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# Human Rights and Human Trafficking

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## 1. Introduction

International law recognises human trafficking as the movement into, or maintenance of an individual in, a situation of exploitation through fraud, coercion, abuse of authority or other unlawful means.[1] While subject to specific prohibition in its own right, trafficking is increasingly employed as an umbrella term to encompass a wide range of exploitative practices including debt bondage, slavery, servitude, forced labour, child labour, and forced marriage. It is not difficult to sustain an argument that their recent association with the politically charged criminal phenomenon of 'trafficking' has given these moribund prohibitions, which have long led a twilight existence on the periphery of the modern human rights system, a new lease of life.

In terms of international law, the most significant step in the global campaign against trafficking was the adoption in December 2000, of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol or Protocol).[2] The Trafficking Protocol represented a decisive break with the old idea of trafficking, enshrined in a long series of treaties dating back to the first decade of the twentieth century, as being exclusively about the movement of women and girls between states for purposes of sexual exploitation. Its definition of trafficking – the first ever – dispensed with any cross-border requirement; recognised the phenomenon as being

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[1] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, in force 25 December 2003, 2237 UNTS 319 (Trafficking Protocol or Protocol), Article 3.

[2] Ibid.

potentially applicable to all persons; and expanded the end purposes well beyond sexual exploitation to include many of the myriad ways in which human beings exploit each other for private gain.[3]

Despite removing the cross-border element in the definition, the impetus behind the development of the Trafficking Protocol was unquestionably an international one. Powerful states of destination in particular were becoming increasingly worried about the reach and impact of transnational criminal groups in regard to a range of illicit activities, including the movement of individuals across national borders for purposes of exploitation. Those states understood very well that individual action, or even a coordinated response amongst a small, like-minded coalition, would be next to useless. The only chance to recalibrate the odds in their favour was to push for a genuinely multilateral cooperation framework: one that would impose obligations on states in accordance with their particular place in the trafficking cycle. That commitment is reflected in the core primary rules which, as explained below, typically either presume or lead to a situation where obligations and resulting responsibilities are shared between states.

The new definition recognises that not all situations of trafficking are the result of a collectively caused harm that raises obvious issues of shared responsibility. The unlawful recruitment and use of child soldiers for example, widely identified as a form of trafficking,[4] is often entirely manifested within the borders of a single state. It is reported that most trafficking-related exploitation involving India is internal, encompassing men, women, and children who have never left that country being caught up in situations of forced and bonded labour from which they cannot escape.[5] There are nevertheless good reasons why trafficking continues to be strongly associated with cross-border movements. High levels of personal control are required to place and maintain individuals in exploitation, and the application of such controls is rendered more effective through the geographic, social and linguistic isolation of victims. The economics of trafficking are also relevant: the supply of potentially exploited and coerced labour in relatively poorer countries is funnelled to meet demands for cheap

[3] For a detailed examination of the drafting history of the protocol, its substantive provisions and the definition see A.T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010), especially at Chapters 1 and 2.

[4] See for example, S. Teifenbrun, 'Child Soldiers, Slavery and the Trafficking of Children' (2007) 31 *Fordham International Law Journal* 415. See also US Department of State, *Trafficking in Persons Report: June 2012* (Washington, DC, Department of State, 2014), pp. 34, 38-39.

[5] See *Trafficking in Persons Report* 2014, ibid., pp. 203-206. See also Global March Against Child Labour, *Dirty Cotton: A Research on Child Labour, Slavery, Trafficking and Exploitation in Cotton and Cotton Seed Farming in India* (2012).

goods and services in relatively wealthier ones. It is on this basis that women from Thailand and China are trafficked into the Australian sex industry;[6] and that men and women from Fiji and Bangladesh are trafficked by private contractors onto United States military bases for bonded and highly exploitative labour.[7] The illegal market for transplanted organs in Israel is not addressed locally. Rather, Brazilians are trafficked to South Africa, Belarusians to Ecuador, and Moldovans to Kosovo to meet this demand.[8] The broad scope of the relevant primary obligations discussed below ensures that issues of shared responsibility will inevitably arise in such situations. In relation to the trafficking of women between Thailand and Australia for example, the rules reflect an understanding that a one-sided response is inevitably incomplete and therefore ineffective; accordingly, they impose on both Thailand (as state of origin) and Australia (as state of destination) specific obligations of prevention, response, and cooperation tailored to the part of the problem that it is within their respective capacities to address. The secondary rules of responsibility make it possible to attribute violations of primary obligations to both states. The involvement of multiple states and private parties in trafficking-related harm may complicate application of the primary and secondary rules to determine shared responsibility, but does not prevent it.

This chapter examines the legal framework around trafficking in persons with specific reference to the concept of shared responsibility[9] for trafficking-related harm; most particularly, the human rights violations that are integral to the trafficking process and its outcomes. The chapter acknowledges that it is one thing to recognise common obligations and joint conduct giving rise to shared responsibility and quite another to develop responses that address this in a meaningful way. The normative convergence around human trafficking that has emerged over the past decade has not yet led to structures and processes and, most critically, to ways of thinking that give effect to the reality of shared responsibility for trafficking-related harm. As the scenarios selected for this chapter illustrate, the resulting responses are still too often piecemeal and incomplete, failing to meet the broader

[6] See D. McInnes and P. Wilson, *Sex Trafficking: The Dark Side of the Australian Sex Industry?* (Chatswood, NSW: New Holland Publishers, 2012).
[7] See American Civil Liberties Union and Allard K. Lowenstein International Human Rights Clinic, Yale Law School, *Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors* (2012).
[8] See generally M. Smith, D. Krasnolutska and D. Glovin, 'Organ Gangs Force Poor to Sell Kidneys for Desperate Israelis', Bloomberg Markets Magazine, 2 November 2011. See also A. Nicolaides and A. Smith, 'The Problem of Medical Tourism and Organ Trafficking' (2012) 26 *Medical Technology SA* 33.
[9] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359.

international goal of ending impunity for traffickers and securing justice for those who have been exploited.

## 2. Factual scenarios

This chapter selects two very different scenarios as the starting point from which to examine the question of shared responsibility in the context of trafficking in persons. Both scenarios involve multiple wrongs (violations of primary rules) that are capable of being attributed to multiple states, and that together contribute to a single harmful outcome. As with many cases of trafficking-related harm, shared responsibility in these scenarios generally arises through individual, rather than concerted action, although at least one exception is noted below.

