the violation caused by lost opportunities of education *inter alia*.²³² It is relevant that responsibility of private actors for gross violations of human rights has also been elaborated on.²³³

The Palermo Protocol could also be resorted to as a source of remedies because it does provide for: i) measures to provide *inter alia* educational

²²⁶ Office of the High Commissioner on Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking Commentary* (New York, Geneva 2010) 230

²²⁷ *Ibid supra* note 47 Principle 17

²²⁸ *Ibid supra* note 47 Guideline 9

²²⁹ UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law, A/RES/60/147 16 December 2005 para. 11 (d) accessed <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> May 4 2012

²³⁰ *Ibid* para. 15

²³¹ Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition are defined in detail in *Ibid* paras. 19-23

²³² *Ibid* para. 20 (b)

²³³ In this case, states must ensure such party provides reparation to the victim or compensate the state if it has already provided reparation to the victim; establish national programs for reparation and other assistance to victims when private actors are unable or unwilling to meet their obligations; and, enforce valid foreign legal judgments for reparation in accordance with domestic law. See *Ibid*.

and training opportunities, in cooperation with non-governmental organizations and civil society²³⁴; and ii) taking particular account of the special needs of children regarding *inter alia* education.²³⁵ However, the wording of all the provisions regarding victims' protection does not provide a clear content of the obligation, giving discretionary powers of interpretation to state members. For this reason the possibility for clear-cut state responsibility over the violation and over remedies is compromised.

State responsibility could also be argued by resorting to the applicable treaty interpretation rules in the Vienna Convention on the Law of Treaties.

First, the teleological and functional element of Article 31 brings in the principle of effectiveness, according to which a treaty must be interpreted in a way that advances its aims. The preamble to the Protocol states protection of victims as one of the purposes of the treaty. A multi-purpose treaty must be interpreted in a way that all goals are to be taken into account and the option that suits best the grammatical and systemic considerations will prevail.²³⁶

Second, it has been argued that the Palermo Protocol clearly establishes the connection between protection of victims and human rights law.²³⁷ Judge Cançado Trindade has pinpointed the “clear and special emphasis on the element of the object and purpose of the treaty, when it comes to interpretation of human rights treaties”, which is done to ensure that their application provides effective protection of the guaranteed rights. This special nature distinguishes human rights treaties from traditional multilateral ones.”²³⁸ This reasoning is applicable to the Palermo Protocol because victims' protection referred to in the Preamble can only be conceived as a human rights dimension, even though it is a transnational criminal law treaty. In fact, all the rights, obligations or responsibilities regarding international human rights law applied to a state party prior to the Protocol are maintained and not diminished by the Protocol.²³⁹

Finally, good faith is to prevail during the entire process of interpretation, including the application of the treaty by states.²⁴⁰ Under this reasoning, a state could be held responsible for failing to provide educational and training opportunities for victims. However, the issue of the quality and relevance of such educational opportunities remains unsolved.

²³⁴ Ibid supra note 42 Article 6 (3) (d)

²³⁵ Ibid supra note 42 Article 6 (4)

²³⁶ Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer –Verlag 2012) 545-546

²³⁷ Ibid supra note 42 Preamble

²³⁸ Antonio Augusto Cancado Trindade, *International Law for Humankind Towards a New Jus Gentium*, (Martinus Nijhoff Publishers, Leiden Boston 2010) 430-431

²³⁹ Ibid supra note 42 Article 14 and Ibid supra note 47 255

²⁴⁰ Ibid supra note 236 548

Finally, basing his reasoning on the jurisprudence of the Human Rights Committee²⁴¹, Dieter Beiter argues that Article 26 of the International Covenant on Civil and Political Rights -according to which everyone is entitled to equal protection before the law- is an autonomous provision that prohibits discrimination regarding all human rights; as such, it could be relied on in cases affecting ESCR, i.e. the right to education. A proceeding before the Human Rights Committee could be set in motion if the involved state has ratified ICCPR First Optional Protocol.²⁴²The problem with this legal avenue is again that it would also not be informed of the particular educational needs of victims of trafficking.

3.4. Conclusion

The reflection on victims' education brings together three fields of international law: criminal law prosecuting transnational crimes, the rights of victims of human rights violations and specific provisions of economic, social and cultural rights. Together, they do not acknowledge victims' educational needs and consequently establish limited state responsibility on the matter. Not acknowledging victims' educational needs entails failure to comply with the obligation of non-discrimination. For this reason, they do not manage to provide an adequate response to victims' right to education.

Human rights case law has established that state regulation on education may vary in time and place according to the needs and resources of the community and of the individuals²⁴³ but such task remains pending regarding victim's specific needs. The nature and content of the right to education clearly assumes prerequisites that are unattainable for victims is inflexible and puts forward a normalizing discourse. Hence, the right to education needs yet to be adapted in order to accommodate victims' multilayered and complex reality.

Moreover, available legal avenues for establishing state responsibility for violations to victims' right to education are by definition dependant on the scope of the right to education, where states' obligations are created. Such provisions do not acknowledge victims' specific needs. Consequently, victims are deprived from access to hold the state accountable and demand the kind of education they need.

Finally, provisions on remedies for victims and on the right to education as a remedy also fail to tackle in a legally binding fashion education quality and adequacy and for this reason, are not useful to tackle the barriers victims face to access education, as a matter of structural injustice.

²⁴¹ F.H. Zwaan-de Vries v. the Netherlands, HRC, Communication No. 182/1984, 09/04/1987, and UN Doc. CCPR/C/29/D/182/1984 and S.W.M. Broeks v. The Netherlands, HRC, Communication No. 172/1984, 09/04/1987, UN Doc. CCPR/C/29/D/172/1984 where it was held that article 26 can be relied on to protect equality in the right to social security.

²⁴² Ibid supra note 14 407

²⁴³ *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium* [Merits], no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR, 23 July 1968 5

4 Victims of trafficking and their right to education in Ecuador

Chapter 2 and 3 explained how the counter-trafficking regime and the right to education as stated in international law do not explicitly acknowledge victims of trafficking as different and thus fail to establish state responsibility for guaranteeing their right to education.

Chapter 4 presents first the Ecuadorian domestic trafficking legal framework. It further analyzes how the points raised by the theoretical critiques to the international legal framework, presented in section 2.2, are also relevant in the Ecuadorian context.

Second, Chapter 4 explains why and how individual and organizational local actors have proactively managed to establish the Flexible Education Program for victims of trafficking, despite of the inadequacies found in the right to education nature scope and the legal avenues to enforce it. The program adequately accommodates victim's differences, provides them with relevant education and plays a central role in their empowerment by tackling the five educational barriers victims face to access to education, namely: i) the hierarchical nature of the education system; ii) the inflexible and inadequate curricula; iii) rejection and stigmatization by fellow students and teachers; iv) vocational training as the only realistic option; and v) their immediate need of an income. These barriers were proved to constitute structural injustice in section 1.3.1. For this reason, special emphasis will be placed on the role of individual and organizational local actors in taking responsibility for structural injustice, in a situation where state responsibility should be the one providing adequate answers.

4.1. Trafficking in the Ecuadorian legal framework

The Ecuadorian Constitution aligns with Hathaway's argument that considers slavery as a more suitable legal framework to assess exploitation²⁴⁴. The prohibition of trafficking together with the prohibition of slavery is included in the provision on individual freedom.²⁴⁵ Nonetheless, trafficking is prosecuted as a criminal offence in Ecuador. To do so, the criminal code in order to prosecute trafficking as a criminal offence in 2005.²⁴⁶ The definition given in the Palermo Protocol -copied and pasted into the domestic criminal legislation- has allowed for the prosecution of conducts that were being inadequately addressed as sexual offences or not prosecuted at all, but rather understood as a case of

²⁴⁴ For an elaborated argument on this point see James C. Hathaway, 'The Human Rights Quagmire of Human Trafficking', VA. J. INT'L. L. [2008]

²⁴⁵ Ibid supra note 1 Article 66(29)

²⁴⁶ Reform Act to the Criminal Code that criminalizes offenses related to sexual exploitations of children (entered into force 23 June 2005) Official Registry No. 45, Chapter on trafficking in persons-related crimes. Non-official translation by the author.

