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Abstract

Human trafficking is lucrative crime, often trans border, affecting every country in the world. In the course of this crime victims are subjected heinous experiences. Consequently the crime has been described as a grave violation of human rights. However, there are those that question the legal nature of trafficking in human beings, and whether it really is a violation of human rights. This article explores the relationship between human trafficking and human rights, and analyses what are the impacts of that relationship on State's duties to fight the crime.

1.0 Introduction

The exploitation of human beings has existed since ancient times; for instance it is hard to imagine the building of the Roman Empire without the work of slaves. Today, stories of exploitation in the form of trafficking in human beings (THB) continue to emerge from survivors, activists, journalists, academics and policy makers. 'Some victims are lured or deceived into their own slavery due to being misled by their traffickers while there are other who are captured through kidnapping or by being sold as a commodity and are forced to work as slaves.' Quantifying human trafficking is exceptionally hard, it is a clandestine activity and one whose victims more often than not are too scared to seek assistance. There fear is two fold; on one hand they do not want to be retaliated by their traffickers and on the other they fear the authorities - particularly the fear of deportation or criminal prosecution. What is known however is that 'human trafficking knows no boundaries'¹, it preys on innocent and vulnerable individuals and these individuals can be found anywhere. The victims of human trafficking can be of either gender and of any age.

¹ Fowler, Jeana, Nicolette Che, and Lindsay Fowler, "Innocence Lost: The Rights Of Human Trafficking Victims," *Procedia - Social And Behavioral Sciences* 2 (2) (2010): 1345-1349. doi:10.1016/j.sbspro.2010.03.198. p.1346

It is defined in the European Union by Article 2 of the Directive 2011/36/EU Preventing and Combating Trafficking in Human Beings and Protecting its Victims as:²

1. The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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.
2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.
3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

In the course of human trafficking, victims are subjected to heinous experiences that degrade, humiliate and impact their physiological and psychological wellbeing. Take for example forced labour; victims are promised jobs such as cleaners, waitressing, au pairs. On arrival the reality changes, and the victims are forced, for example, to work 12h shifts as domestic servants, are prevented from having contact with the outside world, their documents are taken off them and their obedience is extracted through the use of physical and psychological coercion. The abuse experienced by victims is a constant, and the crime is often committed against a person in such a systematic manner uncomparable to robbery or theft. As summarized by Masika: ‘the conditions faced by trafficked persons include classic elements associated with slavery historically, such as abduction, use of false promises, transport to a strange city or country, loss of freedom and personal dignity, extreme physical abuse, and deprivation.’³

² European Parliament and the Council, Directive 2011/36/EU of 15.04.2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1, 15.4.2011.

³ Rachel Masika, *Gender, trafficking and slavery*, (Oxford: Oxfam, 2007), p. 4

Consequently the crime has been described as a grave violation of human rights.⁴ However, there are those that query the legal nature of trafficking in human beings, and whether it always qualifies as a violation of human rights.⁵

In a situation where the State has done no wrong and private actors commit human trafficking, Piotrowicz fiercely questions whether human rights are violated. The scholar argues: ‘acts by individuals, such as enslavement, only breach the victim’s human rights if the State has failed to prevent it or failed to take appropriate action against it.’⁶ Piotrowicz notes that human trafficking is more a matter for criminal law, as in the case of murder or theft. If human trafficking was a human rights violation this would lead to legal responsibility of non-State action under international law and therefore to individual remedies against the perpetrator under human rights law. There are obstacles to the scholar’s arguments, for there is substantial reference to human rights in the various international instruments that deal with human trafficking. Moreover, it is possible to argue that the threshold for State responsibility is so high that in many cases we will find violations of human rights.