### *2.1 Trafficking and related exploitation involving two European states (Rantsev scenario)*

This scenario presents a straightforward human trafficking situation where there is clear indication of involvement of two countries in the harmful outcome. A consideration of both primary and secondary rules may establish the state of origin as responsible for failing to protect the individual involved, or failing to prevent the practice (e.g. deceptive recruitment) that led to the harm. The state of destination may be held responsible for immigration or labour laws and procedures that facilitate exploitation; for failing to investigate with due diligence; and for failing to protect the victim. Both states may be responsible for failing to cooperate (e.g. in relation to repatriation), and for failing to provide victims with effective access to remedies.

In January 2010, the European Court of Human Rights (Court) found that Cyprus and Russia had incurred international legal responsibility with respect to the death, in Cyprus, of a Russian national and probable victim of trafficking, and that they were both therefore obliged to provide a remedy for the harm caused.[10] Oxana Rantseva entered Cyprus on an 'artiste' visa in 2001; an immigration and employment category that had previously facilitated the entry of tens of thousands of women from poor countries of the former Soviet Union into the Cypriot sex industry. Less than two weeks later, Ms Rantseva was dead in circumstances that were never fully explained. Reports from the Cypriot National Ombudsman[11] as well as from

[10] *Rantsev* v. *Cyprus and Russia*, App. No. 25965/04 (ECtHR, 7 January 2010).
[11] Cyprus Commissioner for Administration (Ombudsman's Office), *The Entry and Labour Status of Migrant Artists Women* (2003).

the Council of Europe Commissioner for Human Rights[12] confirmed that many persons entering Cyprus on these visas were victims of human trafficking: tricked about the nature or conditions of their work; bound to their employers through debt and threats; and unable to move around without close supervision. In its judgment, the Court held that there could be: 'no doubt that the Cypriot authorities were aware that a substantial number of foreign women, particularly from the former Soviet Union, were being trafficked to Cyprus on artistes visas and, upon arrival, were being sexually exploited by cabaret owners and managers'.[13]

The Court rejected an argument by Russia that the claim against it was inadmissible because it had no 'actual authority' over the territory of Cyprus; affirming its competence to examine whether Russia complied with its obligations to protect the applicant from trafficking while she was in Russia, and to investigate allegations of trafficking in Russia. While the victim's death and likely exploitation in this case were not attributed to either Cyprus or Russia, both states were held to have violated a number of their obligations under the European Convention on Human Rights.[14] In relation to Article 2 (right to life), Cyprus was found to have violated its procedural obligation to carry out an effective investigation. In relation to Article 5 (prohibition on arbitrary detention), a violation by Cyprus was found with regard to Ms Rantseva's detention in a police station and private apartment on the evening of her death. In relation to Article 4 (prohibition on slavery, servitude and forced or compulsory labour),[15] three separate violations were found: first, a violation by Cyprus of the procedural obligation to put in place an appropriate legislative and administrative framework; second, a violation by Cyprus of the positive obligation to take protective measures;[16] and third, a violation by both Cyprus and Russia of the procedural obligation to investigate human trafficking. In finding that the investigatory failures by Cyprus and Russia had both contributed to the impunity of the trafficking chain, the Court affirmed the shared nature of responsibility with respect to many such situations:

[12] Council of Europe, Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to the Republic of Cyprus on 7-10 July 2008. Issues reviewed: Asylum, Detention of Migrants and Trafficking in Human Beings in the Republic of Cyprus*, Doc. CommDH(2008)36, 12 December 2008, available at https://wcd.coe.int/ViewDoc.jsp?id=1385749&Site=CM .
[13] *Rantsev*, n. 10, para. 294.
[14] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 222 (as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13) (European Convention on Human Rights).
[15] In the course of its judgment the Court concluded that trafficking in persons 'within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the [European] Anti-Trafficking Convention, falls within the scope of Article 4 of the European Convention on Human Rights'. *Rantsev*, n. 10, para. 282.
[16] The Court found no violation by Russia in relation to the obligation, stating that: 'It is insufficient … to show that there was a general risk in respect of young women traveling to Cyprus on artistes' visas.' *Rantsev*, ibid., para. 305.

> When a person is trafficked from one State to another, trafficking offences may occur in the State of origin, any State of transit and the State of destination. Relevant evidence and witnesses may be located in all States … In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.[17]

### *2.2 Trafficking and forced labour involving third-country nationals on foreign flagged fishing vessels operating in New Zealand's exclusive economic zone (Seafarer scenario)*

Unlike the previous example, this scenario has not been tested through established processes. It has been selected for its value in demonstrating: first, the growing complexity of human trafficking cases, and the legal and political difficulties that have arisen as the concept of trafficking expands to cover a previously unimaginable range of exploitative conduct, often involving multiple state and non-state entities as potentially responsible parties; and second, the jurisdictional complications that will inevitably obstruct allocation of shared responsibility in cases of such complexity.

Fishing is a major industry in New Zealand and a number of regulatory innovations have been developed to optimise harvesting of fish stocks in that country's richly endowed exclusive economic zone (EEZ). One innovation is the 'Foreign Charter Vessel': a system whereby foreign vessels, complete with foreign crew, are chartered by New Zealand companies to fish the EEZ on their behalf, with the catch being transferred onshore for processing. Over the past decade compelling evidence has slowly emerged of forced and exploitative labour amounting to human trafficking on board Foreign Charter Vessels. While isolated cases dating back to the mid-1990s had previously been reported,[18] the issue first came to international attention in August 2010 when the Republic of Korea flagged vessel *Oyang 70*, sank in calm seas 700 km off the New Zealand coast. Five Indonesian fishermen and the Korean captain died. The rescue exposed horrific living and working conditions for the Indonesian crew.[19] Less than a year later, seven crew members abandoned the Korean-flagged fishing vessel *Shin Ji* and thirty-two abandoned the *Oyang 75*, another Korean-flagged vessel. All thirty-nine

[17] Ibid., para. 289.
[18] J.A. Devlin, 'Modern Day Slavery: Employment Conditions For Foreign Fishing Crews In New Zealand Waters' (2009) 23 *Australian & New Zealand Maritime Law Journal* 82.
[19] C. Stringer, G. Simmons and D. Coulston, *Not in New Zealand Waters, surely? Labour and human rights abuses aboard foreign fishing vessels* (New Zealand Asia Institute, The University of Auckland, 2011), p. 3.

Indonesians alleged abuse and under payment or non-payment of wages. Some also alleged physical abuse and sexual harassment.[20] These and other cases make abundantly clear that labour standards for foreign fishing crew, established through a voluntary code of practice adopted by the New Zealand Government in 2006, are being widely flouted.