“misbehaving women”. Moreover, before the Palermo Protocol the domestic courts had not even understood poor labor conditions as exploitation.²⁴⁷

It has been argued that the definition of trafficking in the Palermo Protocol is not appropriate for use in domestic criminal codes because it contains too many elements that place heavy burden of proof on prosecutors; in addition, the ambiguous language poses legal challenges for defendants.²⁴⁸ In Ecuador the criminal has corrected this ambiguities establishing that:

- **Exploitation** encompasses all forms of forced labor or services, slavery work, sale and use of people for forced begging, recruitment of people for participation in armed conflicts or commission of minor offenses. It is worth noticing that the last three activities are not found in the Palermo Protocol and their inclusion in domestic legislation obeys to specific problematic realities in Ecuador, including: a) the common practice in the rural Andes region to force children to beg in urban areas as an income generating activity for their families²⁴⁹; b) social conflicts in the northern-border areas where Colombian guerrillas and drug dealers are suspected of recruiting Ecuadorian children and youth. Endemic poverty and historic social exclusion in Ecuador also surely contribute to people being more vulnerable to this form of exploitation.
- The **sanction** established is 6 to 35 years of imprisonment. The maximum penalty of 35 years is foreseen for cases where the victim is either particularly vulnerable *vis-à-vis* the aggressor, is affected in his or her physical and psychological integrity, or is a child or an elderly person.
- The victim's **consent** is irrelevant in all cases and is not just limited to children and adolescents as required by the Palermo Protocol.
- The intention to profit is not required by the *means rea* of trafficking.
- The following offences were created under the status of **trafficking-related crimes**: a) human trafficking and sexual exploitation are separate crimes differentiated by the element of “transfer”; b) the removal of organs is also established as an independent crime that includes trafficking, marketing, transportation, sale and purchase of organs; c) purchase or contract of sex tourism services and child pornography are also established as independent criminal offences; the later sanctions operators but not customers or people in possession of child pornography.²⁵⁰

²⁴⁷ Ibid supra note 9

²⁴⁸ Ann D. Jordan, *The Annotated Guide to the complete UN Trafficking Protocol*, (International Human Rights Law Group 2002) 7

²⁴⁹ It is estimated that 1500 children are forced to beg in the streets of the three main cities in Ecuador: Quito, Guayaquil and Cuenca in Ministry for Economic and Social Inclusion, National Institute for Children and Family, *Eradication of child begging in Ecuador* <http://dadignidad.gob.ec/mendicidad-ecuador/> accessed 4 May 2012. Non-official translation by the author.

²⁵⁰ Ibid supra note 246

- Finally, any media that instigates trafficking can be sanctioned with fines as high as 20,000USD imposed on the legal representatives. The products and means used to commit the crime can be confiscated.

In 2004 the fight against human trafficking was declared as a priority policy of the state by the government.²⁵¹ As a result, the National Plan to Combat Human Trafficking, prepared as an inter-agency effort, was approved in 2006.²⁵² The National Plan mirrors the counter-trafficking strategy established in the Palermo Protocol: prevention, persecution, and protection of victims. The Plan establishes the state is responsible for the respect and full observance of human rights of all citizens, and for that purpose it must: a) protect the rights of individuals to exercise their human rights; b) Investigate alleged violations of human rights; c) punish the perpetrators of human rights; d) provide effective remedies to victims of human rights violations; e) provide timely and comprehensive reparation for the victims. For this reason, the following principles guide the implementation of the National Plan:

- Equality before the law, evidenced in the practice of all processes
- Non-discrimination.
- The best interest of the child that imposes upon the state a duty to adjust its decisions and actions for compliance.
- Children-focused public policies formulation and implementation and budget allocation.
- Groups of individuals and individuals' free and democratic participation in discussion and design of proposals and policies.²⁵³

By 2009, only four years after the criminal reforms the prosecution had achieved 18 convictions in total, 10 in Pichincha province and 8 in El Oro province. Direct assistance services for victims of trafficking have been provided by NGOs who have previous extensive experience in the field of sexual exploitation.²⁵⁴

Financial resources allocated for assistance to victims of trafficking in Ecuador are substantial. For example, in September 2007, Ecuador received non-reimbursable funds for 300.000 USD from the United States government to combat trafficking.²⁵⁵ In January 2010, Ecuador again

²⁵¹ Executive Decree 1981, Official Registry No. 410 31 August 2004. Non-official translation by the author.

²⁵² National Plan to combat human trafficking, smuggling of migrants, sexual, labor and other forms of exploitation, and prostitution of women, children and adolescents, child pornography and corruption of minors, Official Registry No. 385 12 October 2006. Non-official translation by the author.

²⁵³ Id *ibid*.

²⁵⁴ Ministry of Foreign Affairs, Commerce and Integration of Ecuador, Report on counter-trafficking initiatives presented by Ecuador to the United States of America State Department in 2007 and 2008. Non-official translation by the author.

²⁵⁵ Ministry of Foreign Affairs, Commerce and Integration of Ecuador, Press Bulletin No. 733, Ecuador signs agreements with the United States of America, 7 September 2007

received non-reimbursable funds from the United States for 300.000 USD to combat trafficking in persons.²⁵⁶ This has contributed to at least 450 victims of trafficking being rescued and provided with direct assistance services, from March 2006 to December 2011.²⁵⁷

The Government has officially reported that²⁵⁸:

- The National Plan was updated in December 2010 in order to re-orient its focus towards four areas: prevention, punishment, reparation and international cooperation.
- The Ministry of the Interior set up a unit to combat trafficking in persons and the smuggling of migrants and the judicial police created a special anti-trafficking unit in 2011.
- The National Council for Children and Adolescents monitors and processes complaints and organizes training for communities, schools, judiciary staff and other government agencies nationwide.
- The Army and the Police in the northern-border are being continuously trained in order to foster prevention, monitoring and control of forced recruitment of people into military organizations.
- The Ministry of Tourism regulates and undertakes awareness-raising activities with the tourism and business sectors.
- Jointly with civil society, the government has prepared: i) road maps and unified victim assistance protocols, to avoid overlaps in investigations and duplicity of efforts; ii) a manual on procedures to monitor the commercial sexual exploitation of children and adolescents; and iii) a briefing document on the use of indicators in legal proceedings to identify trafficking of children and adolescents.

4.2. Trafficking in Ecuador under review

4.2.1. Trafficking: a development issue

Ecuador is an economy heavily dependent on production and export of primary products -i.e. oil, bananas, flowers, shrimps- and remittances from

available at <http://www.mmree.gob.ec/mre/documentos/novedades/boletines/ano2007/septiembre/bol733.htm> accessed 4 May 2012. Non-official translation by the author.

²⁵⁶ Embassy of the United States of America in Ecuador, Press Bulletin ‘Us Government signs USD 16.2 million cooperation agreements with Ecuadorian Government’ 6 January 2010 available at http://spanish.ecuador.usembassy.gov/latest_embassy_news/press-release/pr_01060110.html accessed 4 May 2012. Non-official translation by the author.

²⁵⁷ Ibid supra note 9. Doctor Supliguicha reported that the Program she coordinated operates mainly in Quito, the capital, and that there are other organizations providing direct assistance services in Machala, Cuenca and Lago Agrio. Non-official translation by the author.

²⁵⁸ UN HRC, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Ecuador, A/HRC/WG.6/13/ECU/1, 8 March 2012, paras. 87-93

migrants. The current government has sought to diversify the production base and its external markets and has sought to include the rural and poorer sectors in this process. Public investment in roads, airports and electricity as well as in the social field has resulted in high economic growth.

As it is common in developing economies, gender inequality, lack of access to jobs, education and housing, the inequalities between rural and urban areas are endemic problems in Ecuador, and for its neighbors.