The aim of this paper is to ascertain the relationship between human trafficking and human rights and to establish what a human rights approach to human trafficking entails. It is not however the purpose to consider the debates on the horizontal application of human rights, as this debate continues to be unresolved.⁷

2.0 A brief reminder of what are human rights

Much has been written on the topic of the framework of human rights⁸, which entails the proliferation of universal rights (civil, cultural, economic, political and social rights, as well as the right to development), a number of domestic and international human rights organisations, human rights courts and

⁴ Jennifer, Nam, “The case of the missing case: examining the civil right of actions for human trafficking victims,” *Columbia Law Review*, 107, (2007): 1655-1696

⁵ Ryszard, Piotrowicz “The legal nature of trafficking in human beings,” *International Human Rights Law Review*, 4, (2009): 175-203.

⁶ Ryszard, Piotrowicz, “States’ Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations,” *International Journal of Refugee Law*, 24 (2), (2012): 181-201, p.193

⁷ Martin, Scheinin, “Terrorism’ Obligations” in *International Human Rights Law*, ed. Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran , (Oxford: Oxford University press, 2014) pp.550-566

⁸ see for e.g., Philip Alston, *The United Nations And Human Rights* (Oxford: Clarendon Press, 1992). Jack Donnelly, *Universal Human Rights In Theory And Practice* (Ithaca: Cornell University Press, 1989); Michael E Goodhart and Anja Mihr, *Human Rights In The 21St Century* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2011).

human rights studies. I will therefore not dive into a profound analytical discussion that surrounds the subject. Instead I aim to present the key details of human rights that will allow me to ascertain whether or not human trafficking is a violation of human rights.

2.1 Obligations of States towards persons

The history of human rights materializes this legal regime as a vertical relationship between the State and its citizens, where the framework is designed to control and limit the State in its actions towards the people. ‘The essence of human rights law is that it makes the State accountable for failing to protect rights which it has the power and obligation to protect, such as the prohibition on slavery.’⁹ Here it is helpful to introduce the “nature of obligations” framework.

The “nature of obligations” framework sheds light on what a State has to do to comply with human rights law. According to Mégret¹⁰ States must respect, protect and fulfill human rights:

Respect

‘States have a negative obligation not to take any measures that result in a violation of a given right. They should not consciously violate rights, either through their organs (for example, parliament or the executive) or through their agents (such as, civil servants, the police, or the army).’¹¹

Protect

Protection requires States to ensure that persons within their jurisdiction do not suffer violations from third parties. In other words states should create an environment where rights can be enjoyed. This duty extends to the private sphere. The women’s rights movement has significantly relied on this duty with respect to the need to protect women from abuse at home.¹² As Mégrét summarised ‘violations that occur *a priori* in the private sphere (and were as a result

⁹ Ryszard, Piotrowicz “The legal nature of trafficking in human beings,” *International Human Rights Law Review*, 4, (2009): 175-203, p.192

¹⁰ Fredrick Megret, “Nature of Obligations” in *International Human Rights Law*, ed. Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, (Oxford: Oxford University press, 2014), pp. 96-118

¹¹ *Ibid.* p.102

¹² See for e.g., Bonita Meyersfeld, *Domestic Violence And International Law* (Oxford: Hart, 2010).

traditionally neglected by human rights law), have thus been linked to the public sphere.¹³

Fulfill

The obligation to fulfil is a positive one where States have to take steps that will allow the applicability of rights. In other words states do not just have to adopt appropriate legislation but they also have engage in ‘judicial, administrative and educative and other appropriate measures.’¹⁴

2.2 Protecting humanity and dignity

Donnelly describes another key feature of human rights: ‘We have human rights not to the requisites for health but to those things ‘needed’ for a life of dignity, for a life *worthy* of a human being, a life that cannot be enjoyed without these rights.’¹⁵ Donnelly also states that:

‘The “human nature” that grounds human rights is a *prescriptive* moral account of human possibility...the moral nature that grounds human rights says that beneath this we must not permit ourselves to fall. Human rights are “needed” not for life but for a life of dignity, a life worthy of a human being. “There is a human right to x” implies that people who enjoy a right to x will live richer and more fully humane lives.’¹⁶

2.3 Human rights in law

Recognition of the significance of human rights has paved the way for the codification of these values within various international conventions and in domestic law. This in turn makes the notion of human rights more factual. Indeed Freeman argues that the gap between human rights as a normative ideology and

¹³ Megret, F. (2104). Nature of Obligations In D. Moeckli, S. Shah and S. Sivakumaran (Eds.) *International Human Rights Law* (pp. 96-118), Oxford: Oxford University press p.102

¹⁴ UN Human Rights Committee. (2004). General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant. 26 May 2004, CCPR/C/21/Rev.1/Add.13.para 7.