The jurisdictional complexities of this scenario are formidable: the harmful conduct is apparently taking place at least partially outside the territory of the state to which it is most directly linked (New Zealand); by nationals of a second state on vessels flying the flag of that state (Republic of Korea); and against nationals of a third state (Indonesia). In relation to New Zealand for example, there is a question about whether this state is legally responsible for what happens on the Foreign Charter Vessels operating within its EEZ or in adjacent international waters. Charges that New Zealand is responsible under international law for violating its primary obligations to prevent trafficking, investigate allegations of trafficking with due diligence, prosecute perpetrators, and protect victims all depend on whether the jurisdictional hurdles necessary to attribute responsibility in the first place can be cleared. Certainly any responsibility that is successfully established in respect of New Zealand is likely to be shared with: first, the flag state of the vessel concerned, which may also be found to owe a duty under international law to prevent trafficking on its 'territory'; to prosecute its nationals; and to protect victims; and second, the state of origin of the victims which may be found to owe a similar range of obligations of prevention and response. The scenario presents a further complication related to the involvement and potential responsibility of (or for) non-state actors whose conduct has contributed to the harm. This group could include the New Zealand entities to whom fishing permits are issued, and who contract the services of Foreign Charter Vessels; recruitment agencies in the flag state and the victims' country of origin; and even the seafood processing, export and retail corporations within and beyond New Zealand whose supply chain is tainted by forced or exploitative labour.

## 3. The primary rules

The composite nature of trafficking guarantees that it does not sit comfortably within existing boundaries and categories of international law. Human rights law, for example, does not contain a clear prohibition on trafficking. The question of whether or not such a prohibition

[20] Ibid.

exists; or whether it can be inferred; or whether other prohibitions that do exist can be made to 'fit' trafficking can only be answered with reference to a myriad of sources, instruments and standards. In addition, international human rights law is no longer the sole element of the international legal framework around trafficking. International criminal law, humanitarian law, refugee law, labour law, and migration law are all part of that framework. Also relevant are the rules that determine which states have the capacity/obligation to act, and under what circumstances. For example, in deciding which states involved in the *Seafarer* scenario are required to protect victims and prosecute perpetrators, reference must be made to general principles of jurisdiction, along with specialist primary rules that are part of the law of the sea.

Of critical importance is the relatively new field of 'transnational criminal law', which includes, alongside treaties on corruption and drug trafficking, the United Nations Convention against Transnational Organized Crime (Organized Crime Convention)[21] and its attached Protocol on trafficking in persons. Like its parent instrument, the Trafficking Protocol was never intended to be a human rights treaty, and its core obligations relate to criminalisation, punishment, border controls, and cooperation in investigations and prosecutions. The jurisdictional scope of these provisions is very wide, clearly aimed at eliminating safe havens by ensuring that all parts of the crime can be punished wherever they took place.[22] States parties are required to exercise territorial jurisdiction (including over their vessels),[23] and are encouraged to exercise jurisdiction in other circumstances, for example when nationals of a state are either victims or perpetrators of relevant offences.[24] Human rights law and refugee law are affirmed as being applicable, and victims are acknowledged as holders of certain entitlements, but the relevant provisions are vague on details. These limitations could have paved the way for a fragmentation of the legal order around trafficking, but concerns in this regard have proved to be largely unfounded. A review of relevant human rights law, prompted by the adoption of the Protocol, has confirmed the applicability of a broad range of existing rights and obligations to all forms of trafficking-related exploitation.[25] The development and adoption of several regional treaties, a raft of soft law instruments that integrate human rights into the legal framework, as well as a small but slowly growing body of international and

[21] United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, in force 29 September 2003, 2225 UNTS 209 (Organized Crime Convention).
[22] United Nations Office on Drugs and Crime (UNODC), 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto', UN Sales No. E.05.V.2 (2004), p. 104 (para. 210).
[23] Article 15(1) Organized Crime Convention, n. 21.
[24] Ibid., Article 15(2).
[25] Gallagher, *The International Law of Human Trafficking*, n. 3, especially at Chapter 3.

regional case law, have also contributed substantially to filling some of the Protocol's gaps and fleshing out the substantive content of the most important primary rules. The Protocol's rapid entry into force and wide ratification[26] meant that national legal systems changed very quickly and in similar ways, using its provisions as a template for legislative reform. Today, most states have specialist laws or penal code provisions that incorporate a common definition of trafficking and comparable legislative standards related to prosecution, prevention and victim protection.

A comprehensive examination of the relevant primary rules around trafficking has been undertaken by the present author elsewhere.[27] The following sections do not repeat or summarise that analysis, but rather provide an overview of the core obligations most relevant to the two scenarios set out above, as well as an insight into their application in situations where questions of shared responsibility arise.

The link between the primary rules, considered in this section, and the secondary rules of state responsibility, examined in the following section, is a critical one. Specifically, it is the content of the primary rules that largely determines the nature and allocation of legal responsibility. For example, as discussed further below, the question of whether a state may be responsible for trafficking related harm caused by private individuals must ultimately be answered with reference to the primary rules. If those rules can be shown to establish obligations to prevent, remedy or respond to abuses committed by private persons or entities then, despite the general principle of non-attribution of private conduct,[28] the secondary rules would not prevent a finding of responsibility in relation to relevant acts and omissions.

The primary rules are also critical in establishing the standard against which attribution of responsibility is measured. For example, the standard of 'due diligence' is becoming the accepted benchmark against which state actions to prevent or respond to human rights and other violations originating in the acts of third parties are to be judged. An assessment of whether a state has met such a standard will depend on the content of the original obligation, as well as the facts and circumstances of the case. In relation to trafficking, states will generally not be able to avoid responsibility for the acts of private persons when their ability

[26] The Protocol entered into force 25 December 2003 with forty-five states parties (as at December 2014, the Protocol has been ratified or acceded to by 166 states).
[27] Gallagher, *The International Law of Human Trafficking*, n. 3, Chapters 2 and 3.
[28] 'As a general principle, the conduct of private persons or entities is not attributable to the State under international law.'. Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Article 8, para. 1.

to influence an alternative, more positive, outcome (judged against the primary rule) can be established: 'if the state acts or fails to act, its responsibility is potentially engaged and remaining questions are left to be resolved by the interpretation and application of the relevant primary rules'.[29]

These same rules also come into play when determining responsibility where two or more states are involved in the commission of an internationally wrongful act. In such a situation, the secondary rules of responsibility are clear on the point that, leaving aside certain limited exceptions of unlikely applicability to trafficking cases,[30] each state is responsible for its own wrongful conduct[31] and further, that the responsibility of one state is not diminished by the fact that one or more other states are also responsible for that same wrongful act.[32] However, the practical question of whether a particular wrongful act incurs the joint responsibility of two or more states under the relevant secondary rules is, once again, dependent on the primary rules applicable to the states concerned[33] and the application of the facts to those rules.