As it was elaborated on in section 4.1 there is no reference to the structural inequalities and underlying cultural understandings from which human trafficking arises in the public policy contained in the National Plan to Combat Human Trafficking nor in the criminal legislation –the recent reforms to the Criminal Code-. The trafficking discourse has silenced debates about individuals’ right to economic, social, cultural and political development and the correlated states’ primary responsibility to create favorable conditions for the realization of such development.

4.2.1. Trafficking: a human rights violation

Ecuador adopted a human rights approach in the trafficking discourse through the principles guiding the Counter-Trafficking National Plan. Despite the political emphasis on human rights, implementation of the plan has been trusted to the Ministry of Interior, a branch of the Ministry for Coordination of Security. Moreover, it has been argued that the government lacks the capacity to take these principles in practice. Direct assistance service providers in Ecuador report that government institutions involved in counter-trafficking struggle to find common strategies and paths and as a result there is no single institution in charge of the implementation and monitoring of nationwide initiatives.²⁵⁹

It was argued in section 4.5.2 that the shortcoming of the human-rights approach is victimization of those affected by trafficking. Other interest groups in Ecuador prefer to resist the victim-based approach. In contrast to the victimhood-based protection declared in the National Plan, organized sex workers’ in Ecuador, for example, have long advocated for positioning prostitution as a problem rooted in the way society treats women. Furthermore, they argue that society treats prostitution hypocritically, in an attempt to eradicate the perception that exploitation is caused by the women prostitutes. Their cause is one of the oldest in the region and became more visible as early as 1984, when organized sex workers gained national attention by striking against those who profited from their work; they forced brothels to close down during a few days and demanded that those who benefited from their work stop exploiting them.²⁶⁰

It was argued in section 2.7 that the trafficking framework presents victims as one-dimensional victimized figures with little agency over their destiny.

²⁵⁹ Ibid supra note 22

²⁶⁰ Angelita Abad et al, ‘The Association of Autonomous Women Workers, Ecuador: “22nd June”’ in Kamala Kempadoo and Jo Doezema (eds.) *Global Sex Workers Rights, Resistance and Redefinition*, Routledge 1998, p. 175.

This lack of agency is challenged in Ecuador by the migrants –understood under the security paradigm discussed in section 4.6 as risky beings- and by the professionals involved in provision of direct assistance services.

First, Ecuadorian migrants in Europe have demonstrated that they are first and foremost active agents making rational decisions over what they consider is best for them. Until May 2010, of the approximately 500,000 unemployed migrants in Spain, only 3,400 Ecuadorians joined the voluntary return program offered by the Spanish government. Moreover, the Ecuadorian government set in place the program “Cucayo” seeking the return of migrants through the provision of seed capital to start businesses in Ecuador. Only 2,643 returned migrants applied to benefit from the program and only to 273 actually benefited from it, from 2007 to May 2010.²⁶¹ Despite the governmental efforts to promote return, Ecuadorians have resorted either to a family based strategy of multi jobs or to seek help from relatives in Ecuador -causing in some cases remittances to go in the opposite direction. Regularized migrants who have obtained double nationality chose to re-migrate to third countries, such as the UK where the Ecuadorian community has grown considerably.²⁶² These figures speak of active individuals in control of their destiny and not of risky beings in need of protection.

Second, direct assistance services providers in Quito report that the core of the work they do with victims is strengthening and fostering their personal skills, capabilities and ultimately their inner selves. Hence, the psychological, medical and social services they provide are designed to depart from and end at the human being they are dealing with.²⁶³

4.2.2. Trafficking, migration: a security concern

Ecuador experiences extensive migration both to and from its borders. In this context, the securitization of migration by developed countries has the potential to generate negative impacts for Ecuadorians who migrate and for foreigners who migrate into Ecuador in search of better opportunities.

On one hand, the number of registered Ecuadorians in Spain has increased dramatically over the last 50 years, from 4721 before 1961 to 113.253 in 2000.²⁶⁴ According to information updated to July 2007, 1'571.450 Ecuadorians have migrated in total. 48.6% of Ecuadorian migrants were in Spain in 2008, 28.2% in the U.S. and 8% in Italy.²⁶⁵ As it can be expected, remittances to Ecuador amounted USD 21'078.444 between 2000 and 2010,

²⁶¹ Jacques Ramirez, *With or without passport: anthropological analysis of Ecuadorian migration*, (National Institute of High Studies 2010) 46. Title translated by the author

²⁶² Ibid 47

²⁶³ Ibid supra note 9

²⁶⁴ **Before 1961:** 4721 Ecuadorians in Spain **1961-1970:** 8635 **1971-1980:** 15437 **1981-1990:** 8491 **1991-2000:** 113.253. National Institute for Statistics of Spain 2006 in Ibid supra note 261 3

²⁶⁵ National Institute for Statistics and Census, 2008.

five times more than in the previous decade.²⁶⁶In contrast with Mexico and Central America, where migration is predominantly male, female migration in Ecuador is as high, or slightly higher than male migration.²⁶⁷

On the other hand, it is important that immigration into Ecuador has increased progressively since 2005. Immigration from Peru and Colombia has increased in the recent years, amounting to 75% of all the people who came into Ecuador between 2000 and 2007.²⁶⁸It has been argued that this is due to Ecuador's dollarized economy that is attractive for unskilled workers, its position as a world famous tourism destination but also an effect of the free mobility constitutional provision. However, since the constitutional reform in 2008, there has been an increase in immigrants from Pakistan, Bangladesh and Nepal -among others- arriving to Ecuador and being identified to be on their way to irregularly arrive to the United States. In order to prevent the advantages provided by human mobility to be used to commit crimes²⁶⁹, Ecuador implemented a visa system for migrants from Afghanistan, Bangladesh, Eritrea, Ethiopia, Kenya, Nepal, Nigeria, Pakistan and Somalia²⁷⁰. However, the above shows that Ecuador has become an important destination and departure point for a high number of migrants. This context analyzed from a critical perspective allows to suspect that the large donations from the US to Ecuador for counter trafficking may not be purely philanthropic.

Counter-trafficking initiatives being used to mask anti-migration policies poses two major drawbacks. First, the more fundamental discussion on inequalities –both within Ecuador and between Ecuador and developed countries- is silenced; as a result, financial resources, political efforts and public attention is deviated from wrongs in the broader paradigm of power towards an isolated crime presented as horrid. Second, the migratory process -of Ecuadorians abroad and foreigners into Ecuador- seeking better conditions is sabotaged: the people described in the previous paragraphs are put at higher risk of exploitation as they exhaust all opportunities to migrate, and their families are deprived from the income migrants send back home.

When migration is approached as a protection of national security issue and trafficking is approached as an isolated crime, irregular migrant workers and victims of trafficking are not considered rights-bearing individuals. Thus, as was discussed in section 2.6 that trafficking as a security issue limits the

²⁶⁶ Source Central Bank of Ecuador in Ibid supra note 261 47

²⁶⁷ Ibid supra note 261 26

²⁶⁸ Ibid supra note 261 27

²⁶⁹ Ministry of Foreign Affairs, Commerce and Integration of Ecuador, Press Bulletin No. 623 Ecuador requires visa to citizens of 9 countries, 6 September 2010, available at <http://www.mmree.gob.ec/2010/bol623.asp> accessed 4 May 2012. Title translated by the author.

²⁷⁰ Ministry of Foreign Affairs, Commerce and Integration of Ecuador, Ministerial Agreement No. 105, <http://www.mmree.gob.ec/2010/acuerdo.pdf> accessed 4 May 2012. Title translated by the author.

legal channels for migrant workers in need of access to employment opportunities in destination countries.