¹⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca: Cornell University Press, 1989), p.17.

¹⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice (3rd ed)*, (Ithaca: Cornell University Press, 2003), p.14

social science as an element of the positivist school of thought has been filled through law; for law is normative as well as factual.¹⁷

Human rights began to dominate the arena of international law after the Second World War. The United Nations' 1948 Declaration of Human Rights¹⁸ and the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (1950)¹⁹ were established against the backdrop of a number of committed atrocities. These documents predominantly focused on civil and political rights. However subsequent treaties and conventions incorporated economic, social and cultural rights: for example the United Nations' 1966 International Covenant on Economic, Social, and Cultural Rights²⁰ and the Council of Europe's European Social Charter.²¹ More recently the EU has adopted the Charter of Fundamental Rights of The European Union.²²

The starting point for human trafficking as part of the human rights field lies in 19th Century documents (e.g., 1926 League of Nations Slavery Convention²³) that concern the abolition of slavery; today recognised as one of the purpose elements of human trafficking.

3.0 Where do human rights obligations vis-à-vis human trafficking come from

The purpose of this section is to embed the discourse on human trafficking in human rights and bring forth the source of State obligations in this regard.

International and regional human rights law makes it clear that States have a duty to protect human beings from slavery and like practices. Article 8 of the International Covenant on Civil and Political Rights prohibits slavery and forced or compulsory labour. Article 4 of The European Convention on Human Rights also forbids slavery and forced labour. There is thus a place for slavery and forced

¹⁷ Michael Freeman, *Human Rights*, (Cambridge: Polity Press, 2002), p.77

¹⁸ United Nations. (1948). The Universal Declaration of Human Rights. Retrieved 6 November 2015, from <http://www.un.org/en/documents/udhr/index.shtml> accessed on 1st August 2016

¹⁹ Council of Europe. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms. Retrieved 6 November 2015, <http://conventions.coe.int/treaty/en/treaties/html/005.htm> accessed on 1st August 2016

²⁰ United Nations. (1966) International Covenant on Economic, Social, and Cultural Rights. Retrieved 6 November 2015, <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> accessed on 1st August 2016

²¹ Council of Europe. (1961). European Social Charter. Retrieved 6 November 2015 <http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm> accessed on 1st August 2016

²² European Union. (2012). Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

²³ League of Nations. (1926) Convention to Suppress the Slave Trade and Slavery, 25 September 1926, 60 LNTS 253, Registered No. 1414

labour to sit comfortably in the human rights domain. However, what about human trafficking?

As the work of Jean Allain clearly shows human trafficking and slavery are not synonyms.²⁴ In some instances human trafficking may be qualified as slavery or forced and compulsory labour; this is when the purpose of the exploitation was such. What about exploiting persons for the purpose of removal of organs or for forced begging? These instances are not necessarily qualified as slavery or forced labour and thus we must ask if they can still be seen as falling within human rights obligations. The answer is yes.

The Charter Of Fundamental Rights of The European Union at Article 5 outlaws slavery, servitude, forced labour and human trafficking. Likewise Article 6 of the Convention on the Elimination of all Forms of Discrimination against Women states that parties ‘shall take all appropriate measures, including legislation, to support all forms of traffic on women and exploitation of prostitution of women.’²⁵ The 1989 Convention on the Rights of Child prohibits trafficking in children for any purpose and includes protection measures for children who have been trafficked.