The primary rules directly applicable to trafficking can be usefully, if somewhat artificially, divided into three categories: first, rules related to protection and support of victims including those governing repatriation and access to remedies; second, rules relating to an effective criminal justice response; and third, rules relating to prevention. As noted by the European Court of Human Rights, legal developments around trafficking confirm that 'only a combination of measures addressing all three aspects can be effective in the fight against trafficking'.[34] The relevant rules impose common, but differentiated obligations. For example, the obligation of prevention is equally applicable to all states but must be met in a way that addresses an individual state's contribution – or potential contribution – to the harmful outcome.

### *3.1 Shared obligations of protection and support*

[29] J. Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 EJIL 435, 440.
[30] These exceptions are set out in Articles 16-18 of the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).
[31] Article 47(1) ARSIWA, ibid.
[32] ARSIWA Commentary, n. 28, Commentary to Article 47, para. 1.
[33] Ibid. Commentary to Article 47 ARSIWA, para. 6.
[34] *Rantsev*, n. 10, para. 284.

International law requires states to take some measures to protect and support victims of trafficking although the precise contours and limits of those measures are not definitively settled. However, it is certainly possible to identify an emergent consensus around several core obligations. The first of these relates to identification. In many situations, victims of trafficking are simply invisible. When they do come to the attention of the state, they are commonly misidentified as illegal or smuggled migrants. Sometimes this is because the state does not wish to accept the existence of trafficked persons within its territory. More commonly, as appeared to happen in the *Rantsev* scenario, where the victim was in police custody hours before her unexplained death, misidentification can be traced to a lack of commitment, understanding, and resources on the part of the state and its agencies. While recognised as a discrete obligation in at least one specialist treaty,[35] the requirement to take steps to proactively identify victims can be argued to flow more broadly from the fact that the rights which international law accords to trafficked persons amount to nothing without a corresponding obligation on competent authorities to identify them as such. In other words, by failing to identify trafficked persons correctly, states effectively and permanently deny victims the ability to realise the rights and protections to which they are legally entitled.

While the obligation to identify victims will generally fall most immediately on the state in which the exploitation takes place, the central importance of identification to the realisation of a broad range of entitlements extends this obligation to all states involved. That is well illustrated in relation to the *Seafarer* scenario where identification will be a responsibility not just of New Zealand as the apparent country of destination, but also South Korea as the flag state of the implicated vessel and Indonesia as the state of origin of the victims. For example, a failure on the part of Indonesia to cooperate with New Zealand in identifying victims – or indeed to correctly identify returned victims – will inevitably compromise the ability of those persons to secure the protection and support that New Zealand and Indonesia are required to provide.

International law does not specify with precision the nature and level of protection and support that must be provided to victims of trafficking. However, there is little argument over the existence of an obligation in that regard which becomes operational when the relevant

[35] Council of Europe Convention on Action against Trafficking in Human Beings, ETS 197, 16 May 2005, in force 1 February 2008, Articles 19(1), 19(2) (European Trafficking Convention); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, (15 April 2011) OJ L 101/1, (EU Trafficking Directive), Article 11(4).

state knows – or should know – that an individual within its jurisdiction is or could be a victim of trafficking.[36] Key elements of the obligation include a requirement that victims be removed from harm and protected from further harm; that they not be prosecuted or detained for status-related offences (such as illegal departure or entry or illegal work); and that assistance and support not be made conditional on the victims' agreement to cooperate with criminal justice agencies. More generally, their status as victims of crime and victims of human rights violations entitles trafficked persons to be treated with humanity and with respect for their dignity and human rights, as well as to measures that ensure their wellbeing and avoid re-victimisation.[37]

Obligations of protection and support also extend to the issue of repatriation. Trafficked persons are routinely deported from countries of transit and destination, often as a result of a failure to identify them correctly. In addition to denying them the rights to which they are entitled as trafficked persons, forced repatriation to the country of origin or to a third country can have serious consequences for victim safety and wellbeing. They may be subject to punishment from national authorities for unauthorised departure or other alleged offences; they may face social isolation or stigmatisation and be rejected by their families and communities; they may be subject to violence and intimidation from traffickers – particularly if they have cooperated with criminal justice agencies or owe money that cannot be repaid. Those who are forcibly repatriated, especially without the benefit of supported reintegration, are at great risk of re-trafficking. The primary rules around trafficking affirm shared, but differentiated obligations on the part of states involved in returns. In respect of destination states, the repatriation of victims of trafficking shall: 'preferably be voluntary'[38] and conducted 'with due regard for the safety of the person and for the status of any related legal proceedings'.[39] In relation to the *Seafarer* scenario, this latter obligation would operate to prevent New Zealand from returning victims to Indonesia if such return deprived them of the opportunity to participate effectively in legal proceedings against their exploiters. A country of origin such as Indonesia is required to accept the return of a trafficked national or resident

[36] This point was picked up by the European Court of Human Rights in *Rantsev*: 'In order for a positive obligation to take operational measures [to protect victims] to … it must be demonstrated that he state authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual has been or was at immediate risk of being trafficked or exploited', n. 10, para. 285.
[37] UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law', UN Doc. A/RES/60/147 Annex (16 December 2005), para. 10.
[38] Article 8(2) Trafficking Protocol, n. 1; Article 16(2) European Trafficking Convention, n. 35. On the concept of 'preferably voluntary' return see Gallagher, *The International Law of Human Trafficking*, n. 3, pp. 342–344.
[39] Article 8(2) Trafficking Protocol ibid.

without undue delay and with due regard for their safety.[40] Countries of origin are further required to cooperate in return, including through verifying victim nationality or residence and issuing necessary travel documents.[41] Overlaying these specific obligations are commonly applicable rules related to *non-refoulement*, which prevent a trafficked person from being returned to a situation where they face the risk of persecution or other serious harm.[42] As noted in the introduction, most instances of shared responsibility with respect to trafficking related harms will not involve joint or concerted action between two or more states. However, unlawful repatriation of trafficked persons is often a coordinated and cooperative venture and to that extent would represent an exception.