In Ecuador, individual and organizational local actors working in the field with victims of trafficking report that despite promoting a human rights approach in the political discourse, the Ecuadorian government has implemented a security approach to dealing with trafficking in practice. For example, more attention, resources and efforts have been allocated to patrolling the northern-border with Colombia than to providing a human rights based response to the Colombian victims of trafficking for sexual exploitation purposes and economic migrants.²⁷¹

Moreover, the tendency to approach trafficking as a security issue can be noted between the lines of a recent proposal for the creation of an Ecuador-Peru bi-national group against trafficking. The bi-national group would develop and strategically address policy and operational prevention, investigation and prosecution against trafficking as well as assistance for and protection of victims in the area around the border.²⁷²

4.2.1. Trafficking: sexual exploitation and sex work

The attitude towards immigration is not homogeneous in Ecuador. On one hand, there is an inclusive and progressive vision framed in the notion of "universal citizenship" –contained in the Constitution approved in 2008- and the ideal of Latin American integration. On the other hand, the Colombian internal conflict has resulted in high numbers of migrants moving to Ecuador, and has negatively influenced the perceptions and policies towards migrants from Colombia, as well as Peru. Consequently, migrants and asylum seekers are linked with increasing unemployment, drug trafficking, crime and the expansion of armed groups. The latter puts pressure for further measures to protect homeland security and the national workforce.²⁷³

As asserted by Ruiz, immigration laws and procedures are thought to have contributed notably to the construction and reproduction of *-inter alia-* identities, norms and sexual categories, which are then used to regulate the admission and exclusion of certain groups of migrants. In fact, migrant sex workers are one of the groups defined as a "threat" to the nation, and excluded, overtly or subtly, through laws and immigration procedures unless they are 'victims' of trafficking. This is exemplified by the way migrants' rights organizations deal with migrant sex workers: migrant sex

²⁷¹ Ibid supra note 9

²⁷² Conclusions of the Ecuador-Peru Bi-national workshop "Towards Better Joint strategies to address trafficking in persons - Forging Alliances", 28 March 2012, in Press release "Ecuador and Peru allies against trafficking with the support of Canada and UNODC" available at <http://www.unodc.org/peruandecuador/es/ecuador-y-peru-aliados-contra-la-trata-de-personas-con-el-apoyo-de-canada-y-unodc.html> accessed 4 May 2012. Non-official translation by the author. Underlined added by the author.

²⁷³ Ibid supra note 127 6

workers are either invisible, only made visible to draw differences between "good" and "bad" migrants, or upheld as "victims" of human trafficking.²⁷⁴

4.3. Education for victims of trafficking in Ecuador

This section aims to provide an analytical answer to the question: how and why is state responsibility for victims' right to education being exercised by individual and organizational local actors? To do so, this section follows two methodological steps. First, the analysis will touch upon the *de facto* shift of state responsibility to individual responsibility for victims' right to education. Second, the Flexible Education Program for victims of trafficking will in connection with individuals' motivations to get involved in this initiative.

4.3.1. State responsibility shifts to individual responsibility

According to international human rights law, Ecuador should be fulfilling its international duty to respect, protect and fulfill victims' right to education. However, the government does not touch upon this topic in its official reports on its counter-trafficking efforts²⁷⁵. In contrast, this research has found that individual and organizational local actors are taking over this responsibility by undertaking a tailor-made accelerated education program for victims of trafficking. This means that individuals are overtaking state responsibility for the right to education in order to meet the demands of their community: it is clear that state responsibility for human rights a *de facto* shifts to individual responsibility.

Section 1.3.1 sufficiently argued for victims' unmet educational needs as a matter of structural injustice. For this reason, this section resorts to philosopher Iris Marion Young's theory of responsibility for justice and social connection model to explain the *de facto* shift of responsibility for the right to education. Young's theory does not have the unmet educational needs of victims of trafficking in mind. She illustrates her theory by resorting to the exploitation at sweatshops²⁷⁶ and the lack of adequate and affordable housing in the United States²⁷⁷.

Young explains her social connection model features by contrasting it with the classic liability model.

²⁷⁴ Ibid supra note 127 8 and 15

²⁷⁵ Ibid supra note 258 paras. 87-93

²⁷⁶ Ibid supra note 24

²⁷⁷ Ibid supra note 17 Chapter 2

Liability Model ²⁷⁸	Social Connection Model ²⁷⁹
Purpose: to sanction, punish or secure compensation or redress for a past action because it is derived from legal reasoning.	Purpose: to lead the actors participating in ongoing structural injustice processes into collective action to change them.
Responsibility derives from a proved direct causal link between the harm caused and the individual's intended or not action or omission	Responsibility derives from : a) "Belonging together with others in a system of interdependent processes of cooperation and competition through which individuals seek benefits and aim to realize projects. b) Participation in the diverse institutional processes that produce structural injustice"
One isolated individual involved in one action .	"Individuals bear responsibility for structural injustice because they contribute by their actions to the processes that produce unjust outcomes." It is not possible to establish responsibility regarding one specific outcome because harmful outcomes, structural injustices cannot be traced back to any particular contributor. Presumably no one intends the outcome and moreover many may regret it.
The harm caused is a wrong understood as morally and legally unacceptable deviation from a background structure considered as normal.	The harm caused is understood as structural injustice . It questions the background conditions to which production and reproduction most of us contribute to in a greater or lesser degree by following the accepted and expected rules and conventions regarded as normal.
The harm caused is a specific wrong that is finished in time .	Responsibility established regarding ongoing processes or institutions that are likely to continue producing harms unless there are interventions in them.
Individual responsibility	Shared responsibility lies in the fact that everyone participates in the structural processes that result in injustice. Consequently, everyone share the responsibility to transform in order to reduce or eliminate the injustice they cause. Shared responsibility is a personal responsibility for the consequences or risks of harmful outcomes caused by a group of persons. However, it cannot be isolated and identified.
Has developed clear rules of evidence devised to: i) demonstrate the causal link between the individual and the harm caused, and ii) evaluate the intentions, motives, consequences of the actions iii) establish the degree of responsibility of the individual as aider and abettor, accomplice, etc.	Parameters of reasoning guide actors on how to take action to try to undermine injustice, according to the position they are in. These are: i) power ii) privilege iii) interest iv) collective ability
Language of blame impedes action that will end in collective action . Fosters a spirit of resentment, produces defensiveness or focuses people more on themselves than on the social relations they should be trying to change.	Responsibility can only be discharged collectively because the unjust processes it seeks to change can only be altered when many actors from diverse positions within the social structures work together.
Language of blame that divides people between the wrongdoers and the innocent , whether as victims or as bystanders.	Intends to develop a public understanding of the many actors, actions practices that result in injustice.
Oversimplifies the causes of injustice, renders people passive or unable to help remedy the problem. Improperly inflates the power of some actors and ignores that of many others, for example, the role of victims.	Victims of injustice are called to share with others the responsibility to engage in transforming the structures that victimized them capitalizing on their unique understanding of the problem.
Isolated wrong that caused harm in a specific place .	Global social and economic processes bring individuals and institutions into ongoing structural connection with one another across national jurisdictions . Calls for solidarity understood as a relationship among separate and dissimilar actors who decide to stand together and take up shared responsibility to make the social institutions and practices they enact and support just.

²⁷⁸ Ibid supra note 24 121 and Ibid supra note 17 107, 114 and 116-117.

²⁷⁹ Ibid supra note 24 119, 122 and 130 and Ibid supra note 24 100, 107, 116, 120-121.

As it can be seen in the table, the social connection model is a mechanism to establish responsibility for structural injustice. By connecting different but interrelated actors whose actions are part of an extensive system of structural processes, it attempts to help the general claims for social justice make sense²⁸⁰. The overall purpose is to correspond to the intuition that those who participate by their actions in the structural processes that produce injustice bear some responsibility for correcting this injustice.²⁸¹ Establishing such responsibility requires a broader understanding of the complex interaction among the many actors involved and how this produces outcomes that many consider unjust.²⁸²

Responsibility is different in kind and not in degree and should not be understood as an attenuated form of responsibility as complicity, as understood in the liability model.²⁸³

It is worth noticing that Young does not intend to replace the liability model with the social connection model. She understands them as complementary. The liability model, she argues, is insufficient to establish responsibility where the actions of particular persons contribute indirectly, collectively and cumulatively through the production of structural constraints on the actions of many and privileged opportunities for some. In contrast, the social connection model helps to build an account of how macro-social processes encourage the wrongs of individual actors and understand why they are widespread and repeated.²⁸⁴

Young's social connection model can be understood as ultimately fostering a bottom-up approach to meaningful upholding of human rights. This is precisely what local actors in Ecuador are doing: upholding victims' right to education by implementing the Flexible Education Program they designed in order to meet victims' needs.