Noting these legislative instruments, the best way to conclude is to ascertain that there are numerous provisions that in some form or another place a responsibility on the State in the prevention of human trafficking. Moreover, as argued by Gallagher:

Human rights law has battled the demons of discrimination on the basis of race and sex; it has demanded equal or at least certain key rights for aliens; it has decried and outlawed arbitrary detention, forced labour, debt bondage, forced marriage, and the commercial sexual exploitation of children and women; and it has championed freedom of movement and the right to leave and return to one’s own country. There can be no doubt that the spirit of the entire corpus of human rights law rejects, absolutely, the practices and results that are integral to the human trafficking process.²⁶

Equally interesting is the reference to human rights in human trafficking legislation. The Preamble to the Council of Europe Convention on Action against Trafficking in Human Beings states that human trafficking is ‘**a violation of**

²⁴ Jean Allain, J. (Ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary*, (London: Oxford University Press, 2012)

²⁵ UN General Assembly. (1979). Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979. Art. 6

²⁶ Anne Gallagher, *The International Law of Human Trafficking*, (Cambridge: Cambridge University Press, 2012), p. 5

human rights and an offence to the dignity and the integrity of the human being'²⁷ [emphasis added]. The UN Resolution 11/3 states 'Recognizing also that trafficking in persons **violates human rights** and impairs the enjoyment of them...' ²⁸ [emphasis added].

It is also relevant to consider case law from the European Court of Human Rights (the Court), which makes clear that a State has specific obligations with respect to human trafficking. In the case of *Rantsev v. Cyprus and Russia* the court held that: 'The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership.'²⁹ It thus appears that the Court sees human trafficking as at least being based on slavery. Whether this is wrong or right is beyond the scope of this paper, however it is true that with the *Rantsev* judgment the Court confirmed human trafficking to the human rights arena.

Domestic courts have followed suite; the England and Wales Court of Appeal stating:

'The abuse to which victims of trafficking are exposed takes many different forms. At some levels it may amount to "slavery", or not far distant from "slavery", "servitude", or "forced or compulsory labour". Activities of this kind are prohibited by Article 4 of the European Convention of Human Rights...' ³⁰

Lastly the writings of prominent scholars and civil society organisations merit our attention. For Obokata 'trafficking is not only a criminal justice issues, but also a human rights issue, because the act is regarded as a serious threat to the promotion and protection of human rights.'³¹ Similarly Gallagher, one of the main authorities on the topic of human trafficking, repeatedly embeds any discourse on human trafficking within the human rights debate.³² Whilst Unchosen, a key anti-

²⁷ Council of Europe. (2005) Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197

²⁸ Human Rights Council. (2009). Resolution 11/3. Trafficking in persons, especially women and children. At. Preamble.

²⁹ *Rantsev v Cyprus and Russia* App No. 25965/04 (ECtHR 7 January 2010) At Para 281

³⁰ *R v L and Others (The Children's Commissioner for England and Equality and Human Rights Commission intervening)*, [2013] EWCA Crim 991, para. 11

³¹ Tom Obokata, "A Human Rights Framework to Address Trafficking of Human Beings," *Netherlands Quarterly of Human Rights*, 24(3), (2006): 379-404. p.380

³² Anne Gallagher, "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway," *Virginia Journal of International Law*, 49(4), (2009), Available at SSRN: <http://ssrn.com/abstract=1409816> accessed 2nd August 2016

trafficking UK charity, wrote: ‘Most women and children trafficked for sexual exploitation suffer extreme violations of their human rights, including the right to liberty, the right to dignity and security of person, the right not to be held in slavery or involuntary servitude, the right to be free from cruel and inhumane treatment, the right to be free from violence and the right to health.’³³ These works show that exploitation of another person through a means of deception, coercion, violence, abuse of power or fraud equate to the violation of a person’s integrity, liberty and freedom of movement. In turn these are rights that are safeguarded by human rights instruments.

The purpose of the next sections is to highlight and sensitize the reader to think of human trafficking as a human right violation only when the State has failed in its obligation as contained in law, and not in any other instance.