Remedies confirm the status of trafficked persons as victims of crime and victims of human rights abuse. They are a practical means by which victims can both access and receive justice. The obligation to provide remedies and the right to access remedies in the context of trafficking exists as a free-standing obligation in the specialist trafficking treaties.[43] However, it can also exist as a secondary obligation flowing from a breach of an international rule that is attributable to the state. In this context, it is important to affirm that even if the state is not directly implicated in the initial harm (as is typically the case in situations of trafficking), responsibility may still be imputed through a concomitant or subsequent failure on the part of the state to prevent, respond to or remedy abuses committed by private persons or entities. For example, a failure of a state to discharge its obligation to investigate and prosecute trafficking to the required standard of due diligence will be the trigger for the state to incur an obligation to provide remedies for that failure. As the European Court of Human Rights confirmed in *Rantsev*, remedies are an obligation that is shared among all states that have contributed to the harmful outcome. In the *Seafarer* scenario, allocation of the primary obligation to provide access to remedies will similarly depend on findings of responsibility and, based on the present assessment of the primary rules, will likely fall on all involved states.

### *3.2 Shared obligations of an effective criminal justice response*

[40] Article 8(1) Trafficking Protocol, ibid. Under the European Trafficking Convention, states of origin are to facilitate and accept return 'with due regard for the rights, safety and dignity' of the victim and without undue delay: Article 16(1) European Trafficking Convention, n. 35.
[41] Articles 8(3)-8(4) Trafficking Protocol, ibid.; Articles 16(3)-16(4) European Trafficking Convention, ibid.
[42] Article 14(1) Trafficking Protocol, ibid.; Article 40(3) European Trafficking Convention, ibid.
[43] See Article 25(2) Organized Crime Convention, n. 21; Article 6(6) Trafficking Protocol, ibid.; Article 12(2), 15(2) and 17 EU Trafficking Directive, n. 35.

The primary rules recognise that trafficking offences can occur in multiple states and impose on all involved states a shared obligation to provide an effective criminal justice response to trafficking. Some aspects of this broad obligation are clear. For example, the criminalisation of trafficking in national law, confirmed in all specialist instruments as extending to conduct of corporations as well as individuals,[44] has been identified as a 'central and mandatory obligation'.[45] Relevant treaty law does not explicitly address investigation and prosecution. However, it is not difficult to argue, as the European Court of Human Rights has done, that states have an obligation to give effect to their criminal laws by appropriately investigating allegations of trafficking related exploitation that come to their attention; prosecuting those against whom there is adequate evidence; and subjecting them to a fair trial and to effective and proportionate sanctions.[46] The duty to investigate and prosecute is applicable both when there is an allegation of violation by state officials and when the alleged perpetrator is a non-state actor. In relation to the latter case, a state will become responsible under international law if it fails to seriously investigate private abuses of rights and to punish those responsible, thereby aiding in the commission of those private acts.[47] States are further obligated to seize and confiscate proceeds of trafficking.[48]

The common obligations of an effective criminal justice response mean that it will frequently be possible that more than one country will be in a position to assert jurisdiction over a particular trafficking case or even in respect of the same offenders. For example, in the *Seafarer* scenario, criminal jurisdiction could theoretically be exercised by New Zealand (territoriality),[49] Indonesia (passive personality) and Republic of Korea (active personality). The primary rules require that in cases of concurrent jurisdiction, states consult and cooperate from the outset in order to coordinate actions, and more specifically, to determine the most appropriate jurisdiction within which to prosecute a particular case.[50] In some cases, it will be most effective for a single state to prosecute all offenders, whereas in other cases it may be preferable for one state to prosecute some participants, while one or more other states pursue

[44] Article 5 Trafficking Protocol, ibid.; Article 18 European Trafficking Convention, n. 35; Article 5 EU Trafficking Directive, ibid.
[45] UNODC, 'Legislative Guides', n. 22, p. 269, para. 36.
[46] See *Siliadan* v. *France*, App. No. 73316/01 (ECtHR, 26 July 2005), paras. 89, 112; *Rantsev*, n. 10, para. 287.
[47] Note the position of the Inter-American Court that investigations 'must be conducted in serious manner and not as a mere formality preordained to be ineffective': *Velásquez Rodríguez* v. *Honduras*, IACtHR, (Ser. C) No. 4 (1988), para. 177.
[48] Articles 12-14 Organized Crime Convention, n. 21; Article 23(3) European Trafficking Convention, n. 35; Article 7 EU Trafficking Directive, n. 35.
[49] But see discussion below on attribution of responsibility in this case.
[50] Article 15(5) Organized Crime Convention, n. 21; Article 31(4) European Trafficking Convention, n. 35.

the remainder. Issues such as nationality, the location of evidence and witnesses, the applicable legal framework, resource availability, and location of the offender when apprehended will need to be taken into consideration.[51] The Organized Crime Convention provides that where several jurisdictions are involved, state parties are to consider transferring the case to the best forum in the 'interests of the proper administration of justice' and 'with a view to concentrating the prosecution'.[52]

The question of how the obligation to conduct a criminal investigation into trafficking is to be shared among states is a slightly different one. In the *Rantsev* case, the European Court of Human Rights noted that, as the harm occurred in Cyprus, absent special circumstances, 'the obligation to ensure an effective official investigation applies to Cyprus alone'.[53] However, cross-border trafficking cases may indeed present such special circumstances, particularly when the criminal activity in one country contributes to, or enables, the harmful act in another. In this case, 'the failure to investigate the recruitment aspect of alleged trafficking would allow an important part of the trafficking chain to act with impunity'.[54] Accordingly, while Cyprus alone was responsible for investigating the victim's death and the exploitation, Russia could have – and should have – investigated and prosecuted any recruiters and brokers knowingly involved in the movement of the victim into a situation of exploitation.[55] In short, the Court affirmed that common obligations incur a common responsibility: investigations must cover 'all aspects of trafficking allegations from recruitment to exploitation'.[56] The nature of cross-border trafficking means that cooperation between states will generally be a pre-requisite for effective investigation of a case from recruitment to exploitation. The primary rules do indeed recognise that, in addition to the obligation to investigate trafficking taking place within their territories, '[s]tates are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories'.[57] Specific obligations of international cooperation in trafficking cases set out in relevant treaty law relate to both extradition[58] and mutual legal assistance.[59] International law encourages, but does not

[51] These issues are explored further in P. David, F. David and A.T. Gallagher, *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases* (Jakarta: ASEAN, 2010).
[52] Article 21 Organized Crime Convention, n. 21.
[53] *Rantsev*, n. 10, para. 243.
[54] Ibid., para. 307
[55] Ibid., para. 306.
[56] Ibid.
[57] Ibid, para. 288.
[58] Articles 15(3), 16 Organized Crime Convention, n. 21; Articles 23(1), 31(3) European Trafficking Convention, n. 35 (obligation to extradite or prosecute).

require, joint investigations and other forms of law enforcement cooperation in trafficking cases for purposes such as victim and suspect identification and proactive intelligence gathering.[60]

*3.3 Shared obligations of prevention*

The principles of state responsibility discussed below confirm that states bear some responsibility for failing to prevent the occurrence of internationally wrongful acts. The standard implied in this obligation is one of 'best efforts': the state is required to take 'all reasonable and necessary measures to prevent a given event from occurring'.[61] A decision on what is 'reasonable or appropriate' in a particular situation will require consideration of the facts of the case and surrounding circumstances, including the capacities of the state, as well as of the relevant primary rules. A decision on where the prevention responsibility falls or how it should be apportioned between states will be dependent on a similar range of factors.

