

## STATE RESPONSIBILITY FOR TRAFFICKING IN PERSONS AND HUMAN RIGHTS VIOLATIONS

*Dr. Roberta Avellino\**

### 1. Introduction

Although the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>1</sup>(hereinafter referred to as the '**Draft Articles**') have been proclaimed as a significant advance in international law, 'it is not clear to what extent the Draft Articles accurately reflect human rights law'.<sup>2</sup> Therefore, the relationship between human rights law and the basic concepts and rules of State responsibility must be examined, in view of its actors and stakeholders. What are the duties and obligations of States in terms of human rights law? As Crawford rightly asks, how does the 'continuing international discussion and application of human rights law relate to the fundamental structure of the law of State responsibility?'<sup>3</sup> Certainly, the international arena has witnessed great progress in the development and promotion of human rights and the implementation thereof, as States are 'no longer 'free' to do as they will in the domestic sphere' but are compelled by international law to protect individuals from the violation and abuse of such.<sup>4</sup> Nonetheless, millions of people still fall victim to human rights abuses and thus, generate an urgent call for the better enforcement of human rights law and the prevention of such repulsive circumstances.

The responsibility and accountability of States for violations under international law is a high concern in assessing the international community's global response to human rights violations such as trafficking in persons, however, international courts and tribunals have very rarely dealt with trafficking in persons. What are the obstacles, which are hindering recourse on an international level? What are the factors, which diminish the necessity, or rather the interest of scholars, for detailed consideration of the concept of State responsibility with regard to trafficking in persons?

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\* Dr. Roberta Avellino read Law at the University of Malta in 2004 whence she graduated as Doctor of Laws in November 2010. She further pursued her studies with a Masters in International Law at the University of Malta, whence she graduated with distinction in 2011. This article is based on her thesis entitled 'Trafficking in Persons – Specific Issues under Public International Law'. Dr Avellino is currently working with the Ministry of Education and Employment.

<sup>1</sup> International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session* (UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/50/10 2001).

<sup>2</sup> Annie Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21 4 EJIL 883.

<sup>3</sup> James Crawford, 'Human Rights and State Responsibility' (2006) 12th Raymond & Beverly Sackler Distinguished Lecture Series, Thomas J. Dodd Research Centre, University of Connecticut, 1.

<sup>4</sup> Mark Gibney and others, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harvard Human Rights Journal 295.

Gallagher<sup>5</sup> describes that this fact is sometimes due to the entailed lengthy procedures, which are very time-consuming and expensive while the establishment of monitoring mechanisms and committees under international instruments may draw a perception, which does not recognise the need for such international recourse. Furthermore, trafficking in persons is sometimes seen as a crime which goes against the very livelihood of the State and therefore, States usually negate their responsibility by arguing that the perpetrators are members of organised criminal networks, which are not affiliated with the State in any way and thus, the network itself should be held responsible for the primary wrong. In the context of these circumstances, it is crucial to analyse the concept, definition and consequences of State responsibility and the breach thereof, in order to identify when and how a State could be held responsible for the crime of trafficking in persons and human rights violations.

## 2. The Concept of State Responsibility under International Law

Throughout its evolution, the notion of State responsibility has been an issue of scholarly and legal debate as it has undergone transformation from its classical beginning focusing on the treatment of aliens and their property on State territory, to a concept which must be evaluated in order to meet its demands during a time of change in international relations. Gallagher argues that 'the allocation of responsibility for violations of international law is critical to that system's effectiveness and credibility'<sup>6</sup> and refers to Dupuy who opines that responsibility is a leading component within every system of law as it fosters organisation regarding 'the nature of rights and of obligations, the consequences of their infringement' and finally moulds the ethical and social foundations of the legal framework.<sup>7</sup> In turn, Dupuy refers to Anzilotti, who observes that in determining State responsibility,

[O]ne needs to determine of what the issue really consists. 'Malice and fault', in the proper senses of the words, express human will as a psychological fact, and one cannot therefore speak of them except in relation to the individual. The point is, subsequently, whether an action contrary to international law, in order to be imputable to the State, has to be caused by malice or of fault by individual agents; in other words, whether the latter's malice or fault is a condition laid down by the law in order for particular acts to lead to particular consequences for the State.<sup>8</sup>

State responsibility has been considered by Brownlie in relation to States as the normal and ordinary subjects of the law. However, he argues that State responsibility in fact

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<sup>5</sup> Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010) 218.

<sup>6</sup> *Ibid.*

<sup>7</sup> PM Dupuy, 'The International Law of State Responsibility: Revolution or Evolution?' (1989) 11 *Michigan Journal of International Law* 126.

<sup>8</sup> PM Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States' (1992) 3 *European Journal of International Law* 141.

combines a much broader question, which is distinct from that surrounding the legal personality of States.<sup>9</sup>

### 3. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts

The notion of State responsibility has also been central to the workings of the International Law Commission (hereinafter referred to as 'ILC') whereby Article 1 of the Draft Articles holds a State responsible for 'every internationally wrongful act'. Article 5 of the commentary to the said Draft Articles clarifies that the term 'international responsibility' covers the relations, which arise from the internally wrongful act of States, 'whether such relations are limited to the wrongdoing State and one injured State' or to other States or also other subjects under international law.<sup>10</sup>

The ILC has toiled hard and long on State responsibility, which clearly shows that this is one of the most difficult topics under international law.<sup>11</sup> However, it must be noted that the Draft Articles were formulated in a time and circumstances, during which international law, international affairs, and politics were undergoing tremendous changes. Such happenings have definitely influenced the role, stakeholders, and *raison d'être* of public international law. In fact, throughout this period, international law has moved towards specialised legal regimes with their own mechanisms of dispute settlement and responsibility. Such regimes include the General Agreement on Tariffs and Trade and the European Court of Human Rights. Henceforth, in view of various specific legal regimes and the fragmentation of international law, what are the relevance and impacts of the ILC's Draft Articles under international law?