4.0 Human rights violations and the need for state involvement

It is worth beginning this section by recalling the position of Prof. Piotrowicz:

‘THB [Trafficking in Human Beings] is usually a private criminal act or enterprise – one or more private citizens are involved in the recruitment and transport of the victim, the trafficker (or somebody else) takes physical control over the activities and movement of the victim, and they (or somebody else) then exploit the labour of the victim for their own gain. In the absence of State involvement, for instance through complicity or neglect, it is hard to see why THB is anything more than a crime just like, say, murder, or theft. This is in no way to belittle the seriousness of THB and the harm it causes to victims. Nevertheless, human rights obligations are owed by States, not traffickers, murderers and car thieves.’³⁴

³³ Unseenuk.org,. (2015). *Facts and Figures*. Retrieved 6 November 2015, from <http://www.unseenuk.org/resources/trafficking-facts> accessed 2nd August 2016

³⁴ Ryszard, Piotrowicz “The legal nature of trafficking in human beings,” *International Human Rights Law Review*, 4, (2009): 175-203, p.186

In a separate piece Piotrowicz writes:

‘...in the absence of some form of State involvement or complicity, it becomes problematic to argue that the State is in some way directly responsible for undoubtedly egregious practices to which victims are subjected’³⁵

The premise of Piotrowicz’s argument is that we can only perceive human trafficking as a human rights violation when the State is in some way responsible: e.g., through failure to enact a legal regime, ratify instruments or if the State was directly involved in the crime. This argument echoes Freeman’s point, that assuming:

‘proper measures of police protection have been taken, there is clearly no duty incumbent upon members of the family of nations to answer for the injuries which resident aliens may suffer at the hands of individuals unconnected with the State or acting in a purely private capacity.’³⁶

In a similar vein the Office of the High Commissioner for Human Rights writes with respect to terrorism that: ‘Acts constituting human rights violations are committed primarily by organs or persons in the name of, or on behalf of, the State.’³⁷ Likewise in the case of *E V United Kingdom*³⁸, the Court held that the State had breached Article 3 of the Convention on the grounds that social services had failed to intervene to prevent on-going sexual abuse by a stepfather upon his step-children. The Inter-American Court of Human Rights also reflected on this point and coherently held that:

³⁵ Ryszard, Piotrowicz, “States’ Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations,” *International Journal of Refugee Law*, 24 (2), (2012): 181-201p. 186

³⁶ Alwyn V Freeman, *The International Responsibility Of States For Denial Of Justice* (New York: Kraus Reprint Co., 1970), p.368

³⁷ Office of the High Commissioner for Human Rights. (2008) . *Human Rights, Terrorism and Counter-terrorism*. Retrieved 6 November 2015, from <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> accessed 2nd August 2016, p.9

³⁸ *E V United Kingdom* (2003) 36 EHRR 31

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.³⁹

As such it follows that a human rights violation can occur if: (i) a State was directly engaged in the act of human trafficking; or (ii) a State did not discharge its obligation under the relevant law. Piotrowicz continues that the ‘consequence for breach of human rights lie with the State rather than the perpetrator, whose accountability remains confined to criminal law and, sometimes, to tort.’⁴⁰ Moreover, as the author points out, in none of the documents addressing human trafficking is there an obligation put on the trafficker. Instead it is the State that has duties and responsibilities to fulfill.

The breach was illustrated in *Siliadin v. France*. In this case the Court held that Article 4 of the European Convention on Human Rights gave rise to positive obligations, including the adoption and implementation of relevant criminal legislation making practices in Article 4 an offence. As summarized by Rijken and Koster:

‘The Court then held that a violation of Article 4 is a serious violation of the personal integrity. Since this is a fundamental value, only criminal law can guarantee the effective and necessary protection by the state against these violations. Because France did not have adequate criminal legislation that unambiguously made punishable the behaviour at issue and since the perpetrators of this behaviour had not been convicted, the Court judged that the state had violated its positive obligations under Article 4. For this violation, the state may be held liable.’⁴¹

³⁹ IACtHR series C No 4 (29 July 1988)/ Para. 172

⁴⁰ Ryszard, Piotrowicz “The legal nature of trafficking in human beings,” *International Human Rights Law Review*, 4, (2009): 175-203, p.193

⁴¹ Conny R.J.J. Rijken and Dagmar Koster, "A Human Rights Based Approach To Trafficking In Human Beings In Theory And Practice", SSRN Electronic Journal, n.d., doi:10.2139/ssrn.1135108, p. 22

5.0 Human rights obligations concerning human trafficking

Having established that we can only speak of human rights violations if the State has been at fault, it is relevant to set out the structure of the responsibilities with regard to human trafficking.