4.3.2. The Flexible Education Program in Ecuador

An education better suited for victims of trafficking would be guided by norms that promote equal respect or facilitate inclusive social cooperation, or further the particular mission of education without entailing disrespect or systematic disadvantage for them.²⁸⁵ Following this line of thought, individual and organizational local actors in Ecuador set victims' meaningful empowerment as their ultimate goal. They aim to strengthen victims' voice about their own needs.

It is pivotal for this research at this point to know what victims and their families in Ecuador think and expect from education. When interviewed

²⁸⁰ Ibid supra note 24 116

²⁸¹ Ibid supra note 24 125

²⁸² Ibid supra note 17 108

²⁸³ Ibid supra note 17 104

²⁸⁴ Ibid supra note 24 115

²⁸⁵ This is an applied reasoning to trafficking of the more general reflections by Young on structural injustice in Ibid supra note 24 98

about this topic, victims and their families expressed that relevant education for them must²⁸⁶:

- Suit the work schedule of the family;
- Include sports, music and recreational activities;
- Be free of charge, mainly because economic hardship might have been one of the factors triggering trafficking in the first place;
- Be provided close to home or the transport costs must be covered;
- Be non-hierarchical in nature;
- Bring out children's personal skills;
- Provide them with opportunities to participate in public activities using the knowledge they have acquired;
- Provide opportunities to talk to teachers;
- Help them love the process of learning and not only focus on the final result; and
- Help them look good and feel good about themselves without changing their personal beliefs.

It is worth noting that on one hand, international standards in soft-law do call for flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural contexts²⁸⁷ and for coherent interaction among all the actors concerned, including civil society.²⁸⁸ On the other hand, NGOs providing direct education for victims of trafficking do not use international law and international human rights law as a frame of reference; thus, international law has no influence over the design or implementation of the Flexible Education Program.²⁸⁹

The Flexible Education Program²⁹⁰ currently providing education to victims of trafficking was developed as a response to the abovementioned victims' demands. The Program was originally devised as a tool to eradicate indigenous child labor in the Andean rural region of Ecuador in 2003. Child labor had not been identified as a serious issue, nor discussed or debated, but a deeper analysis of the problem led to detect a serious problem: 500,000 indigenous children between 9-18 years presented a severe gap between their chronological age and their education level. The initiative has evolved into an inclusive education program in order to respond to all children and adolescents outside the formal education system. This includes victims of trafficking and children on the northern border who are at risk of being involved in criminal activities.

The program challenges the notion of progressive –and long term– realization of the right to education. Departing from a pragmatic hands-on point of view, the creators of the program believe in solutions right here,

²⁸⁶ Ibid supra note 9

²⁸⁷ The Committee encourages “alternative” educational programs, which parallel regular secondary school systems Ibid supra note 12 para. 12-13.

²⁸⁸ Ibid supra note 163 para. 60

²⁸⁹ Ibid supra note 22

²⁹⁰ Ibid supra note 22

right now. Hence, their work focuses on facilitating students' reintegration to education as soon as possible.

Accelerated education exists theoretically in the education literature.²⁹¹ The real challenge is to implement it successfully for individuals who have suffered violent upheavals that disrupted the normal stages of personal maturation and the consolidation of skills and abilities. These issues are taken into account, evaluated and integrated into the program to reduce the chances that students will exit the education system once again. Hence the Flexible Education Program was conceived as a process that combines several elements in order to respond to victims needs: shortest time possible, adequate psychological learning strategies and an educational environment that helps students overcome their difficult experiences. The program consists of the following elements:

1. A preliminary phase during which students' situation is assessed: their level of maturity, what they know, what they remember from the schooling they have received. From this point, students can begin a process of re-training, and re-socialization to help them become more self-aware. This stage is always successful because the qualitative evaluation highlights progress, strengths and weaknesses. Moreover, students' self-esteem and confidence is built so that they can continue successfully to the next stage.
2. A tailor made curricula that considers the available time students have: a successful new mechanism that consists of one-week micro-curricular units. Under this system, which emphasizes participation in class, the student and the teacher can see their achievements immediately and correct, provide feedback or strengthen certain weaknesses. One step at a time, teacher and student progress more effectively because they see results rapidly, which helps re-build self-esteem. This curriculum has been certified by the Ministry of Education and is homologous to the education received by any other student in the traditional educational system.²⁹²
3. Continuously trained staff and specifically designed materials support the whole process.

The methodology applied in the classroom is called experiential learning and consists of: 'experience, reflection, conceptualization and implementation'. This strategy implements elements of humanism and constructivist learning. The objective is the recovery of the human being so she or he is able to re-establish a life plan. For this purpose, a team composed of the following professionals supports the teacher:

- a. Pedagogical mediator; who has an advisory role and provides direct support in the methodological process.
- b. Local technician: ensures that surrounding conditions provide the best possible environment for the student to learn. Monitors attendance and

²⁹¹ Henry M. Levin, 'Accelerated Schools: A Decade of Evolution' in M. Fullan *Fundamental Change* (Springer 2005) 137-160

²⁹² Ministry of Education of Ecuador, Ministerial Agreement No. 482, 10 December 2008. Title translated by the author.

when anomalies are identified, immediately undertakes home visits to investigate the reasons for absence and works through them with students' families.

c. General Coordinator: manages the entire process in a specific geographic area.

The Flexible Education Program goes beyond the educational system and becomes part of a special protection system for vulnerable groups. In order to respect students' rights and their need to socialize, it is not appropriate to implement a parallel education program. Hence, the program is implemented at public schools premises. Adequate follow-up and support makes the difference for victims of trafficking. Under these conditions, victims of trafficking are regular students again, but trained professionals accompany their personal development processes within their family and community.

Individual and organizational actors in charge of this initiative reports not to be familiarized with the international law framework on trafficking or with the applicable international human rights law. However, they affirm that the Flexible Education Program is duly informed by the HRBA, and was designed as a strategy to achieve meaningful reparation for human rights violations. The Program is framed within the applicable constitutional provisions on the rights of victims of trafficking²⁹³ and the right to education²⁹⁴.

It is worth noting that on one hand, international standards in soft-law do call for flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural contexts²⁹⁵ and for coherent interaction among all the actors concerned, including civil society.²⁹⁶ On the other hand, NGOs providing direct education for victims of trafficking do not use international law and international human rights law as a frame of reference; thus, international law has no influence over the design or implementation of the Flexible Education Program.²⁹⁷

The Flexible Education Program does not run free of complications. One of the obstacles is the lack of available resources. On one hand, victims' education is not a priority for the international cooperation. On the other hand, the government finds the Program expensive due to the specialized and trained personnel it requires. On this point, local actors argue that the Program is less expensive than regular education because the dropout rate is low and consequently the government ends up paying only once for each student.

²⁹³ Ibid supra note 1 Articles 35 and 66 (3) (b) and (29) (b)

²⁹⁴ Ibid supra note 1 Articles 26-29, 343-345 and 347-349

²⁹⁵ The Committee encourages "alternative" educational programs, which parallel regular secondary school systems. Ibid supra note 12 para. 12-13

²⁹⁶ Ibid supra note 163 para. 60

²⁹⁷ Ibid supra note 22

In addition, the high number of children not attending and falling behind in school was not in the public debate; the reasons why children drop out of school were not properly understood either. Mismatched perceptions regarding children out of school led people to believe that the Flexible Education Program was created as a system for “lazy” students, thus undermining its value. Fortunately, the Flexible Education Program did have to undergo a strict evaluation process during which it was possible to prove its worth.

Adequate oversight by the government remains a challenge. There are doubts about the government’s capability to manage the many elements of the Program. In particular, there is justified hesitation regarding the strict nature of the regular education system as opposed to the flexibility that victims’ education requires.