This may only be assessed by tracing back to the Draft Article's conception and historical foundations. Following the inception of the ILC, the subject of State responsibility was selected to form part of the ILC's work programme at the Commission's first session in 1949 whereby, State responsibility was chosen as one of the themes set for codification, however it did not manage to make it on the Commission's priority list. Subsequently, in 1954 further to the General Assembly Resolution 799 (VIII) of December 1953, the Commission was requested to 'undertake, as soon as it considered it advisable, the codification of the principles of international law governing State responsibility'.<sup>12</sup> The Commission commenced its study on the topic of State responsibility in 1955 and appointed Garcia Amador as Special Rapporteur, whose presented reports dealt mainly with the notion of responsibility for injuries to

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<sup>9</sup> Ian Brownlie, *Principles of Public International Law* (Seventh Edn, OUP 2003) 433.

<sup>10</sup> Draft Articles on the Responsibility of States with Commentary art 1 para. 5.

<sup>11</sup> Maria Fernanda Perez Solla, 'The Notion of International Responsibility: A 'Classic' in Times of Change?' (2010) Paper presented at the Agora Session of the European Society of International Law in Florence, Italy, 1.

<sup>12</sup> Official Website of the International Law Commission 'State Responsibility' <<http://www.un.org/law/ilc/>> accessed March 2012.

the persons or property of aliens.<sup>13</sup> Later in 1969, the Commission requested the Special Rapporteur to formulate a first set of draft articles.

The analysis of the Commission vis-à-vis the international responsibility of States, consisted of two separate segments. Firstly, the origin of international responsibility was analysed while the second part entailed an in depth analysis of the content of the particular responsibility. Subsequently, in 1970 the Special Rapporteur presented a study which dealt with the origin of international responsibility through the examination of the general rules governing this theme namely: 'the principle of the internationally wrongful act as a source of responsibility; the essential conditions for the existence of an internationally wrongful act; and the capacity to commit such acts'.<sup>14</sup> This report was also complemented by draft articles based upon the said general rules, which focused solely upon the responsibility of States for internationally wrongful acts.

The Draft Articles on Responsibility of State for Internationally Wrongful Acts and their Commentaries were adopted by the ILC at its fifty-third session in 2001<sup>15</sup> while the General Assembly in Resolution 56/83 of December 2001 took note of the Articles and entrusted them to the consideration of Governments without prejudice as to their eventual adoption or other action. The adoption of the Draft Articles has been considered as a major step in the codification and progressive development of international law, however, one must also note the political context which surrounded the workings of the Commission in order to delineate the spirit with which the Articles have been formulated. As already noted, the Draft Articles were the brainchild of the International Law Commission, which brings together independent experts. Nonetheless, the Commission as an entity is answerable to the General Assembly of the United Nations with special reference to the States involved in the Assembly's Sixth Committee.<sup>16</sup> It is thus, clear that the Draft Articles encompass the political bearings of the ILC and the interests of its active stakeholders as States aimed to pursue national interests under international law. On the other hand, the Draft Articles were still subject to the acceptance of States, which lead to the document's revision and streamlining in various instances. Such a change in direction included the elimination of Article 19, which dealt with State crimes and which was considered as one of the most controversial components of the draft text. The Draft Articles are the result of a process which combined codification and progressive development and which have also influenced specific judgments of international tribunals, including the International

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<sup>13</sup> Yearbook of the International Law Commission, 1956, vol. II, document A/CN.4/96; *ibid.*, 1957, vol. II, document A/CN.4/106; *ibid.*, 1958, vol. II, document A/CN.4/111; *ibid.*, 1959, vol. II, document A/CN.4/119; *ibid.*, 1960, vol. II, document A/CN.4/125; and *ibid.*, 1961, vol. II, document A/CN.4/134 and Addendum.

<sup>14</sup> Yearbook of the International Law Commission, 1969, vol. II document A/7610/Rev. 1, para 80.

<sup>15</sup> Official Records of the General Assembly, Fifty-sixth sessions, Supplement No. 10 (A/56/10), paras 69, 70, 76 and 77.

<sup>16</sup> The Sixth Committee is the main committee of the General Assembly of the UN which is responsible for the deliberation of legal issues and affairs.

Court of Justice (hereinafter referred to as 'ICJ').<sup>17</sup> Thus, despite the fact that the Draft Articles remain simply as a document of the General Assembly, which might reflect existing State practice or symbolise a convenient approach to satisfy conflicting interests, the application of their principles within international judgments and settlements of responsibility proves that they have in fact played an important role under international law.

#### 4. Human Rights and State Responsibility

The invocation of State responsibility for the violation of an international obligation is 'a matter involving numerous substantive issues',<sup>18</sup> one facet of which is the sphere of human rights violations. This is triggered by the current development in the human rights movement, which recommends that the established standard system that provides for the invocation of State responsibility must be modified in order to cater for the better enforcement of human rights.<sup>19</sup> In this regard, Crawford enlists three areas of developments, which support his claim, namely that the international law of State responsibility is grounded upon:

- a. The basis of a rather firm distinction between the State and the private sector;
- b. The basis that States possess the prerogative of responsibility. Individuals may be criminally responsible under international law, but only for a narrow range of crimes by no means coextensive with the field of human rights. There is no such thing as international (non-criminal) responsibility of non-State actors for human rights violations; and
- c. The basis that though third States may be able to invoke the responsibility of another State for human rights violations without any showing of special interest or injury on their part, the normal rules about non-intervention and the protection of State autonomy nonetheless continue to apply.<sup>20</sup>

Moreover, the concept of State responsibility for human rights abuses is also highly interlinked with the concept of State responsibility for violations carried out by non-State actors and the nature of the State's questionable duty to protect individuals against harm carried out by private entities. Farrior is confident that a cursory glance at international human rights law does in fact impose this duty upon the State and argues that the continued scepticism surrounding this principle is the earlier indoctrination of the fact that international law is solely concerned with the conduct of States and State

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<sup>17</sup> See, e.g., *Gabcikovo-Nagymaros Project* (Hung./Slovk.), 1997 ICJ REP. 7, 39-46, paras. 49-58 (Sep. 25) and James Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (CUP 2002) 16.

