Leiden Journal of International Law (2020), **33**, pp. 177–187
doi:10.1017/S0922156519000591

ORIGINAL ARTICLE

INTERNATIONAL COURTS AND TRIBUNALS: INTERNATIONAL COURT OF JUSTICE

State responsibility and positive obligations in the European Court of Human Rights: The contribution of the ICJ in advancing towards more judicial integration

Rosana Garciandia*

The Dickson Poon School of Law, King's College London, WC2R 2LS
Email: rosana.garciandia@kcl.ac.uk

Abstract

The European Court of Human Rights (ECtHR) follows its own rules regarding the responsibility of states, although the international law of state responsibility enshrined in the International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) remains, as general international law, relevant to its decisions. However, case law of the ECtHR shows that the Court is departing from certain ARSIWA principles as it adopts a broad interpretation of rights contained in the European Convention on Human Rights (ECHR) giving rise to positive obligations.[1]

Exploring those trends in the state responsibility regime of the ECHR, this article argues that, by clarifying certain ARSIWA provisions, the International Court of Justice (ICJ) can play an important role by contributing to a higher degree of judicial integration on the law of state responsibility. It is desirable that the ICJ takes any upcoming opportunity to provide greater clarity on the challenges and nuances of the applicability of the law of state responsibility, in particular as it relates to positive obligations. That would contribute to a more systematic use of those rules by regional courts such as the ECtHR, and ultimately to guaranteeing a greater protection of human rights.

Keywords: European Court of Human Rights; human rights; International Court of Justice; positive obligations; state responsibility

1. Introduction

The ILC ARSIWA codified rules applicable to violations of the international obligations of states, including the obligation that states shall not perpetrate acts prohibited by international law, as well as positive human rights obligations (positive obligations).[2] The notion of positive obligations refers to obligations that a state has to adopt measures or take deliberate actions to ensure that human rights are respected, protected and promoted.[3]

*The author would like to thank Professor Philippa Webb for her support and for her comments on earlier drafts.

[1]See J. Crawford and A. Keene, 'The Structure of State Responsibility under the European Convention on Human Rights', in A. van Aaken and I. Motoc (eds.), *The European Convention on Human Rights and General International Law* (2018).

[2]In accordance with Art. 12 ARSIWA, 'there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character'.

[3]See Section 2.

© Foundation of the Leiden Journal of International Law 2019

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

According to a compilation published by the UN Secretariat in 2017 on the use of ARSIWA by diverse international courts and bodies,[4] references to ARSIWA have increased notably from 2001 to 2016,[5] and regional human rights courts are increasingly referring to them. The document surveyed the decisions of international courts, tribunals, and other bodies and found that 47 references were made in ECtHR cases, 18 by the ICJ, 12 by the Inter-American Court of Human Rights (IACtHR), and one by the Human Rights Council (HRC). In addition, from a total of 202 references in opinions, 102 were made by the ICJ, 70 were made by the ECtHR, and 13 by the IACtHR.

This report, read in conjunction with previous similar compilations,[6] indicates an increase in the number of references to the ARSIWA by many courts and bodies, including the ECtHR. However, this increase comes accompanied by other relevant trends in the Strasbourg Court: a broad interpretation of many ECHR rights as giving rise to positive obligations as the Court avoids the application of some ARSIWA provisions, and the departure from some of the ARSIWA principles.

This article explores these trends, turning to ICJ case law for guidance. It argues that the ICJ can play a role in advancing towards more judicial integration on state responsibility by clarifying certain ARSIWA provisions as they relate to positive obligations, and that this would ultimately contribute to greater protection of human rights. As Jägers observes, 'the law of state responsibility offers an interesting, yet underutilized tool for addressing human rights violations'.[7] According to Simma, 'it is a fact that the preparedness of states to bring "pure", genuine human rights scenarios before the Court has always been extremely limited, and it is fair to assume that this will remain the case'.[8] Nevertheless, there is potential for a greater contribution by the Court to deepen judicial integration on the approach to state responsibility in human rights courts. '[T]he bringing of inter-state disputes directly under compromissory clauses of human rights instruments, namely, the Genocide Convention, the CERD and the Convention against Torture is a recent development' which has led the Court to 'face human rights issues squarely where it has claimed jurisdiction'.[9]

The article is structured in three sections. Section 2 focuses on the ECtHR trend of interpreting broadly certain rights contained in the ECHR as giving rise to positive human rights obligations, avoiding the use of certain ARSIWA provisions. Section 3 looks at some examples in which the ECtHR has departed from the international regime of state responsibility. Section 4 looks at ICJ case law relevant to this research, and identifies areas in which the ICJ could provide further clarification.