Notwithstanding obstacles and challenges, the positive results are clear. First, the Flexible Education Program has had positive effects on local public policy in Quito. The Municipality has accepted and implemented the program not only as an education initiative but also as a strategy to provide special protection and assistance to a vulnerable group. Second, the Program has proved that when children who have dropped out of school are properly motivated, supported and understood, they are capable of impressive efforts to remain in school. Third, the Program has proved that its strategy is capable of re-programming victims’ skills and abilities while fostering real changes in teachers’ ethics at the same time. Such should be the effects of the right to education in real people’s life yet they are being achieved through individuals’ agency out of care for what their communities need. International human rights law plays little or no role.

It is worth remembering at this point, that the barriers victims face to access to education are understood as structural injustice by this research. Following this line of thought, it is necessary to analyze the role individual and organization actors in charge of the Flexible Education Program have played in eliminating such barriers under the light of Young’s theory of justice.

Young argues that all the agents who contribute to the structural processes that produce injustice share responsibility for remedying that injustice. This is because the connections among them bring obligations of justice over both global and local processes. Because responsibility in these terms seems too enormous, it is important to understand the conceptual difference between responsibility and duty: taking responsibility involves exercising discretion, which means it is up to each agent to decide what to do to discharge responsibility for injustices. Responsibility is more open and discretionary than duty.²⁹⁸ In this context, agents need some guidance in reasoning about how to take action to undermine injustice. For this purpose, Young presents her “parameters of reasoning” about individual and

²⁹⁸ Moreover, Young argues, “We should not be blamed or found at fault for what we do to try to rectify injustice, even if we do not succeed. (...) We can and should be criticized for not taking action, not taking enough action, taking ineffective action, or taking action that is counterproductive. We also have a right and an obligation to criticize the others with whom we share responsibility.” in *Ibid supra* note 17 143-144.

organizational action regarding structural injustice: i) power; ii) privilege; iii) interest; and iv) collective ability.

Young's assertions are apparent in the case of local individual and organizational actors guaranteeing victims' right to education in Ecuador. First, their self-motivated and joint action to set up the Flexible Education Program shows that they feel responsible for providing an adequate answer to a structural injustice in their community, namely the barriers victims face to access to education. Second, it is clear that they exercised a fair amount of discretion when setting up the Program's objectives and means. For instance, displaying their own good judgment, they chose the relevant constitutional provisions as their legal framework, they designed the program according to the specific victims' needs and they decided to keep the local government duly involved. Third, individual and organizational local actors' actions reflect almost exactly Young's "parameters of reasoning":

i) Power

Agents' position in structural processes usually carries a degree of potential or actual power or influence over such processes; when individuals or organizations do not have sufficient power, they should focus on where they have greater capacity to influence structural processes.²⁹⁹ Individual and organizational local actors in Ecuador have little power over the structural process that cause trafficking as well as over the weaknesses of the legal framework providing for victims' protection. Yet they realized they were in a position to influence the way victims are reintegrated, at the local level, by setting in motion the Flexible Education Program, which does accommodate victims' differences and helps them achieve their educational goals.

ii) Privilege

In most situations of structural injustice, there are relatively privileged agents who have relatively little power as individuals or in their institutional positions regarding that injustice; such privilege means they have greater responsibilities than others to take action.³⁰⁰ Well-educated professionals in Ecuador set up the Flexible Education Program; it was their academic and professional background that allowed them to identify victims' as a disadvantaged group in need for an adequate response. Access to education allows people to be aware of structural injustices in their communities; both education and awareness are certainly sources of privilege because they are not available to everyone in the Ecuadorian context.

iii) Interest

²⁹⁹ Ibid supra note 17 144

³⁰⁰ Ibid supra note 17 145

Under the ‘social connection model’ victims of structural injustice have unique interests in undermining injustice and they are called to take responsibility for doing so.³⁰¹ Moreover, their social positions offer them a unique understanding of the nature of the problems.³⁰² Victims who have benefited from the Flexible Education Program in Ecuador have displayed responsibility for undermining the barriers they face to access education by showing their commitment to make the most of the opportunity to attend to school. In doing so, victims have helped individual and organizational local actors to both better understand the inadequacies and inflexibility of regular school and to design innovative strategies to keep victims engaged in school.

Second, there may be agents whose perceived self-interest may coincide with promoting justice. For such agents, taking political responsibility means to figure out how to align their interests with those of agents who suffer injustice.³⁰³ This is the case of individual and organizational local actors who set up the Flexible Education Program. They report that access to education on an equal basis is their organization’s ultimate goal. Their work in the field led them to realize that dropout high rates in Ecuador was a serious structural problem that would seriously undermine every effort to build an equal society in the long-term.³⁰⁴

Finally, on the issue of ‘interest’ it is worth mentioning that, as discussed in section 2.2.4, critics of trafficking have found that the criminal law focused strategies have been ineffective or paternalistic, in particular from the migrant sex workers point of view. While the counter-trafficking international legal framework and discourse pushes for increased migration control, that is rarely what migrant sex workers are interested in.³⁰⁵

iv) Collective ability

Shared responsibility for undermining injustice can be discharged only through collective action. To do so, agents will need to reorganize their activities and relationships or can draw on the resources of already organized entities and use them in new ways to promote change.³⁰⁶ As it was explained above, the Flexible Education Program is a joint initiative led by two local NGOs, one working on direct assistance for victims and the other one working on remedial education, in cooperation with

³⁰¹ Ibid supra note 17 146

³⁰² Ibid supra note 17 113

³⁰³ Ibid supra note 17 146

³⁰⁴ Ibid supra note 9

³⁰⁵ This reasoning results from Young’s ideas on the situation of workers at sweatshops applied *mutatis mutandi* to the situation of victims of trafficking. Ibid supra note 17 146

³⁰⁶ Ibid supra note 17 147

the local government. Moreover, the Program was adapted for victims of trafficking building on the already existing flexible education methodology for indigenous children rescued from working exploitative conditions in Ecuador. The valuable lessons learned from that initiative and the institutional arrangements that had been set up shaped the methodology used by the Program for victims of trafficking.

In doing so, individual and organizational actors have taken the struggle for equality one step forward, from making demands on the state to involving the state into their initiatives to achieve meaningful education for all in Ecuador.

4.4. Conclusion

On the shortcomings of the trafficking framework

Ecuadorian reality corroborates the critical views advanced by the scholarship regarding the international legal framework on trafficking. Each of the premises expanded on in section 2.2 are found to be true in the field in Ecuador. It is clear that counter-trafficking initiatives in Ecuador have silenced the inequalities between developed and developing countries, which constitute the structures that push individuals to migrate or to exploit other individuals.

Trafficking in Ecuador is also presented as a human rights violation in the discourse but combated as a crime in practice, with little attention paid to victims' rights by the government. Moreover, Ecuador presents a complex migratory context where trafficking is strongly linked to an anti-migration and a securitization discourse. The fact that the Ministry of Interior, a branch of the Ministry of Coordination for Security, is in charge of implementing the National Plan to combat trafficking supports this assertion.

In addition, the counter-trafficking discourse clashes with the long-standing sex workers movement who have traditionally advocated for a broader understanding of the socio-economic factors involved in prostitution as a social phenomenon beyond the narrow criminal approach.

On victim's right to education in Ecuador

Overall, the Flexible Education Program for victims of trafficking in Ecuador has successfully tackled the barriers victims face to access education as a matter of structural injustice, despite of the inadequacies found in the right to education nature, scope and the legal avenues to enforce it. This interaction shows a clear fracture between the state-centered obligations and standards stated in international human rights law and the initiatives undertaken by individual and organizational local actors to guarantee human rights.

On the question of why individual and organizational local actors decided to establish the Flexible Education Program, it can be asserted that they realized they could undertake the responsibility for the structural injustice posed by the barriers victims face to access education. To do so, they have

identified a demand in their community and organized themselves to provide an adequate answer, in a display of Young's 'parameters of reasoning': power, privilege, interest and collective ability.