<sup>18</sup> Iain Scobbie, 'The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law' (2002) 13 5 EJIL 1201.

<sup>19</sup> Crawford (n 3).

<sup>20</sup> *Ibid.*, 1 – 2.

actors.<sup>21</sup> On the other hand, under the ILC's Draft Articles, it is provided that the conduct of individuals not acting in their official capacity on behalf of the State is not attributable to the State. However, it is important to keep in mind that international State responsibility arises in the instance of a State's breach of an international obligation and more specifically, when an act of that State is not in conformity with the conduct required to fulfil its obligation.<sup>22</sup> This applies regardless of the obligation's origin, 'whether customary, convention or other'<sup>23</sup> while the internationally wrongful act may include both an act and an omission.

Therefore, 'it is the omission on the part of the State – not the act by the private actor – for which the State may be responsible'.<sup>24</sup> In this regard, Farior further points out the various Draft Articles, which address obligations pertaining to the protection of human rights.<sup>25</sup> These include an obligation of conduct under Article 20, an obligation of result under Article 21, and an obligation to prevent a given event under Article 23. Additionally, circumstances of force majeure, fortuitous events<sup>26</sup> and necessity<sup>27</sup> relieve the responsibility of States but do not preclude the injured State's right of compensation for the caused damage.<sup>28</sup> This imposition upon States by the ILC to prevent an event by taking the necessary measures does not depart from the main principle of the non-attribution of private conduct, but on the other hand, acknowledges that 'the rules governing attribution have a cumulative effect'.<sup>29</sup> To this effect, a concession

[r]eflects a discernible movement toward a more nuanced conception of State responsibility. Particularly in the area of human rights, there is growing acceptance that the State will be responsible, not only if it abrogates human rights in the traditional sense (sometimes referred to as direct responsibility arising out of vertical application of legal obligations), but also if it fails to adequately protect those within its jurisdiction from the actions of others that result in a violation of rights (sometimes referred to as indirect responsibility arising out of horizontal application of legal obligations).<sup>30</sup>

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<sup>21</sup> Stephanie Farior, 'State Responsibility for Human Rights Abuses by Non-State Actors' Proceedings of the Annual Meeting (American Society of International Law) Vol. 92, *The Challenge of Non-State Actors* (1998) ASIL 300.

<sup>22</sup> Draft Articles on Responsibility of States with Commentary, art 16.

<sup>23</sup> *Ibid.*, 17.

<sup>24</sup> Farior (n 21) 301.

<sup>25</sup> *Ibid.*

<sup>26</sup> Draft Articles on Responsibility of States with Commentary, art 31.

<sup>27</sup> *Ibid.*, 33.

<sup>28</sup> *Ibid.*, 35.

<sup>29</sup> Gallagher (n 5) 236.

<sup>30</sup> *Ibid.*, 237.

Article 48 of the ILC's Draft Articles provides any State with the opportunity to invoke State responsibility for breaches of international obligations, which are due to the international community as a whole. This has been a much welcomed development. However, Brown Weiss takes a cautious approach and warns that this presents potential dangers as no collective or third-party decision about a breach must be made. Therefore, it is up to the State to note and determine whether an international obligation owed to the international community has in fact taken place and whether to react by making a claim.<sup>31</sup> Hutchinson further warns of the abuse of this provision and describes it as 'a sort of international vigilantism', with states being wrongly accused of crimes and subjected to damaging measures without good cause'.<sup>32</sup> Besides, Katselli advocates for the need to establish specific enforcement mechanisms in order to render and instil certainty as to the effectiveness of international law. Such forms of remedies may also include means of a unilateral and non-forcible nature, 'especially for the protection of supreme values and principles of humanity'.<sup>33</sup> These mechanisms must be supported by strict terms for the use of third-State countermeasures in accordance with the principle of proportionality in order to secure 'a just and peaceful international community'.<sup>34</sup>

The ILC adopts a 'special responsibility' approach to violations of peremptory norms of international law, which involve a gross or systematic failure by the State to fulfil its duty to prevent such conduct resulting in the said serious violation. However, this avenue may not directly include the invocation of State responsibility for trafficking in persons. In order to succeed in doing so, the circumstances surrounding trafficking must be classified as characteristics surrounding slavery or the slave trade or maybe, a crime against humanity. Of course, this would entail an assessment of the direct reference to the primary obligation of the given States while satisfying the general rules of attribution. Additionally, should this hurdle be overcome, the circumstances must be considered as serious, gross, or systematic.<sup>35</sup> Thus, while it is somehow possible to invoke State responsibility for trafficking in persons under international law, this would prove to be possible in the event that the obligations of States result from the application of the primary rules. The successful attempt to include and qualify violations of human rights such as trafficking in persons as an internationally wrongful act in its own right would certainly strengthen the chances of validating the invocation of State responsibility.

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<sup>31</sup> Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 AJIL, 805.