2. A broad interpretation of ECHR rights giving rise to positive obligations

The notion of positive obligations has been developed by human rights courts and UN monitoring bodies. The Committee on Economic, Social and Cultural Rights (CESCR), for example, has contributed to their definition through its general comments. General Comment 3 on the Nature of

[4]The compilation covers 163 cases, with 392 references to ARSIWA in publicly available decisions taken from 1 January 2001 to 31 January 2016 (*Responsibility of States for internationally wrongful acts, Compilation of decisions of international courts, tribunals and other bodies*, Report of the Secretary-General, 20 June 2017, UN Doc. A/71/80/Add.1).

[5]In that compilation, the UN Secretariat shows an almost stable increase in references to ARSIWA from 2001 to 2016, in both decisions and opinions: references in decisions raised from one in 2001 to 68 in 2015. References in opinions raised from one in 2002 to 15 in 2016, with 24 in 2014, and 37 in 2015.

[6]See compilations prepared by the Secretary-General in 2007, 2010, 2013, and 2016, as requested by the General Assembly in its resolutions A/RES/59/35, A/RES/62/61, A/RES/65/19, and A/RES/68/104.

[7]N. Jägers, *Corporate Human Rights Obligations: In Search for Accountability* (2002), 175.

[8]B. Simma, 'Human Rights before the International Court of Justice: Community Interest Coming to Life?', in C. J. Tams et al. (eds.), *The Development of International Law by the International Court of Justice* (2013), 301–25, at 319.

[9]V. Gowland-Debas, 'The ICJ and the Challenges of Human Rights Law', in M. Adenas et al. (eds.), *A Farewell to Fragmentation. Reassertion and Convergence in International Law* (2015), 109–45, at 111.

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

States Parties' Obligations talks about the obligation of states parties 'to take steps' towards the realization of a right, recognizing legislative measures, the provision of judicial or other effective remedies, administrative, financial, educational and social measures.[10] In its comment on Article 12 of the International Covenant on Economic, Social and Cultural Rights, although not referring explicitly to positive obligations, the Committee discussed the obligations to protect and fulfil the right to adequate food.[11] Other UN monitoring bodies have also defined positive obligations in their work under the individual complaints procedure.[12]

In order to understand the concept of positive human rights obligations, the case law of the ECtHR is particularly relevant. Although the Court has not provided an authoritative definition of positive obligations[13] and the boundaries between positive and negative obligations are not always precisely defined, it has interpreted express positive obligations and developed implied positive obligations related to the prohibition of torture, the right to a fair trial, the right to an effective remedy and freedom of expression, shedding light on what can be considered a positive obligation.[14] In 1996, Judge Martens saw positive obligations as 'requiring member states to ... take action'.[15] While this definition may seem too general, it reflects the essence of the diverse duties that have been considered by the ECtHR under the category of positive obligations, *inter alia*, the obligation to protect vulnerable persons from serious ill-treatment,[16] the obligation to protect the rights of detainees,[17] the obligation to deploy reasonable police resources to protect media organizations from violent attacks to freedom of expression,[18] the obligation to secure children's right to education,[19] or the obligation to preserve a cultural diversity of value to a whole community.[20] The idea behind positive obligations is that in order to ensure protection of certain rights 'passive non-interference' is not enough,[21] and the state may have a 'duty to act in a particular way'.[22]

As Feldman has noted, some positive obligations are imposed expressly by the language of the Convention, whereas an increasing number of positive obligations are considered by the Court to be implied in the ECHR.[23] During the first years of existence of the ECtHR, most positive obligations were express, whereas after the 1970s the development of implied positive obligations increased notably. This increase in the identification of positive duties for states can be associated with the idea of effectiveness, with the Court trying to develop the most effective system for states to protect the rights under the Convention.[24] Another interesting explanation of this evolution is that it responds to the needs of the Court,[25] as imposing on states the duty to conduct effective

[10]CESCR, General Comment N. 3: The Nature of States Parties' Obligations (Art. 2, para. 1 of the Covenant), 14 December 1990, UN Doc. E/1991/23, paras. 2, 3, 5.

[11]CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, UN Doc. E/C.12/1999/5, para. 15.

[12]I. Boerefijn, 'Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties', (2009) 56(2) *Netherlands International Law Review* 167, 171.

[13]A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), 2.

[14]H. Tomlinson QC, 'Positive Obligations under the European Convention on Human Rights', ALBA Summer Conference 2012, at 9; L. Lavrysen, *Human rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights* (2016).

[15]Dissenting Opinion of Judge Martens in *Gul v. Switzerland* 1996-I, at 165 (ECtHR, 19 February 1996).

[16]*Z v. UK* (ECtHR, 10 May 2001).

[17]*Fox, Campbell and Hartley v. UK* (ECtHR, 30 August 1990).

[18]*Özgür Gündem v. Turkey* (ECtHR, 16 March 2000). These three examples are cited in Mowbray, *supra* note 13, at 2.

[19]*Costello Roberts v. United Kingdom* (ECtHR, 25 March 1993).

[20]*Chapman v. United Kingdom* (ECtHR, 18 January 2001).