The role played by individual and organizational local actors in Ecuador has brought to light the fact that victims, their families and people working with them are better placed and able to meaningfully interpret the right to education and to make the international human rights legal framework work for them in real life. In doing so, they contribute to fleshing out the bones of the universality claim of the right to education.

It is clear that the Ecuadorian experience has contributed to expanding the understanding of trafficking and its structural roots, to bringing down to earth the promise of the right to education for all stated in international human rights law and to re-think the notion of responsibility for human rights.

5 Concluding remarks

The analysis and findings in this research provide a nuanced perspective of the interaction between the theoretical underpinnings and content of international law and international human rights law on the one side, and their actual impact on real people's life on the other.

The barriers victims face to access to education are understood as structural injustice by this research. As such, they pose a quest for international human rights law: is the education it puts forward in fact relevant and accessible for victims of trafficking?

International law on trafficking and on the right to education fails to clearly establish *de iure* state responsibility for eliminating the barriers victims face to access to education, as a matter of structural injustice. In contrast, it is clear that individual and organizational local actors working in the field have managed to help victims to successfully overcome such barriers. For this reason, any discussion on victims' right to education in Ecuador must focus on how responsibility shifts *de facto* from the state to individuals and Young's theory of justice has proved to be the most useful methodological tool for this purpose.

This research has highlighted the wide gap between provisions on trafficking and education in international law and what victims need from education. In fact, the current trafficking legal framework poses a constraint for full and meaningful reintegration of victims because it does not establish clear and specific state obligations and fails to consider victims as right bearers. Individual and organizational actors in the field overcome these legal shortcomings and bypass the flawed *lege lata* on trafficking. Hence, there is a clear fracture between the way they address trafficking-related issues and the actual provisions and theoretical debates in international law. This is illustrated by their lack of awareness of the legal content of the right to education despite their substantial contribution to its development in the field.

Instead of law, individual and organizational local actors use their non-legal academic background and exercise their professional responsibility to uphold victims' human rights. Their role is brilliantly explained by Young's framework that conceptualizes responsibility for global structural injustices as participation in and a connection to social-structural problems establishing individually shared responsibilities that can only be discharged collectively.³⁰⁷ According to Young, such responsibility entails doing whatever it takes to achieve the objective and this is precisely what individual and organizational local actors have done by organizing the knowledge and resources available to them to ensure that victims can access to relevant and meaningful education in Ecuador.

The findings show that despite the lack of an adequate response by international law, there is still hope in individuals' capability to re-interpret

³⁰⁷ Ibid supra note 17 146

law and make it work for the benefit of those in need. This means that ultimately, individuals in Ecuador may rely on one another to provide creative responses that serve to guarantee human rights in their communities, when international human rights law itself fails to be at tool to accomplish such goal.

Bibliography

International law

United Nations Convention against Transnational Organized Crime (adopted 15 November 2000 entered into force 29 September 2003)

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000 entered into force 25 December 2003)

Rome Statute of the International Criminal Court (adopted 17 July 1998 entered into force 1 July 2002)

Travaux Préparatoires of the negotiation for the elaboration of the United Nations Convention against Transnational Organized Crimes and the Protocols thereto

UNGA, Resolution 56/83, International Law Commission Draft Articles on State Responsibility, 12 December 2001

International Human Rights law

Universal System

UNGA, Universal Declaration of Human Rights (adopted 10 December 1948)

UNGA, Declaration on the Right to Development (adopted 4 December 1986) A/RES/41/128, Articles 1-3

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976)

International Covenant on Civil and Political Rights (adopted 16 December 1966 entered into force 23 March 1973)

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979 entered into force 3 September 1981)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990 entered into force 1 July 2003)

Convention on the Rights of the Child (adopted 20 November 1989 entered into force 2 September 1990)

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006 entered into force 3 May 2008) Articles 16 and 27 (2)

CESCR, General Comment 3, the nature of States parties obligations, 14 December 1990

CESCR, General Comment 9, the domestic application of the Covenant, 3 December 1998, E/C.12/1998/24

CESCR, General Comment No. 13, the right to education, 8 December 1999

CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Ecuador, CEDAW/C/ECU/CO/7, November 21 2008

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', HRQ [1998]

The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights', HRQ [1987]

UN ECOSOC, Recommended Principles and Guidelines on Human Rights and Human Trafficking Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (20 May 2002) E/2002/68/Add.1

UN ECOSOC, Official Records 2004 Supplement No. 3, Decision 2004/110 Special Rapporteur on trafficking in persons, especially in women and children, (19 April 2004) E/2004/23 E/CN.4/2004/127

UN HRC, Working Group on the Universal Periodic Review, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 Ecuador, A/HRC/WG.6/13/ECU/1, 8 March 2012

UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law, A/RES/60/147 adopted 16 December 2005

UN HRC, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Ecuador, A/HRC/WG.6/13/ECU/1, 8 March 2012

Commission on Human Rights, Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33, E/CN.4/1999/49, 13 January 1999

UNESCO, International Standard Classification of Education ISCED, 1997

UNESCO, Convention on Technical and Vocational Education

UNESCO, Revised Recommendation concerning Technical and Vocational Education, November 2 2001

Regional System

American Convention on Human Rights (adopted 22 November 1969 entered into force 18 July 1979)

Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (adopted 17 November 1988 entered into force 16 November 1999)

Domestic Ecuadorian law

Constitution of the Republic of Ecuador (adopted 28 September 2008 entered into force 20 October 2008)

Reform Act to the Criminal Code that criminalizes offenses related to sexual exploitations of children (entered into force 23 June 2005) Official Registry No. 45, Chapter on trafficking in persons-related crimes

Executive Decree 1981, Official Registry No. 410 31 August 2004

National Plan to combat human trafficking, smuggling of migrants, sexual, labor and other forms of exploitation, and prostitution of women, children and adolescents, child pornography and corruption of minors, Official Registry No. 385 12 October 2006

Ministry of Education of Ecuador, Ministerial Decree No. 482, 10 December 2008

Books

Andrijasevic R, *Migration, Agency and Citizenship in sex trafficking* (Palgrave Macmillan 2010)

Aradau C, *Rethinking Trafficking in Women Politics out of Security*, (Palgrave MacMillan 2009)

Askola H, 'Awkward Aliens: Female Migrants, Exploitation and the Trafficking Framework' in Helen Stalford, Samantha Currie and Samantha Velluti, *Gender and Migration in 21st Century Europe* (Ashgate Publishing Limited 2009)

Askola H, *Legal Responses to trafficking in Women for Sexual Exploitation in the European Union*, (Hart Publishing 2007)

Beiter K, *The Protection of the Right to Education by International Law*, (Martinus Nijhoff Publishers 2006)

Bergstrom Y, *The Universal Right to Education: Freedom, Equality and Fraternity*, (Springer Science+Business Media B.V. 2009)

Cameron S et al, 'Structural factors in Human Trafficking' in Sally Cameron and Edward Newman (eds.) *Trafficking in Humans* (United Nations University Press 2008)

Cancado Trindade A, *International Law for Humankind Towards a New Jus Gentium*, (Martinus Nijhoff Publishers, Leiden Boston 2010)

--, *The Access of Individuals to International Justice*, (Oxford University Press 2011)

Coomans F, 'In search for the core content of the right to education' in Daniel Brand and Sage Russel (eds.), *Exploring the core content of socio-economic rights: South African and international perspectives*, (Protea Book House 2002)

Doezema J, 'Now you see her, now you don't Sex workers at the UN Trafficking Protocol negotiations' in Joanne Conaghan, *Feminist Legal Studies Critical Concepts in Law*, Volume IV Challenges and Contestations, (Routledge 2009)

Dörr O et al, *Vienna Convention on the Law of Treaties: A Commentary* (Springer –Verlag 2012)

Gallagher Anne, *The International Law of Human Trafficking* (Cambridge University Press 2010)