<sup>32</sup> DN Hutchinson, 'Solidarity and Breaches of Multilateral Treaties' (1988) *British Year Book of International Law* 152, 202 (quoting Bruno Simma for the term "a sort of international vigilantism," Bruno Simma, 'International Crimes: Inquiry and Countermeasures', in *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Joseph H. Weiler, Antonio Cassese, & Marina Spinedi eds., 1989)), 283, 299.

<sup>33</sup> Elaine Katselli, 'Countermeasures by Non-Injured States in the Law on State Responsibility' (2005) *European Society of International Law* 8.

<sup>34</sup> *Ibid.*

<sup>35</sup> Gallagher, (n 5) 258.

Nonetheless, despite the growing awareness of the concept of State responsibility for violations of human rights such as trafficking in persons, the rules of State immunity have been clearly 'defended' and safeguarded even on the assumption that the alleged crimes constitute violations of established *jus cogens* rules. On 3 February 2012, the ICJ affirmed the principles of State immunity in *Germany v Italy*,<sup>36</sup> when the Court issued a judgment in favour of Germany. Legal proceedings were initiated by Germany in December 2008 as it claimed that Italy had failed to respect Germany's jurisdictional immunity in three instances.

Firstly, Italy was accused of allowing civil claims to be brought against Germany in Italian courts, seeking reparation for injuries and damages which were caused by violations under international humanitarian law during the Second World War.<sup>37</sup> Furthermore, Germany claimed that Italy had taken measures of constraint against a German State property within Italian territory and that it had further failed to respect Germany's jurisdictional immunity by declaring the enforceability of decisions of Greek civil courts in Italy, which dealt with acts similar to those which gave rise to claims for compensation before the Italian courts. In this regard, Italy's line of defence was based upon the fact that Germany was under an international obligation to provide compensation to the victims seeking redress before the Italian courts and that State immunity excludes *jus cogens* rules. However, the Court was not convinced by Italy's line of reasoning and held that this argument is only put forward on the assumption that there exist conflicting parameters between *jus cogens* rules as part of the law of armed conflict and the manner of according State immunity to Germany, while in fact, each body of the law addresses different and separate matters.<sup>38</sup>

In conclusion, the Court held that national legislation has not limited immunity in instances of violations of *jus cogens* or the allegation thereof and thus, despite the fact that the proceedings for compensation arising in Italy were indeed based on cases alleging violations of *jus cogens* rule, the applicability of Germany's State immunity under customary international law was not affected.<sup>39</sup> On the other hand, the ICJ referred to Germany's shortcomings in terms of international humanitarian law and argued that Germany is obliged to restore the situations of the victims and their state of affairs as prior to the alleged infringements.<sup>40</sup> Keitner views this judgment as a reinforcement of the notion that the position of international law-makers is translated into one of international law-makers 'when their legal 'transgressions' attract a sufficient following to establish a new rule of customary international law'.<sup>41</sup> Stephan

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<sup>36</sup> Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) (Judgment) ICJ (3 February 2012).

<sup>37</sup> *Ibid.*, para 121.

<sup>38</sup> *Ibid.*, paras 109-120.

<sup>39</sup> *Ibid.*, paras 92-97.

<sup>40</sup> *Ibid.*, para 99.

<sup>41</sup> Chimene I. Keitner, 'Germany v. Italy: The International Court of Justice Affirms Principles of State Immunity' (2012) 16 *Insights, ASIL* 5, 1.

has deemed this judgment ‘a victory to traditional conceptions of international law and a setback to an effort to privilege international human rights over other aspects of the international legal system’.<sup>42</sup>

Undoubtedly, this judgment brings forth essential issues which require attention within the field of human rights as it focuses upon the effective implementation of the right of access to justice by victims of alleged violations of human rights. Although the Court has clearly admitted that Germany was in breach of its obligations under international humanitarian law through the administration of specific compensation schemes, the settlement of the compensation claims brought forward by the victims is still a pending concern. This matter is also impending in various instances of human rights violations and cases of trafficking in persons as victims continue to struggle to identify the appropriate fora, at which to address their claims for compensation.

## 5. Non-State Actors

The international community now also encompasses non-State actors, whose role still remains inadequately contemplated.<sup>43</sup> The emphasis upon the recognition of non-State actors is especially more important in certain areas such as human rights, whereby individuals are deemed as bearers of legal rights and prerogatives, which may also be enforced against the particular State. Brown Weiss articulates that the ILC should have done more to identify ‘the expanded universe of participants in the international system entitled to invoke State responsibility’.<sup>44</sup> Further criticism is directed at the ILC’s Draft Articles as Brown Weiss claims that the ILC strictly focuses upon the invocation of responsibility of a State by another State. From this point of view, the Commission has not foreseen the expansion of the international community and the ‘significant role of individuals and non-State entities’ in areas such as human rights, environmental protection and foreign investor protection.<sup>45</sup> Surely, such entities possess the resources and capacity to engage in forms of conducts that ‘compromise not just human rights but also laws relating to organised crime, the conduct of warfare, maintenance of international peace and security, trade, and environmental protection’.<sup>46</sup>

In highlighting the current changes within the international arena, Perez Solla<sup>47</sup> holds that the status of such actors, which include international organisations, minorities and human rights NGOs, is considered to be very limited, resulting in their *de facto* impunity

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<sup>42</sup> Benjamin Wittes, ‘Paul Stephan on ICJ Decision in Jurisdictional Immunities of the State (Germany v. Italy)’ (13 March 2012) Lawfare <<http://www.lawfareblog.com/2012/02/paul-stephan-on-icj-decision-in-jurisdictional-immunities-of-the-state-germany-v-italy-2/>> accessed March 2012.

<sup>43</sup> Edith Franssen, ‘Overview of Literature on the Actual Role of non-State Actors in the International Community’ (1991) SIM Special 19, 183.