In recent years this has been simplified for European States with the enactment of the Council of Europe Convention on Action against Trafficking in Human Beings and in the EU the 2011/36/EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims. By way of a summary: both the Convention and the Directive oblige States to 1) prohibit trafficking acts; 2) investigate, prosecute and punish traffickers; 3) protect human trafficking victims and 4) address the causes and consequences of trafficking.

There is no blanket approach to fulfilling these obligations. What works in some countries may not be appropriate in others. However, there are some accepted steps that States should take to fulfill their obligations. A starting point is introducing or amending relevant legislation. The legislation should address all aspects from prosecution of offenders, protection of trafficked persons to establishing partnership frameworks to allow for a multi-disciplinary methodology. Human trafficking is connected to various spheres and activities, this means that a suitable response will entail broad legislation that impacts an array of State agencies, with the shared aim of preventing the exploitation of persons and thus the abuse of people's dignity.

Secondly: the realization of the requirements of victim protection. This was recognised by the European Court of Human Rights in the famed *Rantsev* case. In this case the Court held that if a State was aware, or ought to have been aware, that an individual was at a risk of being trafficked:

‘...there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.’⁴²

The judgment can be interpreted so as to argue a State has to provide for the safety of a trafficked person. It is not a far stretch to justify this in terms of the fact that trafficked persons by the very nature of their status are at a high risk of being re-trafficked. There is thus a nexus between Article 4 (prohibition of slavery and forced labour), which is a human right and the need to provide protection to trafficked persons. In this case Cyprus was found to violate Article 4 because of its direct failure to fulfill its obligations under the ECHR.

⁴² *Rantsev v Cyprus and Russia* App No. 25965/04 (ECtHR 7 January 2010), At para. 286

The court did not specify how far the protection should stretch, but the judgment makes clear there is a need for a victim centered approach. For example Article 12 provides for a range of measures that will allow a victim to safely and with full understanding take part in criminal proceedings. Article 12 underlines the need for victim protection by specifying right to access to victim protection programs and further support to prevent secondary victimization (avoiding unnecessary repetition of interviews during investigations, avoiding giving evidence in open court and unnecessary questioning concerning the victim's private life and avoiding visual contact between victims and defendants. Parties should use appropriate communication during examination).

Implementation through effective policing also requires those representing the State to be aware of people's vulnerabilities. Irregular migrants may fear deportation if they were to contact authorities and/or they may fear reprisal from their traffickers. As such they may not come forth and identify themselves as victims. Operative systems therefore cannot rely on victims to do the identifying but instead States need efficient mechanisms in place that provide for the maximum opportunities of victim identification. In turn this may require having: appropriate and regular training to frontline staff, specialized units that deal with human trafficking (e.g., the Modern Slavery Coordination Unit in Greater Manchester Police), communication amongst agencies and civil society organisations.

Thirdly, any approach to human trafficking requires effective and educated judiciary persons (prosecutors and judges). This is particularly true with regard to obligations concerning prosecuting trafficking but also obligations to consider the non-prosecution or non-application of penalties to human trafficking victims. An effective legal process will only take place if the relevant actors understand the complex nature of human trafficking.

An effective system also requires victims having knowledge of the rights and remedies and physical places for them to seek sanctuary and engage in rehabilitation. This is where civil society organisations and access to lawyers comes in to play.

Lastly, it would appear reasonable to require that States monitor their efforts and if statistics illustrate an approach is ineffective, the State must find new or additional tools.