It is important to acknowledge that, in the context of trafficking in persons, the issue of 'prevention' is a highly vexed one. The primary rules are vague and largely aspirational, reflecting a general unwillingness – and perhaps also an inability – on the part of states to come to terms with the vast and complex range of factors, many of them structural, that contribute to or facilitate trafficking related harm. These aspects complicate the allocation of shared responsibility for preventing a particular trafficking related harm, not least because of difficulties in ascertaining the harm and the point of time at which it occurred. A case such as *Rantsev* provides a useful illustration of the difficulties in allocating shared responsibility for failures of prevention. At what point was the obligation to prevent triggered and in relation to which state? Was Oxana Rantseva a victim of trafficking before she left Russia, when she entered Cyprus, or at some point afterwards?

In terms of the legal and policy framework, prevention is generally understood as referring to positive measures to stop future acts of trafficking from occurring. The complex and contested 'causes' of trafficking will almost never be tied to a single state and in this sense

[59] Article 18 Organized Crime Convention, ibid.
[60] Article 27 Organized Crime Convention, ibid.; Article 10(1) Trafficking Protocol, n. 1. Generally on issues of shared responsibility in relation to cross-border law enforcement cooperation see Chapter 8 in this volume, S. Hufnagel, 'Cross Border Law Enforcement', p. __.
[61] '[B]ut without warranting that the event will not occur',ARSIWA Commentary, n. 28, Commentary to Article 14, para. 14.

prevention is the paradigmatic example of a shared responsibility. The Court in *Rantsev* identified a number of steps that could have been taken by either or both Cyprus and Russia to prevent trafficking. These included putting in place adequate measures regulating businesses that may be used as a cover for trafficking (such as recruitment agencies in Russia and cabaret bars in Cyprus); and ensuring immigration laws do not encourage, facilitate or tolerate trafficking.[62] Under the *Seafarer* scenario, the primary rules require Indonesia to take steps to alleviate the factors that make its foreign maritime workers vulnerable to exploitation such as poverty, underdevelopment and lack of equal opportunity.[63] The Republic of Korea and New Zealand share responsibility to prevent trafficking by addressing the impunity that is created, for example, through failure to oversee vessels within their jurisdiction; and the maintenance of regulatory systems that facilitate or help hide exploitation. A key prevention obligation requiring states to 'discourage the demand that fosters … exploitation that leads to trafficking'[64] is clearly shared: falling on all those states with a role to play in shaping the incentives that are currently driving exploitation.

## 4. Secondary rules of responsibility

States persistently deny legal responsibility for trafficking. In some cases, the refutation of responsibility is justified with reference to the harm (the trafficking) being committed by a criminal or groups of criminals and not by the state itself. In other cases, responsibility is not acknowledged because the state claims to have done everything reasonably possible to avoid the harm and thereby to have not violated any relevant primary rule. Along with an appreciation of the relevant primary rules, an understanding of the principles of international legal responsibility as they apply in the trafficking context is an essential pre-requisite for examining and, if warranted, for rejecting claims of this kind.

As noted in section 3 above, the secondary rules of responsibility generally decline to attribute the conduct of private persons or entities to the state. This has immediate implications for the allocation of responsibility for trafficking related harms because, in the majority of trafficking situations, direct state involvement is either not present or unable to be

[62] *Rantsev*, n. 10, para. 283.
[63] Article 9(4) Trafficking Protocol, n. 1; Article 31(7) Organized Crime Convention, n. 21; Article 5 European Trafficking Convention, n. 35.
[64] Article 9(5) Trafficking Protocol, ibid. An almost identical obligation is set out in Article 6 of the European Trafficking Convention, ibid., and Article 18(1) of the EU Trafficking Directive, n. 35.

conclusively established. The scenarios presented in this chapter provide a useful illustration. The trafficking of women between Russia and Cyprus, and of men between Indonesia and New Zealand, is controlled and conducted by individual entrepreneurs and loosely organised criminal networks. Involved states and their officials have undoubtedly facilitated this trade through their inaction, inertia, and occasional active involvement. However, the harm of trafficking, in terms of both the process and the end result, is very much a direct consequence of actions taken by private entities.

This does not mean however, that involved states can absolve themselves of any responsibility to the victims – and to the international community as a whole – on the basis that the conduct complained of is not attributable to them. As shown in the previous section, the relevant primary rules do indeed affirm the responsibility of states for harm committed by private parties, and the shared nature of that responsibility. While the harm in this case – the exploitation and death of the victim – was not directly caused by any of the implicated states, their agents or officials, the European Court of Human Rights had no trouble in finding that both Cyprus and Russia were individually responsible for certain acts and omissions that contributed to this harm. The origin of that responsibility lay in their common primary obligations with regard to protecting persons from being trafficked, supporting victims of trafficking and prosecuting the perpetrators. The question of attribution was addressed in relation to these obligations, not to the act of trafficking. While the relevant obligations were shared, they applied to the two involved states in different ways. Russia was required to take those measures that were within its jurisdiction and powers 'to protect the [victim] from trafficking, to investigate allegations of trafficking and to investigate the circumstances leading to her death'.[65] Cyprus was obliged to effectively investigate cases of trafficking related exploitation taking place within its territory, as well as to protect victims and persons who may be victims of trafficking from further harm. Both states were obliged to cooperate with each other, most particularly in relation to securing an effective criminal justice response. In this case at least it appears that the primary rules have allocated obligations in such a way as to ensure that there are no obvious gaps in responsibility. Theoretically, all aspects of the trafficking cycle as it operates between Russia and Cyprus incurs relevant obligations of action on the part of one or both states. As both states were found to be responsible for the harm, both were found liable in damages that reflected the severity of their respective acts and omissions and thereby their relative contribution to the harm.

[65] *Rantsev*, n. 10, para. 208.