<sup>44</sup> Brown Weiss, (n 31) 809.

<sup>45</sup> Ibid.

<sup>46</sup> Gallagher (n 5) 236.

<sup>47</sup> Perez Solla (n 11) 1.

and exemption. Therefore, the possibility of broadening the fundamental primary rules to non-State actors should be considered. On the other hand, one must not completely depart from an international framework, which is founded upon the sovereignty of States and the focused picture of State responsibility. This is due to the fact that the State enjoys a leading rank within the international legal order. Nonetheless, from a realistic point of view, in the case of trafficking in persons, the invocation of responsibility of actors such as criminal networks and international governmental organisations is of great importance as they may be held responsible for their internationally wrongful criminal acts.

Undoubtedly, the very fact that a State may bear responsibility for violations of human rights, which are carried out by non-State actors continues to stir debate in the international arena. In bridging the gap between the traditional international legal scholars and the human rights movement and community,<sup>48</sup> State responsibility for human rights abuses yields great relevance in the fields of trafficking in persons, violence against women and contemporary forms of slavery, terrorism, and other human rights violations, among others.<sup>49</sup> In the words of Perez Solla, 'if international law cannot prevent the interaction among international actors from negatively affecting human and natural life, international law misses important aspects and problems of current concern'.<sup>50</sup> This contemporary concern places due emphasis on the role of the State which is also expected to act as a guardian of the enjoyment of human rights, as a supervisory body over the possibility of violations of human rights and as the guarantor of security. Such principles are also reflected within the State's responsibility to protect its population from the wrath of gross violations of human rights, including those committed by non-State actors. This direction has been continuously supported by international human rights instruments and authoritative comments and opinions as in the case of violence against women when the General Assembly Declaration on the Elimination of Violence against Women explicitly upheld State responsibility for violence committed by both State and private actors.<sup>51</sup> The State's adequate performance of such a responsibility is subsequently assessed through its observation of the standard of due diligence.

Human security may serve as a driving force to fill in lacunae under international law and link areas such as international human rights law and the international fight against

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<sup>48</sup> For different schools of thought and further discussion about the relationship between traditional international law and international human rights law see, Malgosia Fitzmaurice & Danesh Sarooshi (eds.), *Issues of State Responsibility Before International Judicial Institutions* (Hart Publishing, 2004); Naomi Roht, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 Cal. L. Rev. 449; Rosalyn Higgins, *Problems & Process: International Law and How We Use it* (OUP 2003); Rebecca J. Cook, 'State Responsibility for Violations of Women's Human Rights' (1994) 7 Harv. Hum. Rts. J. 125; and W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 4, 866-876.

<sup>49</sup> Farrior (n 21).

<sup>50</sup> Perez Solla (n 11) 6.

<sup>51</sup> Resolution adopted by the General Assembly (A/RES/48/103) Crime Prevention and Criminal Justice (1994).

crime and terrorism which is mainly perpetrated by non-State actors.<sup>52</sup> Although deeply interlinked, these aspects of international law have been dealt with through separate approaches. The consolidation of these areas will encourage and strengthen international cooperation within these fields and fulfil the primary objectives of human security that of securing the safety of individuals and society at large from threats which risk the very well-being and existence of humanity, whatever the status of the perpetrator. The State must be held responsible for the internationally wrongful acts of the non-State actors within its territory. Why should not the State be held accountable for the wrongdoings and violations of such actors on persons within their jurisdiction? Is it not the State that it is supposed to be the prime regulator with total jurisdiction over all activities and happenings within its territory? Surely, the lack of State responsibility for internationally wrongdoings of non-State actors will only bear further human tragedy and tremendous suffering to the victims of human rights violations such as trafficking in persons.

## 6. To Prevent, Protect and Respond

The obligation of States to prevent trafficking in persons is a natural consequence of the positive obligations arising out of the majority of international instruments namely, the responsibility to prevent, protect and respond. Although the utmost attention is appropriately shifted to instruments, which directly deal trafficking in persons, in order to achieve the complete eradication of trafficking in persons, the international community must seek to decipher the root causes of trafficking in persons in order to prevent its occurrence. Such grounds, which trigger the incidence of trafficking in persons, include poverty and discrimination and thus, a vulnerable population in search of a better quality of life.<sup>53</sup> The cooperation of States in ensuring the full realisation of economic, social and cultural rights should be fulfilled under the ICESCR<sup>54</sup> to prevent the foreseeable violations of human rights and trafficking in persons. Gender discrimination and violence against women are other core reasons, which lead potential victims to search for other avenues of income and employment and consequently, fall prey to the false promises of the traffickers.

In this regard, the ICCPR obliges States to 'ensure the equal right of men and women to the enjoyment of all civil and political rights'.<sup>55</sup> The UN Convention Against Transnational Organized Crime and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>56</sup> impose upon Signatory States the obligations to undertake cooperation measures and establish

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<sup>52</sup> See, Mulaj Klejda (ed), *Violent Non State Actors in World Politics* (Columbia University Press 2010).

<sup>53</sup> Anna Gekht, 'Shared but Differentiated Responsibility: Integration of International Obligations in the Fight against Trafficking in Human Beings' (2008) *Denver Journal of International Law and Policy* 51.

<sup>54</sup> International Covenant on Economic, Social and Cultural Rights 993 UNTS 3, art 2.

<sup>55</sup> International Covenant on Civil and Political Rights 999 UNTS 171, art 3.