6.0 Examples of State violation of human rights in human trafficking cases

This sections aims to show how despite the almost abundant level of relevant legislation, human rights in the context of human trafficking continue to be breached.

Take for instance the UK's tied Visa system for domestic workers under the Domestic Workers in a Private Household Visa.⁴³ The Domestic Workers in a Private Household Visa came into force in 2012, a product of the government's ambition to reduce net migration to the UK. Under this scheme a number of restrictions are attached to the visa. Domestic workers are not allowed to change employers while in the UK, and can stay for a maximum of six months, after which time they must return home. In addition they cannot bring dependents or switch to another type of visa. One main concern is the extent to which, employers subject individuals to exploitation and abuse by taking advantage of the fact that employees are legally "tied" to them. This in itself evokes imagery of historic slavery. Data provided by the UK National Crime Agency shows an increase in the number of referrals of human trafficking to the National Referral Mechanism that involved domestic servitude.⁴⁴ A persuasive case could thus be made: the law puts domestic migrant workers at risk of exploitation. It should be noted that the matter has not been put before the European Court of Human Rights however bodies such as *Kalayaan*, the migrant domestic workers' Non Governmental Organization, have expressed profound concern regarding the legislation. There is thus possible State failure to protect human rights.

A second example concerns Iraq and has recently been brought to public attention by an article in the New Yorker Magazine. The article cites the lawlessness that is overtaking Iraq as posing a threat to women and girls. It goes on to say 'The Sunni extremists have beheaded their male enemies and sexually enslaved some female captives.'⁴⁵ All this against a backdrop of a recently enacted Jaafari bill which legalizes marriage of girls as young as nine, entitles a husband to non-consensual sex with his wife and prevents a woman from leaving her home without her husband's permission, thus fostering a culture of gender inequality. The article paints a picture of a State that is not fulfilling its international legal responsibilities with regard to preventing human trafficking, prosecuting the offenders and protecting the victims. It is violating human rights laws.

The point made here is that human rights violations occur in a compliance deficit. On the other hand, what happens if the State did "everything by the book". If a country has adopted all the necessary laws and measures in respect of combating human trafficking can we still speak of a violation of human rights?

⁴³ Home Office. *Visas and Immigration - Domestic Workers in a Private Household visa*. Retrieved 6 November 2015, from <https://www.gov.uk/domestic-workers-in-a-private-household-visa/overview> accessed 2nd August 2016

⁴⁴ 234 referrals were received by the NRM 2014-2015, a 66 %increase from 2013-2014. National Crime Agency. (2015). *National Referral Mechanism Statistics – End of Year Summary 2014* (1 January 2015).

⁴⁵ Rania Abouzeid, "Letter from Baghdad. Out of Sight" *The New Yorker*, October 5, 2015, pp.34-39

7.0 The yardstick of due-diligence: how far does the duty to respect, protect and fulfill go?

In this section we discuss how we can attempt to decide if a violation of human rights occurred. To this end the standard of due diligence has been developed. In raising the need to rely on the due diligence standard Meyersfeld argues that:

‘...the due diligence test is the standard increasingly used in international human rights law...to describe a state’s duty to protect human rights...the barometer used to determine whether a state has complied with the obligation to be duly diligent is whether “a more active and more efficient course to procedure might have been pursued.”’⁴⁶

In other words, we can argue that only if best available and adequate measures have been adopted, than a State has fulfilled its obligations. ‘If not, even if suffering is induced by an individual in a purely private capacity, such as in the context of systematic violence, arguable the state would fail to fulfill its duty and would be responsible for a breach of international obligation.’⁴⁷ This rhetoric also applies to the need to remedy abuse because access to protection is an established right. That due-diligence is expected of States has also been well summarized in the *Velásquez Rodríguez* case, where the Inter-American Court of Human Rights held:

‘The State has [under Article 1 of the American Convention] a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.’⁴⁸

First hand experience tells us that never is everything done to precision – as shown above in the Iraq and UK case studies. There continue to be police officers

