Due diligence standard as a guarantee of state international responsibility for violation of human rights by private actors

Svitlana Andreichenko

Key words:
international responsibility, internationally wrongful acts, human rights, due diligence standard.

Conscientious fulfillment of international obligations is the criterion of legality of acts of states in the international and domestic spheres, a prerequisite for the stability and effectiveness of international law. Decision of the task of raising the effectiveness of international law largely laid on the international responsibility which plays a fundamental role in the modern system of international law.

International law and «due diligence» have a long history together. In international law, indeed, some obligations applicable to states are framed along the lines of a «due diligence» modality. In these sectors, «due diligence» structures the relationship between a state, on the one hand, and a non-state actor, on the other. The crucial, defining feature of «due diligence» is that it does not require any attributability of the non-state actor’s conduct to the state. Thus, as a substantive norm of conduct, «due diligence» provides, in certain fields, an answer to the question as to how a state needs to behave vis-a-vis harmful conduct carried out by non-state actors, and this irrespective of any attributability1.

Due diligence played a significant role in the first phase of the efforts to codify rules of State responsibility, a period that lasted until 1963. Most crucial here was the work done between the world wars by non-governmental expert bodies and the League of Nations’ Committee of Experts for the Progressive Codification of International Law, which prepared the topic for the 1930 Hague Conference for the Codification of International Law. These efforts focused on the areas of international law where relevant State practice existed, in particular State responsibility for the damage caused to aliens by private persons in peacetime and during domestic disturbances. Even though the Hague Codification Conference failed to finalize the codification process, a State could be held responsible if it was manifestly negligent, i.e. failed to exercise due diligence in trying to prevent, redress or punish the damage to the alien. This approach was applied in the United Nations International Law Commission until 1963, but no progress was made with respect to codification 2.

A State is internationally responsible when it has performed an internationally wrongful act, meaning conduct consisting of an action or omission that is attributable to a State under international law and that constitutes a breach of the international obligation of the State. The Draft articles on Responsibility of States for Internationally Wrongful Acts (2001) does not consider the situation, in which traditionally used due diligence, such as violation of international law by private persons. While under Chapter II «Attribution of conduct to a state», the conduct of private persons or entities is not attributable to the State under international law, International Law Commission explains that in some cases it is still possible: «… a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over

State obligations to comply with due diligence in international law are considered in works of such domestic and foreign scientists as Anzilotti D., Boutkevitch V.G., Conforti B., Driomina-Voloc N. V., Garcia-Amador F., Klephem A., Koivurova T., Kulesza J., Lukashuk I.I., Malcolm D., Nystuen G., Reynich A., Santarelli N., Zaybert Fort A., Ziemel I. etc. At the same time in the authoritative researches of scientists that are significant contributions to the theory and practice of the international law, the issue of the international responsibility of the state for the breach of due diligence standard is not paid sufficient attention.

Traditionally, there are the rule in international law according to which states are responsible only for their own actions. Already Hugo Grotius in his work «De jure belli ac pacis» and also Emer de Vattel on this basis followed the view that the actions of the states and individuals should be divided. The state cannot be accused of any omission or improper behavior of its subjects.

The principle according to which the state is not responsible for any acts committed by individuals also recognized at the level of customary international law.

International Law Commission in commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 noted: «In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the States». As a result, in case of “purely” private actions, incriminating someone’s behavior to state in general understanding, of course, is excluded.

On the one hand, the state cannot be responsible for the actions of individuals in the absence of any recent ties with public authorities. On the other hand, if the state, however, is required to take certain protective measures, and if they do not comply with the relevant obligations, they perform the same offense that arise to their international legal responsibility, even when the action causing the damage inflicted by individuals. International Law Commission indicate, that state may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects.

International norms in the human rights field have developed obligations according to which States must protect individuals’ Human Rights from the actions of other particular actors and thus must prevent, punish and treat properly and accordingly any Human Rights violation even when they are committed by a non-state actor. These obligations are known as guarantee and protection obligations, or positive obligations.

As noted by Malcolm D. Evans, although there is now an increasing willingness to recognise the responsibility of non-State actors for human rights abuses, this is still done as a matter of human rights law through the prism of State responsibility. In other words, it is because the State has not prevented, investigated or provided a remedy that there has been a human rights violation.

---

Santarelli N.C. emphasizes: «If we take into account that international law proclaims that human rights are to be universally effective, we must consider that the universality of human rights is related not only to a space or geographical consideration but also to the victims and protected subjects: human beings. Moreover, we should say, the goal of Human Rights law is the protection of every human person’s rights and dignity, whether or not his rights are endangered by the actions of a State»10.

Thus States are obliged to both respect and protect rights. They must not only refrain from committing violations themselves through their agents and apparatus, but also must ensure that rights are not abused by others. This requirement to promote human rights enjoyment in a wider sense clearly includes impeding other individuals (i.e. non-state actors) from violating human rights, though this obligation can be difficult to identify and enforce. This is illustrated by the fact that, “in principle, states are not responsible for the actions of private persons or agencies…States are responsible, however, for their failure to meet their international obligations, even when the substantive breaches originate in the conduct of private persons”11.

It should be noted that the positive obligations were recognized initially in regulating the rights of foreigners on cases when foreign citizens not on their own fault became the victims of criminal acts in the receiving state. According to customary law, states are obliged to take appropriate measures to prevent the possibility of committing such offenses, to compensate the damage and to conduct criminal proceeding (Case Concerning United States Diplomatic and Consular Staff in Tehran (1980).