Heyzer N, 'Combating Trafficking in Women and Children, A Gender and Human Rights Framework' in Than-Dam Tuong, Saskia Wieringa and Chhachhi A, (eds) *Engendering Human Security Feminist Perspectives* (Zed Books 2006)

International Organization for Migration, *The IOM Handbook on Direct Assistance for Victims of Trafficking* (IOM 2007)

Jordan A, *The Annotated Guide to the complete UN Trafficking Protocol*, (International Human Rights Law Group 2002)

Kapur R, 'The tragedy of victimization rhetoric, Resurrecting the "naïve" subject in international/post-colonial feminist legal politics' in Joanne Conaghan, *Feminist Legal Studies Critical Concepts in Law, Volume IV Challenges and Contestations*, (Routledge 2009)

Levin H, 'Accelerated Schools: A Decade of Evolution' in M. Fullan *Fundamental Change* (Springer 2005)

Noll G, 'The insecurity of trafficking in International Law' in Vicent Chetail, ed., *Globalization, migration and human rights: international law under review* (Bruylant Bruxelles 2007)

Office of the High Commissioner on Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking Commentary* (United Nations 2010)

Pascualucci J, *The Practice and Procedure of the Inter-American Court of Human Rights*, (Cambridge University Press 2003)

Ramírez F et al, *Migratory Stampede in Ecuador: Crisis, transnational networks for migratory action*, (Centro de Investigaciones CIUDAD, UNESCO, ABYAYALA, ALISEI 2005)

Ramirez J, *With or without passport: anthropological analysis of Ecuadorian migration*, (National Institute of High Studies 2010)

Surtees R and Craggs S, *Beneath the surface, Methodological issues in research and data collection with assisted trafficking victims* (International Organization for Migration 2010)

Tomasevski K, *Human rights obligations in education: the 4-A scheme*, (Wolf Legal Publishers Nijmegen 2006)

-- Human Rights obligations: making education available, accessible, acceptable and adaptable, *Right to Education* (Primers 3 2001)

United Nations, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, New York 2004

Young I.M., *Responsibility for Justice* (Oxford University Press 2011)

Zimmerman et al (eds.), *Caring for trafficked persons, Guidance for Health Providers*, (International Organization for Migration 2009)

Academic Articles

Abad A et al, 'The Association of Autonomous Women Workers, Ecuador: "22nd June"' in Kempadoo K et al, (eds.) *Global Sex Workers Rights, Resistance and Redefinition* (Routledge 1998)

Brems E, 'Human Rights: Minimum and Maximum Perspectives', *HRLR* [2009]

Chapman A, 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights', *HRQ* [1996]

Donnelly J et al, 'Assessing National Human Rights Performance: A Theoretical Framework' *HRQ* [1998]

Eisenberg A, 'Education and the Politics of Difference: Iris Young and the politics of education' *Educational Philosophy and Theory* [2006]

Foucault M, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (Vintage 1979) in Daniel Lechner, 'The dangerous human right to education', *Studies in Philosophy and Education* [2001]

Gallagher A 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway', *VA. J. INT'L. L.* [2009]

Hathaway J, 'The Human Rights Quagmire of Human Trafficking', *VA. J. INT'L. L.* [2008]

Isaacs D, 'Realising the right to education in South Africa: lessons from the United States of America', *South African Journal on Human Rights* [2010]

Piotrowicz R, 'The legal nature of trafficking in human beings' *Intercultural Hum. Rts. L. Rev.* [2009]

Ruiz M, 'Cross border migrants in the sex trade: integration, migration control and new forms of inequality', paper prepared for the 2009 Congress of the Latin American Studies Association, Rio de Janeiro Brazil, 11-14 June 2009

Young IM, 'Education in the Context of Structural Injustice: A symposium response', *Educational Philosophy and Theory* [2006]

Young K, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', *YJIL* [2008]

Non-academic publications

Department of States United States of America, *Trafficking in Persons Report* June 2002

Department of States United States of America, *Trafficking in Persons Report* June 2009

Department of States United States of America, *Trafficking in Persons Report* June 2010

Ministry of Foreign Affairs, Commerce and Integration of Ecuador, Report on counter-trafficking initiatives presented by Ecuador to the United States of America State Department in 2007 and 2008

Ministry of Foreign Affairs, Commerce and Integration of Ecuador, Press Bulletin No. 733, Ecuador signs agreements with the United States of America, 7 September 2007

Embassy of the United States of America in Ecuador, Press Bulletin 'US Government signs 16.2 million Cooperation Agreement with Government of Ecuador, 6 January 2010

Ministry of Foreign Affairs, Commerce and Integration of Ecuador, Press Bulletin No. 623 Ecuador requires visa to citizens of 9 countries, 6 September 2010

Ministry of Foreign Affairs, Commerce and Integration of Ecuador, Ministerial Agreement No. 105

Ministry of Foreign Affairs, Commerce and Integration of Ecuador, Press release "Ecuador and Peru allies against trafficking with the support of Canada and UNODC"

Databases

United Nations Treaty Collection:

<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

United Treaty Bodies Database:

<http://tb.ohchr.org/default.aspx>

Political Database of the Americas, School of Foreign Service, Center for Latin American Studies, Georgetown University:

<http://pdba.georgetown.edu/Constitutions/constudies.html>

Reference bibliography

Bump M et al, 'Conference on Identifying and Serving child victims of trafficking', International Migration [2003]

Dávalos M, 'Does Universal Citizenship exist? Analysis of the cosmopolitanism ideas embodied in the Ecuadorian Constitution of 2008' in Ramiro Ávila Santamaría, ed. Constitution 2008 in the Andean Context, An analysis from Legal Scholarship and Comparative Law (Ministry of Justice and Human Rights 2008)

Herrera G, Moncayo M and Escobar A, Ecuador's Migratory Profile 2011, (International Organization for Migrations 2012)

Kim K et al, 'Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)', Stanford Journal of Civil Rights and Civil Liberties [2007]

Portero C, 'What is life in harmony in the Constitution?' in Ramiro Ávila Santamaría, ed. Constitution 2008 in the Andean Context, An analysis from

Legal Scholarship and Comparative Law (Ministry of Justice and Human Rights 2008)

UN HRC, The right to education of persons with disabilities, Report of the Special Rapporteur on the right to education, Vernor Muñoz, A/HRC/4/29, 2007

UN HRC, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development The Right to education in emergency situations Report of the Special Rapporteur on the right to education, Vernor Muñoz, A/HRC/8/10, 2008

UN HRC, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development The Right to education of persons in detention, Report of the Special Rapporteur on the right to education, Vernor Muñoz, A/HRC/11/8, 2009

UN HRC, The right to education of migrants, refugees and asylum seekers, Report of the Special Rapporteur on the right to education, Vernor Muñoz, A/HRC/14/25, 2010

Table of Cases

International Court of Justice

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Preliminary Objections, International Court of Justice (ICJ), 24 July 1964

Inter-American Court of Human Rights

I/A Court H.R., Case Velazquez Rodriguez v. Honduras, Reparations and Costs, Judgement of 21 July 1989

I/A Court H.R., Blake v. Guatemala, Reparations and Costs, Judgement of 22 January 1999

I/A Court H.R., Case Yean and Bosico v. Dominican Republic, Judgement of 8 September 2005

I/A Court H.R., Case Instituto de Reeduación del Menor vs. Paraguay, Judgement of 2 September 2004

European Court of Human Rights

Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium [Merits], no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR, 23 July 1968

Human Rights Committee

F.H. Zwaan-de Vries v. the Netherlands, HRC, Communication No. 182/1984, 09/04/1987, UN Doc. CCPR/C/29/D/182/1984

S.W.M. Broeks v. The Netherlands, HRC, Communication No. 172/1984, 09/04/1987, UN Doc. CCPR/C/29/D/172/1984

Constitutional Court of South Africa

Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC

Lindiwe Mazibuko & Others v City of Johannesburg & Others, Case CCT 39/09, [2009] ZACC

Lindiwe Mazibuko & Others v City of Johannesburg & Others, Case CCT 39/09, [2009] ZACC

Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others, Case CCT 29/10 [2011] ZACC