⁴⁶ Bonita Meyersfeld, *Domestic Violence And International Law* (Oxford: Hart, 2010). p. 151

⁴⁷ *Ibid.* p. 201

⁴⁸ *Velásquez Rodríguez Case*. (1988). Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrHR), 29 July 1988 at para. 174

who do not know what human trafficking is,⁴⁹ victims who go unidentified and traffickers who are not (properly) prosecuted. The Anti Trafficking Monitoring Group in the UK highlighted that: ‘Whilst the positive obligation to investigate trafficking has been established in law, there is still a discrepancy between the number of potential trafficked persons identified and the number of prosecutions of traffickers... The most worrying finding of the research was that a significant number of victims continue to be prosecuted for offences they have committed as a direct consequence of their trafficking.’⁵⁰ It is therefore arguable, that today States persistently fail to fulfill their obligations in respect of combating human trafficking. As such it would not be an error to speak of human trafficking as a human rights violation.

The due-diligence standard however is not free from problems. The ambiguous documents create an absence of clarity as to what exactly the law requires. Moreover, there is uncertainty as to the standard against which States should be assessed: against their means, against what is reasonable, against what is done in relation to other rights or against international standards? The above-cited *Ransteve* case shows that foreseeability is relevant. What else should be considered? These questions are open ended and as yet there is no clear guidance; especially as so few human trafficking cases end up before the European Court of Human Rights. Of course this is a highly complicated matter – deciding when enough is enough. The space of this work unfortunately does not allow for the exploration of these concepts and terminologies. However in the face of the different approaches Gallagher’s conclusion seems fitting: ‘Ultimately, a decision is likely to come down to an assessment of whether, under the circumstances of the particular case, the State is taking its obligations seriously.’⁵¹ Though what exactly is “seriously” remains undefined.

8.0 Concluding remarks

What conclusions can we draw? This paper has sought to make it clear that human rights are about law - they are a set of norms that are developed through court application. Human rights are awarded to us on the mere basis that we are

⁴⁹ John Meekins, “Human Trafficking Thrives Because Officers Don’t Know What It Is” *In Public Safety*, (2014), <http://inpublicsafety.com/2014/08/human-trafficking-thrives-because-officers-dont-know-what-it-is/> accessed 2nd August 2016

⁵⁰ Anti-Trafficking Monitoring Group, *In the Dock. Examining the UK’s Criminal Justice response to human trafficking.* (2010) http://www.antislavery.org/includes/documents/cm_docs/2013/i/inthedock_final_small_file.pdf accessed 2nd August 2016

⁵¹ Anne Gallagher, *The International Law of Human Trafficking*, (Cambridge: Cambridge University Press, 2012), p. 5

human. Human rights are vertically applied, thus if we speak of a violation the State has to be accountable. A trafficker - essentially a private person - cannot be taken to a court of human rights for the crimes inflicted on a victim. In turn a State can only be guilty of human rights violations if it failed to protect, respect and fulfil the rights it is supposed to comply with under internationally agreed treaties or if it was a perpetrator in the crime. In other words, human rights violations occur when there is a breach of legal obligations. If there is no State fault, there is no violation of human rights vis-à-vis human trafficking. Scholars, practitioners and policy makers should resist the temptation to always call human trafficking a human rights violation. The framework of human rights is not a blank slate on which we can pin point all crimes.

Having said that, the threshold of obligations is quite high albeit still somewhat hazy. If it can be shown that the State did not act with due diligence, then we can speak of a violation of human rights. The approach adopted (legislation, policy, enforcement, etc.) has to be genuinely effective. Naturally, much will depend on the facts of a particular instance. To-date we remain with questions as to what exactly is expected of States so that they fulfill their due-diligence and are not held liable.

A human rights based approach requires recognizing that trafficked persons are rights-holders and thus are entitled to rights such as non-discrimination or rights in relation to non-refoulement. We thus perceive trafficked persons not as witnesses, criminals or irregular migrants but instead we recognise them as victims of a crime and most importantly as humans who are entitled to rights.