Since the late 20th century we can state a similar development in the area of human rights, which begins to cover also the obligation to provide protection in relation to its own citizens. The most famous of this issue is a case of Velasquez Rodriguez (1988), which examined the Inter-American Court of Human Rights.

The Court held in this case that “… in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. 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”12.

The Court concluded that States are required to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation13. Moreover, the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights 14.

The idea is to attract to account the subjects, even if they are only indirectly responsible for human rights violations, has received increased attention in the context of the European system of human rights protection. The European Court of Human Rights has very often used the notion of positive obligation, i.e. the obligation of the State to protect a person against violations of human rights committed by individuals or other entities.

---

13 Ibid. – Para 166.
14 Ibid. – Para 167.
In some cases the Court has inferred a positive obligation from articles of the European Convention on Human Rights that were exclusively couched in terms of a negative duty\(^\text{15}\). This is the case, for instance, in relation to Article 3, the prohibition of torture and inhuman or degrading treatment (\textit{A v UK} (1998), \textit{DP and JC v UK} (2003)), or Article 8 - non-interference with private and family life (\textit{Marckx v Belgium} (1979), \textit{X and Y v Netherlands} (1985), \textit{Rees v. United Kingdom} (1986), \textit{Hatton and others v United Kingdom} (2009). In some other cases, the State is expressly bound by the Convention either to abstain from itself infringing directly the human right or to prevent someone else's infringement of the right. The best example of an express obligation of prevention is offered by Article 2 (\textit{L.C.B. v UK} (1998), \textit{Osman v UK} (1998), \textit{Yasa v. Turkey} (1998), \textit{Kilic v Turkey} (2000), \textit{Keenan v. the United Kingdom} (2001), \textit{Mastromatteo v. Italy} (2002).

The basic theoretical premise for «vicarious» or «indirect» human rights liability of states for non-state activities is deduced from various human rights instruments, which demand that states not only «respect» human rights, but also «ensure», «protect», or «secure» them. Reinsch A. rightly observes: «It has become more and more evident that even existing international human rights instruments could be interpreted so as to lead to state responsibility for non-state activities. This awareness has found its expression not only in legal doctrine, but also in a number of decisions by international bodies»\(^\text{16}\).

Building on the traditional «due diligence» requirement under customary international law, human rights bodies have interpreted obligations to «ensure» as state obligations to take measures to prevent non-state violations of human rights. As a consequence, the UN Human Rights Committee held states responsible for failing to do so adequately. Also in its General Comments the Committee has used a concept of the «horizontal effect» of human rights provisions. In its General Comment on the ICCPR's torture prohibition it stated: «It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity».

States’ obligations that seek the protection of Human Rights from non-state actors’ abuses have a limited nature and are thus effective only in a limited way because a violation may occur in spite of a State’s effort and actions to prevent and punish it\(^\text{17}\).

Thus, international responsibility is one of the guarantees of order of international legal relations, which acquired a new quality in recent decades. Decision of the task of raising the effectiveness of international law largely laid on the international responsibility which plays a fundamental role in the modern system of international law, demonstrating the level of development, unity and organization. Instability of modern world poses new challenges to existing state and legal institutions. World development is characterized by a multiplicity of conflicting and ambiguous trends that significantly alter the defining characteristics of international relations and clearly represent the beginning of a new world order.

The politics of dominating the state as a central international actor begins to treat questioned with the emergence and spread of non-governmental actors actors in regional and global levels. Some researchers (e.g. M.Nicholson) for describing this phenomenon use the term «paradox of participation», according to which the increasing level of openness of the international system for the participation of new actors makes a mess in international relations and contributes to their chaotic, which makes it difficult to achieve effective solutions.

So, as of today we can fix the emergence of a wide range of international actors who «undermine» a state-system of international relations. A. Reinsch indicates a clear departure from purely state-based approach at present, according to which only state behavior can lead to liability in international law\(^\text{18}\).

Display of negative «by-effect» of enlargement participants in international relations is a threat to international order emanating from non-state actors who operate regardless of the state and whose actions lead to a


Due diligence standard as a guarantee of state international responsibility for violation of human rights...

breach of the fundamental values of the international community in various areas (international law, human rights, international security, international humanitarian law, environmental protection, international maritime law and many others). Weak entities were strong in the sense that can cause significant damage to internationally recognized values. The world of the twenty-first century faced with the fact that non-state actors are able to throw a significant challenge to the state.

That is why more acutely raises the question of the extent to which States can and should take responsibility for the actions of individuals, bringing problems of international responsibility of states to the next level.

The development of international practice shows that states will show an increasing willingness to take responsibility for the actions of individuals who violate internationally recognized rights and freedoms. This trend contributes to the development of international legal mechanisms to protect human rights. In particular, the concept of positive obligations on States provides supervisors and courts significant power to require certain behavior from states contributing to the effective implementation of a number of rights and freedoms, because their implementation depends not only on the performance of its obligations of non-interference, but can also require the adoption of a number of positive measures to protect even in interpersonal relations.

Summary

The article is devoted to the issue of international responsibility of the State in the case of breach of due diligence standard. On the one hand, the state cannot be responsible for the actions of individuals in the absence of any recent ties with public authorities. On the other hand, if the state, however, is required to take certain protective measures, and if they do not comply with the relevant obligations, they perform the same offense that arise to their international legal responsibility, even when the action causing the damage inflicted by individuals.

literture