While the situation is more complicated because of questions around jurisdiction and capacity to act, a similar line of analysis is applicable to the *Seafarer* scenario. In brief: the acts of private persons (recruiters, vessel owners and operators) will not generally be attributable to any of the concerned states. Rather, legal responsibility will be incurred by one or more of those states as a result of violation of the relevant primary rules: for example, a failure to identify victims and provide immediate protection and support, a failure to investigate and prosecute offenders, or a failure to prevent future harm. The secondary rules certainly support shared responsibility in this case where it can be shown that two or more states are responsible for the same wrongful act.[66] For example, both the Republic of Korea and Indonesia could be found separately responsible for failing to act with due diligence to prevent the exploitation of Indonesian fishers: Korea through inadequate regulation and monitoring of its fishing fleet, and Indonesia, through inadequate regulation and monitoring of private recruitment brokers. But a finding of shared responsibility – and apportionment of that responsibility – are, once again, dependent on the substantive content of the relevant primary rules.

In conclusion, provided any jurisdictional hurdles can be overcome, the secondary rules of state responsibility easily accommodate shared responsibility among states in the area of trafficking. The potential impediment presented by the fact that much trafficking related harm originates in private conduct is overcome by the primary rules, which impose common but differentiated obligations on all implicated states to prevent, protect, and punish.

## 5. Processes

The reality of common obligations and shared responsibilities amongst states has not necessarily changed the ways in which trafficking is being understood or responded to. For example, cross-border cooperation in relation to prevention, protection, and prosecution remains weak in all regions. A state will rarely call another to task for its contribution to a trafficking related wrong impacting on its interests, even when that contribution is both evident and substantial. Russia appears to have made no attempt to censure Cyprus for its failures in the *Rantsev* case, and in fact did not even request information on the case until

[66] See ARSIWA Commentary, n. 28, Commentary to Article 47 ARSIWA.

prompted by the victim's father.[67] Cyprus did not bother to respond to a mutual legal assistance request that was eventually filed by the Russian authorities.[68] In relation to the *Seafarer* scenario, there is no indication that New Zealand or Indonesia have sought to condemn South Korea for failing to monitor or exercise criminal jurisdiction over its vessels; or that South Korea has reached out to New Zealand for help in facilitating such action.

Available compliance mechanisms have been slow to pick up on the primary and secondary rules that would contribute to allocating responsibility between states and changing responses on that basis. At the international level, formal compliance structures around trafficking are, in any event, very weak. Only Europe benefits from a monitoring mechanism, attached to the European Trafficking Convention, that offers the possibility of credible oversight. Even in this case however, the small and homogenous pool of states parties to the relevant instrument and the very traditional procedures and working methods of the compliance mechanism (individual country investigations and reports) would appear to work against any serious consideration of shared responsibility. A similar picture emerges with respect to the human rights system. At the international level, treaty bodies and investigatory mechanisms inevitably consider trafficking solely from the perspective of the state under consideration. The single judicial consideration of shared responsibility in the context of trafficking which formed the basis for one of the selected scenarios has emerged, not unsurprisingly, from the European Court of Human Rights: one of the very few human rights bodies that has the capacity to deal with multiple wrongdoers.[69]

The most influential monitoring and compliance system in this field is in fact a unilateral one: an annual report issued by the United States Department of State that assesses the efforts of governments to combat trafficking against criteria established by United States law (US TIP reports).[70] The reports use a four-tier ranking system. Any government that does not comply with the minimum standards and that is not making significant efforts to bring itself into compliance is subject to substantial diplomatic pressure and a range of economic sanctions. The mechanism explicitly recognises that governments bear a responsibility to prevent trafficking, to prosecute trafficking, and to protect victims. The criteria used to evaluate

[67] *Rantsev*, n. 10, para. ?
[68] Ibid.
[69] See further M. den Heijer, 'Procedural Aspects of Shared Responsibility on the European Court of Human Rights', SHARES Research Paper 17 (2012), ACIL 2012-16, available at www.sharesproject.nl.
[70] For a detailed explanation of the origins, structure and evolution of the mechanism see A.T. Gallagher, 'Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the U.S. TIP Reports' (2011) 12 *Human Rights Review* 381.

performance acknowledges, in some limited respects, the shared nature of certain obligations.[71] However, the individual country evaluations that are at the heart of each annual report explicitly do not lend themselves to identifying links between countries and other potentially responsible actors. The troubled relationship between those reports and the international legal regime around trafficking[72] presents another obstacle to realising the goals of shared responsibility through this mechanism.

The two scenarios presented in this chapter provide a useful lens through which to consider the limitations of current approaches to promoting and securing shared responsibility, as well as possible opportunities and agents of change. The *Rantsev* scenario is particularly valuable in this respect, representing as it does the very first (and, at present, the only)[73] formal recognition of shared legal responsibility for trafficking related harm, including specific recognition of a duty of effective cooperation between involved states. However, it is relevant to note that academic analyses of this case did not examine the issue of shared responsibility or that aspect of the judgment in any detail.[74] Shared responsibility has also not been highlighted by other mechanisms and processes that have considered trafficking involving both Cyprus and Russia. The Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA), the monitoring body set up by the European Trafficking Convention, produced a report on Cyprus in 2011.[75] The report summarised aspects of the European Court of Human Rights judgment, noted changes that had taken place in Cyprus as a result of the case, and made recommendations for further improvement.

[71] For example, the formal criteria for assessment include a consideration of whether the government under assessment cooperates with other governments in investigation and prosecution of trafficking (US Department of State, *Trafficking in Persons Report*: June 2014 (Washington, DC, Department of State, 2014), p. 425). In assessing whether a government satisfies the criteria related to victim protection the State Department affirmed, in an earlier report, that: 'Source and destination countries share responsibility in ensuring the safe, humane, and, to the extent possible, voluntary repatriation/ reintegration of victim': US Department of State, *Trafficking in Persons Report: June 2009* (Washington, DC, Department of State, 2009), p. 30.

[72] Gallagher, 'Improving the Effectiveness of the International Law of Human Trafficking', n. 70.

[73] The European Court of Human Rights has since considered only one other comparable case. *M. and others* v. *Italy and Bulgaria*. For present purposes the most relevant aspect of the judgment was the Court's confirmation of the possibility of shared responsibility: had trafficking been established (which it had not) this would also have engaged the responsibility of the Bulgarian state, presuming the trafficking had in fact commenced there. *Case of M and others* v. *Italy and Bulgaria*, App. No. 40020/03 (ECtHR, 31 July 2012), para. 169.