<sup>56</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, UN GAOR, 55th Sess., UN Doc. A/55/383 (Nov, 15, 2000)

policies to respond to trafficking in persons. Specifically, the Protocol addresses the demand, which fuels trafficking, by urging States Parties to ‘discourage the demand that fosters all forms of exploitation of persons, especially women and children that leads to trafficking’ through legal efforts and other initiatives within the educational, social and cultural fields.<sup>57</sup> Border measures are also afforded attention under the Protocol as each State is bound to strengthen border controls to prevent and detect trafficking in persons, without prejudice to the free movement of people.<sup>58</sup> Undoubtedly, the obligation of States to provide an effective criminal justice response system is crucial as it allows the State to adequately respond to any incidence of trafficking and at the same time, ensure the delivery of justice for the benefit of the victims. Furthermore, in order to establish a sound criminal justice set up, authorities must tackle the cases of corruption of officials.

The obligation of States to protect victims and provide adequate remedies for their sustained injuries is a responsibility, which flows from customary international law and rules of *opinio juris*.<sup>59</sup> The Global Alliance against Traffic in Women argues that ‘States have a responsibility to provide protections to trafficked persons pursuant to the Universal Declaration of Human Rights’ and through ratification of numerous international and regional human rights instruments.<sup>60</sup> The responsibility of providing protection to victims is also evident in instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women, among others, rendering it a prime responsibility of the State in fulfilling its international obligations under the said instruments. In this regard, the UN Declaration of Basic Principles of Justice to Victims of Crime and Abuse of Power<sup>61</sup> confirms that ‘any person whose rights or freedoms herein recognised are violated shall have an effective remedy’.<sup>62</sup>

## 7. The Responsibility to Protect

The responsibility to protect has been recognised as ‘an essential part of UN doctrine and State responsibility’<sup>63</sup> at the World Summit of 2005,<sup>64</sup> when Member States

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<sup>57</sup> *Ibid.*, 9 (5).

<sup>58</sup> *Ibid.*, 11(1).

<sup>59</sup> Gekht (n 53) 53.

<sup>60</sup> Global Alliance against Traffic in Women, ‘Human Rights Standards for the Treatment of Trafficked Persons’ (1999), 1.

<sup>61</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/30, 96th plen. mtg., U.N. Doc. A/RES40/34, Annex 1 (Nov. 29, 1985).

<sup>62</sup> *Ibid.*, art 6 (a)-(e).

<sup>63</sup> UN News Centre, ‘Interview with Edward Luck, Special Advisor to the Secretary-General’ (1 August 2011) < <http://www.un.org/apps/news/newsmakers.asp?NewsID=38> > (accessed 1 August 2011).

<sup>64</sup> World Summit, High-Level Plenary Meeting of the 60th Session of the General Assembly (2005).

undertook the obligation and responsibility 'to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. Additionally,

The international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. [...] We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those, which are under stress before crises and conflicts break out.<sup>65</sup>

Although the State's responsibility to protect is quite a new concept under public international law, Special Advisor to the UN Secretary General, Dr. Edward Luck hopes that States will endure and adopt this concept within their inherent ways of perceiving State responsibilities. This should also be complemented through concrete implementation such as law and policy-making and the fostering of this concept within educational curricula to truly emphasise the 'State's relationship to its people and its responsibilities to its people'.<sup>66</sup> Certainly, this theory is 'not a radical idea ... this is why States were born: States were born to protect people'.<sup>67</sup> As a matter of fact, positive obligations of 'protecting' human rights are reflected in the majority of human rights instruments whereby States are obliged to safeguard the enjoyment of human rights and monitor the activities of private individuals, which may result in the violation of such. In this respect, the recently adopted Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence<sup>68</sup> makes direct reference to the obligations of the Signatory States in preventing particular conduct carried out by non-State actors and states that

Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.<sup>69</sup>

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<sup>65</sup> Resolution adopted by the General Assembly (A/60/L.1) World Summit Outcome (2005) 30.

<sup>66</sup> (n 63).

<sup>67</sup> *Ibid.*

<sup>68</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence CETS No. 210, May 11, 2011.

<sup>69</sup> *Ibid.*, art 5.

The European Court of Human Rights has articulated the State's obligation to protect in its recent judgment of *Rantsev v Cyprus and Russia*<sup>70</sup> on the 7<sup>th</sup> of January 2010. This case dealt with cross border human trafficking in Europe whereby the victim's father claimed that the concerned States failed to investigate his complaint and protect his daughter from human trafficking and sexual exploitation under the 'artiste' visa scheme. Ms Rantsev was trafficked from Russia to Cyprus where she was sexually exploited and found dead in March 2001 after jumping from the balcony of apartment belonging to one of the cabaret's employees.<sup>71</sup> In this case, the Court ruled that despite the fact that the States were not responsible for the actual trafficking process and the resulting sexual exploitation; States were obliged to protect victims against trafficking in persons and investigate any claims of occurrences. Therefore, Cyprus was found to have violated its positive obligations under Article 4 of the European Convention of Human Rights and was held responsible for not providing appropriate protection against trafficking in persons and for not conducting an investigation into the suspicion that Ms Rantsev had been trafficked.<sup>72</sup> On the other hand, Russia was also held responsible for failing to examine and investigate Mr. Rantsev's claims about his daughter's exploitation.<sup>73</sup> Finally, the Court strongly delineated three positive obligations arising out of the Convention's Article 4<sup>74</sup> and argued that States must have in place a legislative and administrative framework to prohibit and punish trafficking. Secondly, States must take measures to protect victims or potential victims of trafficking in the case of a credible suspicion of trafficking and finally, States have a procedural obligation to investigate situations of potential trafficking on domestic and international levels in full cooperation with other States.<sup>75</sup>

Adequate protection to victims also consists of providing the necessary services to enable the rehabilitation of victims of trafficking, who would be suffering from such a traumatic experience. This aspect also uncovers the fact that although the crime of trafficking in persons is a transnational criminal activity, which must be condemned, it is primarily a grave violation of the victims' fundamental human rights. Therefore, it is imperative that this human dimension is considered when national authorities formulate national anti-trafficking strategies. As a matter of fact, victims of trafficking must be guaranteed access to justice in a tailored way, which recognises their difficulties and, which avoids the risk of re-victimisation. Victims should not in any way be prosecuted or placed in detention and they should not be coerced into cooperating with national authorities in order to be provided with care and support. Additionally, national indicators of trafficking and the identification of victims must be formulated, as

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<sup>70</sup> *Rantsev v Cyprus and Russia* ECHR 2010-25965/04

<sup>71</sup> *Ibid.*, paras 12-28.