[74] See for example, J. Allain, '*Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 *Human Rights Law Review* 546; S. Farrior, 'Human Trafficking Violates Anti-Slavery Provision: Introductory Note to *Rantsev v. Cyprus and Russia* European Court Of Human Rights Judgment of 7 January 2010', (2010) 49 ILM 415; and R. Pati, 'States' Positive Obligations with Respect to Human Trafficking: the European Court of Human Rights Breaks New Ground in *Rantsev* v. *Cyprus and Russia*' (2011) 29 *Boston University International Law Journal* 79.

[75] Council of Europe, 'Group of Experts on Action against Trafficking in Human Beings: Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Cyprus', GRETA(2011)8, 12 September 2011; and Second General Report on GRETA's Activities covering the period from 1 August 2011 to 31 July 2012, GRETA(2012)13, 4 October 2012.

However, in this report and in its annual report covering the relevant period, GRETA did not deal with any aspect of shared responsibility beyond reiterating the Court's emphasis on an obligation of cross-border cooperation with respect to investigation of trafficking cases. The US TIP reports issued since 2011 are similarly silent on any aspect of shared responsibility in their assessment of performance of both Cyprus and Russia.

The shared nature of legal responsibility for trafficking related harm that arose in the *Rantsev* scenario was picked up by the European Union in its Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, adopted in June 2012 (Strategy).[76] The Strategy, a set of measures aimed to support implementation of European Union legislation on trafficking affirms that: 'The main responsibility for addressing trafficking in human beings lies with the Member States.'[77] It refers specifically to the judgment in *Rantsev* v. *Cyprus and Russia* as providing: 'a decisive human rights benchmark with clear obligations for Member States to take the necessary steps to address different areas of trafficking in human beings. These include recruitment, investigation, prosecution, protection of human rights, and providing assistance to victims'.[78] Overall however, the commitments to policy coherence and enhanced coordination are framed in vague and programmatic language that avoids any direct acknowledgement that common obligations lead to shared legal responsibilities.

Despite the clear implications for shared responsibility in the *Seafarer* scenario, this aspect has generated almost nothing in the way of official action. As noted previously, there is no public record of official communication between New Zealand, South Korea and Indonesia on the issue, and no public reference has been made to an existing Memorandum of Understanding that would provide the basis for structured cooperation between these states.[79] Overall, there is very little evidence of cooperation aimed at protecting and providing redress to victims, prosecuting perpetrators or preventing similar incidents from arising in the future. Of the available external compliance mechanisms, the US TIP reports have been the most prominent in highlighting the issue and calling for a meaningful response from all three involved states. However, the criticisms are vague and muted and the individual country analyses and recommendations do not draw any links between the implicated countries in

[76] European Commission, 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016', COM(2012)286 final, Brussels, 19 June 2012 (Strategy).
[77] Ibid., p. 5.
[78] Ibid.
[79] Memorandum of Understanding on Port State Control in the Asia-Pacific Region, 11 April 1994, fourteenth amendments in force 1 January 2014. See www.tokyo-mou.org/organization/memorandum_of_understanding.php.

terms of shared obligations or responsibilities. For example, the Indonesia assessment for 2012 notes the forced labor of Indonesian men aboard Korean flagged fishing boats operating in New Zealand waters, but does not refer to the role played by Indonesian recruiters in the exploitation and the subsequent intimidation of victims and witnesses, or to the obligation on the state of Indonesia to regulate its domestic recruitment agencies.[80] The US TIP reports, along with substantial media attention, have nevertheless made a substantial impact. New Zealand launched a parliamentary inquiry into the operation of Foreign Charter Vessels in 2011[81] and, on the basis of its findings, announced that from 2016 all commercial fishing vessels operating in New Zealand waters will need to be registered as New Zealand ships,[82] a move that will bring foreign crew within New Zealand laws, including those related to employment and maritime safety. The National Human Rights Institution of the Republic of Korea, a statutory body, held its own inquiry into the exploitation of foreign fishermen on Korean vessels[83] and is apparently coordinating with its New Zealand and Indonesian counterparts to bring the issue to the attention of the recently established Association of Southeast Asian Nations Intergovernmental Human Rights Commission.[84]

## 6. Conclusion: towards the future

The preamble to the Trafficking Protocol is unambiguous about the possibility of shared contribution to harm and the consequent need for shared responsibility:

> [E]ffective action to prevent and combat trafficking in persons … requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights.

[80] *Trafficking in Persons Report 2012*, n. 4, p. 186.
[81] *Report of the Ministerial Inquiry into the Use and Operation of Foreign Charter Vessels*, New Zealand (2012).
[82] See N. Guy, 'Foreign Chartered Vessels bill passes first reading', 15 February 2013, at www.beehive.govt.nz/release/foreign-chartered-vessels-bill-passes-first-reading. The Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014 (14/60) received Royal Assent in July 2014.
[83] *Trafficking in Persons Report 2012*, n. 4, at 210.
[84] *Report of the Ministerial Inquiry into the Use and Operation of Foreign Charter Vessels* (2012), at para. 107. Note that as at July 2015, there was no public record available of any such communication with the SEAN Intergovernmental Human Rights Commission.

In finding that Cyprus, as the country of exploitation and Russia, as country of origin, were both responsible for the harm of an individual act of trafficking, the European Court of Human Rights has led the way towards transforming the Protocol's aspiration of shared responsibility into reality. But this case is an exception. While the normative framework around trafficking recognises the plurality of obligations and the probability of multiple contributors to a trafficking related wrong, realisation of that aspect appears to be undermined at almost every turn; not just by how states are interpreting and applying their obligations but also by the highly compartmentalised and individualised nature of available compliance processes and institutions. Jurisdictional complexities such as those presented by the *Seafarer* scenario present additional obstacles whose resolution appears to be intractable without a substantial overhaul of long established rules governing the allocation of prescriptive and enforcement jurisdiction.

While acknowledging such difficulties, we should not fall into the trap of imagining that these are purely technical problems, amenable to the quick fix of a clever international lawyer. Global corporate interests are well served by a highly mobile and vulnerable labour force and many states also derive substantial benefit from the exploitation of their workers in other countries, or from exploitation taking place within their own borders. There are, in short, powerful disincentives to the development of rules and structures that will fairly, consistently and transparently assign responsibility for trafficking related harm. The current levels of opacity and ambiguity around allocation of responsibility – particularly acute in relation to prevention – encourage a diffusion of obligation that makes it easier for all those involved to deny the impact of their contribution and shift the focus to others. These are not reasons to abandon the noble goal of pursuing shared responsibility, but they serve as a useful reminder of the longer game: using international law and its institutions to help 'civilise' state perception of obligation, responsibility, and self-interest.[85]

[85] This concept of international law as a 'gentle civilizer of national self-interest' is taken from M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001).