<sup>72</sup> *Ibid.*, 75 para 8.

<sup>73</sup> *Ibid.*, 75, para 11.

<sup>74</sup> *Ibid.*, para 289-308.

<sup>75</sup> Human Rights Law Centre 'European Court Delivers Judgment in Landmark Human Trafficking Case' <<http://www.hrlrc.org.au/court-tribunal/european-court-of-human-rights/rantsev-v-cyprus-and-russia-2010-echr-2596504-7-january-2010/>> accessed April 2012.

this will enable the easier and faster identification of persons who might be victims of trafficking.

Of course, difficulties arise in the application and enforcement of the obligation of States to intervene in preventing the harm carried out by private entities. In concrete terms, how are States obliged to 'secure' 'protect' and 'promote' the enjoyment of human rights? Can a solitary failure to act comprise a breach of obligation and thus give rise to State responsibility? Are the elements of 'fault' and 'wilful intent' required? Should the failure to act be subjected to an evaluation of a 'foreseeable risk of harm'? What if the State was not in a position to foreknow the harm, but harm arises simply because of the State's failure to carry out the appropriate investigations?<sup>76</sup> The most frequently used criterion in determining the State's ability to influence the resulting outcomes of the conduct of non-State actors is that derived from the 'traditional State responsibility doctrine governing protection of aliens from private violence', that is the due diligence standard.<sup>77</sup>

## 8. The Standard of Due Diligence

The standard of due diligence, which can be traced back to the seventeenth century works of Grotius,<sup>78</sup> has been useful in identifying whether a State incurs responsibility for an act, which although not primarily attributable to the State, falls within the remit of the State to prevent. In this respect, within the sphere of international human rights law, a State may still be held responsible for acts of non-State and private actors should it be proven that the organs of the State failed to react and respond to such acts to prevent their occurrence and consequences. Therefore,

The State's responsibility under such circumstances derives not from its involvement in or complicity with the original act (which could, if established, constitute an additional head of responsibility) but from the breach of consequential, independent legal obligations.<sup>79</sup>

Pearson clarifies that the concept of due diligence is a tool by which 'government responsibility for violation of human rights by non-State actor is assessed' and argues

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<sup>76</sup> Farrior (n 21) 302.

<sup>77</sup> Ibid.

<sup>78</sup> For further discussion on Grotius's contributions to the body of international law see, Peter Haggemacher, Hedley Bull et al. eds., 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture' (1990) *Hugo Grotius and International Relations* 133; Boutros Boutros-Ghali, 'A Grotian Moment' (1995) 18 *Fordham INT'L L.J.* 1609; Ian Clark and Iver Neumann (eds.) 'Grotius, Law and Moral Scepticism: Theory and Practice in the Thought of Hedley Bull' in *Classical Theories of International Relations* (Macmillan 1996); Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, trans. Francis W. Kelsey, Vol. 2 of *The Classics of International Law*, ed. James Brown Scott (OUP 1925); Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* trans. A. C. Campbell (Washington M. Dunne 1901); and Hugo Grotius, *Prolegomena to the Law of War and Peace*, trans. Francis W. Kelsey (New York Liberal Arts Press 1957).

<sup>79</sup> Gallagher (n 5) 248.

that in terms of trafficking in persons, this translates in the State's obligations to provide protection to victims of trafficking and ensure effective prevention through the use of appropriate investigation methods and eventual prosecution of the perpetrators.<sup>80</sup> This principle within the fight against trafficking in persons was also recognised by the then Special Rapporteur on Violence against Women, its Causes and Consequences Ms. Radhika Coomaraswamy. In her report to the Economic and Social Council, she notes that the State's duty to act with due diligence consists of preventing, investigating and punishing violations of human rights by State and non-State actors while also providing remedies and reparation to the victims. These duties are above and beyond the State's treaty obligations under specific human rights instruments.<sup>81</sup> This has been corroborated by various prominent entities within the human rights sphere such as the UN Committee on the Elimination of Discrimination against Women, which argued that States may be held responsible for private acts 'if they fail to act with due diligence' in preventing the human rights abuse or to investigate and punish such acts of violation.<sup>82</sup>

Nonetheless, the standard of due diligence was originally drawn from the 1998 judgment of the Inter-American Court of Human Rights in *Velasquez-Rodriguez v Honduras*.<sup>83</sup> The case dealt with the disappearance of the complainant which was carried out by State officials, however in the event that the official participation of the State in the disappearance was not proven, the State would still have incurred responsibility for failing to prevent this happening and its lack of due diligence in prosecuting and punishing the non-State actors in this regard.<sup>84</sup> Besides, the State is obliged to 'organise the governmental apparatus' and all governmental structures in order to ensure the delivery of 'free and full enjoyment of human rights'.<sup>85</sup> The need for urgent response by the State has also been highlighted in the Inter-American Commission on Human Rights' in its report about the disappearances and murders of women in Juarez, Mexico, whereby it stated that urgent response is required to 'protect against an imminent threat of violence, or in response to a report of a disappearance'.<sup>86</sup>

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<sup>80</sup> Elaine Pearson, 'Human Rights and Trafficking in Persons: A Handbook' (2000) Global Alliance against Traffic in Women, 10.

<sup>81</sup> Economic and Social Council. *Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women* (submitted in accordance with Commission on Human Rights resolution 1997/44, E/CN.4/2000/68 2000) 5.

<sup>82</sup> CEDAW General Recommendation No. 19 UN Doc. CEDAW/C/1992/L.1/Add. 15, 1992.

<sup>83</sup> *Velasquez Rodriguez v Honduras* Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

<sup>84</sup> *Ibid.*, para 182.

<sup>85</sup> *Ibid.*, para 176.

<sup>86</sup> Inter-American Commission on Human Rights, 2002 Annual Report, Ch. VI: *The Situation of the Rights of Women in Ciudad Juarez, Mexico: The Right to be Free from Violence and Discrimination* (2003) OEA/Ser. L/V/II.117, Doc. 1, rev. 1 para. 155.

Henceforth, the standard of due diligence may also be translated into the layers of obligations placed on States to 'respect, protect, fulfil and promote' human rights'.<sup>87</sup>

Subsequent judgments include that of the European Court of Human Rights in *Osman v UK*,<sup>88</sup> which held that the failure of the State's police force to react to harassment could be attributable to the State. In *Akkoç v Turkey*, the same Court argued that the primary obligation of a State is 'to secure the right to life' by enacting measures, which prevent the commission of offences and should they occur, the State is obliged to provide law enforcement measures for the punishment of the perpetrators committing the breaches.<sup>89</sup> In order to fully exploit the standard of due diligence for the full implementation of human rights law, it is necessary for States to employ different strategies, which allow the States to intervene in various stages.<sup>90</sup> Although the development of this concept may be slowed down due to lack of clarity in its application, the State's fulfilment of the due diligence standard must be assessed with due consideration to the facts and surrounding circumstances of each particular case.

## 9. Conclusion

Undoubtedly, the field of State responsibility has been dominated by the workings of the ILC, which although heralded as authoritative in this respect has also been subjected to its fair share of criticism. Allott looks upon the ILC's 'characteristic working method to the topic of State responsibility'<sup>91</sup> and describes the 'long quest by the ILC for a substantive system of state responsibility' as a search for a 'mythical creature', which threatens

[T]he incremental creation of a true international legal system in a true international society and reveals the long-term destructive effect of a government-dominated commission on the development of international law.<sup>92</sup>

The partial exclusion of non-State actors has also been critically noted throughout the years as the international legal system has undergone tremendous change, which demands the reflection of such within the rules governing such structures. Certainly, this movement encompasses the growing role of non-State actors, which further

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<sup>87</sup> Sisi Liu, 'Due Diligence: The Duty of State to Address Violence against Women' (2006) Amnesty International Hong Kong, 4.

<sup>88</sup> *Osman v UK* ECHR 1998–VIII 3124.

<sup>89</sup> *Akkoç v. Turkey* App no 22947 & 8/93 (ECHR 11 April 2000) para 77.

<sup>90</sup> Economic and Social Council. *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women – The Due Diligence Standard as a Tool for the Elimination of Violence against Women, Report of the Special Rapporteur on Violence against Women* (submitted in accordance with Commission on Human Rights resolution 2005/41, E/CN.4/2006/61 2006) 17.

<sup>91</sup> Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) Harvard International Law Journal Vol. 29 Number 1, 1.

<sup>92</sup> *Ibid.*, 2.

emphasises the fact that the Commission's historical 'almost exclusive concern with States 'does not mirror 'the international system of the twenty-first century'.<sup>93</sup> Consequently, the general principle of non-attribution for the acts of private persons is another issue, which presents practical difficulties in the event of holding a State responsible for trafficking in persons and human rights violations. Gallagher questions this scenario and argues that should States be able to absolve themselves of any responsibility on the premise that such acts could not be directly attributable to them, the international legal order would be neglecting 'its greater purpose of securing accountability and justice.' In fact,

International rules on State responsibility would appear to offer very little scope for securing the accountability of States for trafficking taking place within their territories or involving their nationals. This would, in fact, render almost totally ineffective the complex web of international norms that have evolved to protect trafficked and other vulnerable persons from exploitation and abuse.<sup>94</sup>

In employing the general principles of state responsibility in the context of breaches of international obligations dealing with human rights violations, stakeholders within the field international human rights have become accustomed to and recognise the notion of positive obligations. Therefore, a State is not simply required to refrain from engaging in conduct, which violates human rights but is obliged to actually promote and safeguard the effective enjoyment of human rights through its fulfilment of the standard of due diligence.<sup>95</sup> Nonetheless, the role of the State in promoting and upholding such human rights must not be underestimated. As Farrior avidly points out,

[W]hen the state does not provide that protection – from traffickers who prey on girls with impunity, from people who are enslaving other people, from individuals who attack lesbians or gay men with impunity, from companies that subject workers to staggeringly degrading conditions-then what, indeed, remains of the role that the state is to play?<sup>96</sup>

Unfortunately, sometimes international law conveys an erroneous misconception that human rights law attends to 'government action but not government inaction' with the sole purpose of curbing 'government abuses but not private abuses' notwithstanding the historical record that the abolition of slavery was the mission of first international human rights movement.<sup>97</sup>

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<sup>93</sup> Brown Weiss, (n 31) 799.

<sup>94</sup> Gallagher, (n 5) 236.

<sup>95</sup> James Crawford, 'Revising the Draft Articles on State Responsibility.' (1999) 10 2 EJIL 439.

<sup>96</sup> Farrior (n 21) 300.

<sup>97</sup> *Ibid.*