[21]Ibid., at 221.

[22]J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (1993), 102–3.

[23]D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2002), 53.

[24]Mowbray, *supra* note 13, at 221.

[25]Ibid.

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

investigations reduced the Court's burden to embark on expensive and time-consuming fact-finding missions.[26]

This article takes as a working definition of positive obligations the obligations of a state to adopt measures or take deliberate action to ensure that human rights are respected, protected and promoted. This includes obligations to guarantee the rights of individuals, to prevent private actors from breaching the rights of others, to protect victims, to ensure the basic needs of the most vulnerable members of society, and to prosecute and punish perpetrators. Those obligations are normally fulfilled by legislating, enforcing legislation, adopting policy measures, providing public services, and monitoring private actors' compliance with existing legislation.

2.1 The trend

One of the trends observed in recent literature on the ECtHR's use of the ARSIWA is that the Court has broadly interpreted many ECHR rights as giving rise to positive obligations, perhaps as an alternative to directly engaging with certain secondary rules in the ARSIWA. As Crawford, Keene[27] and Boon[28] have indicated, the difficulties in the application of certain ARSIWA rules, especially Article 8 ARSIWA, seem to have led to that broad interpretation of certain rights.

Under Article 8 ARSIWA:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

The interpretation of this provision, the customary nature of which remains controversial,[29] has been the focus of relevant ICJ decisions clarifying the rules for attribution in this context.[30] However, as analysed below, the case law of the ECtHR rarely engages with Article 8 ARSIWA. This could indicate that the application of the 'effective control' test still raises some challenges in practice.

This trend is particularly relevant given the increase in the privatization of certain official functions in areas such as security and border control.[31] In that context, 'control tests under prevailing doctrines of attribution present a "slippage" problem' defined by Boon as the 'decline of government control of functions traditionally associated with the state',[32] which has created an accountability gap.[33] One of the techniques that has emerged in practice to overcome that gap

[26]Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 27 September 2001.

[27]Crawford and Keene, *supra* note 1.

[28]K. E. Boon, 'Are control tests fit for the future? The slippage problem in attribution doctrines', (2014) 15 *Melbourne Journal of International Law* 3.

[29]J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (2002), 265, para. 5.

[30]In the *Nicaragua* case, the ICJ considered 'effective control' as a requirement for attribution (*Military and Paramilitary Activities in and against Nicaragua*, Judgment on the Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14). In 2007, the Court confirmed its position on effective control in the *Genocide Convention (Bosnia v. Serbia)* case, stating that the overall control test was not appropriate for state responsibility (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43, 209–10).

[31]See O. Bures and H. Carrapico, 'Private security beyond private military and security companies: exploring diversity within private-public collaborations and its consequences for security governance', (2017) 67 *Crime, Law and Social Change: An Interdisciplinary Journal* 3; L. A. Dickinson, *Outsourcing war and peace: preserving public values in a world of privatized foreign affairs* (2011); N. D. White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs', (2012) 31 *Criminal Justice Ethics* 233.

[32]Boon, *supra* note 28.

[33]Ibid.

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

is indeed recognizing responsibility of the state for failing to prevent. As Boon explains, 'where the application of the stringent effective control test results in slippage, the duty to prevent has become a favoured strategy'.[34]

In the *Costello-Roberts* case[35] and more recently in the *O'Keeffe* case,[36] the ECtHR focused on defining the positive obligations of the United Kingdom and Ireland in the field of education and protection from mistreatment, but the Court did not discuss whether the respective acts were attributable to the state.[37] A similar approach was adopted in other cases.[38] As Crawford and Keene note, the same reasoning that could be used to support an attribution of ARSIWA in a case like *Storck* v. *Germany*[39] 'is used to support a conclusion on positive obligations'.[40] In that case, the Court found that the actions of police officers constituting wrongful detention were 'imputable' to the state and established that Germany was in breach of its positive obligations under Articles 5 and 8 ECHR. It did not, however, rely on Article 4 ARSIWA, according to which the acts of police officers are attributable to the state as state organs. This would have allowed the Court to establish the responsibility of the state for wrongful detention. The trend seemed to have reverted with the *Kotov* v. *Russia* case,[41] where the ARSIWA were broadly mentioned. But in further cases the Court returned to the same approach, avoiding engaging with some key ARSIWA provisions.[42]

This increasing reliance on positive obligations could represent a risk, as positive obligations are not always applied consistently. As an example, Mowbray calls for a more robust application of the effective investigation duty by the ECtHR under Article 3 ECHR.[43] It is therefore pertinent to examine how the ICJ has dealt with the issue.

2.2 The contribution of the ICJ

The ICJ, which has contributed greatly to the definition of the rules of attribution,[44] dealt in the *Bosnia Genocide* case[45] with a similar matter. Unlike the ECtHR in the *O'Keeffe* case,[46] the ICJ engaged with the attribution test and provided clarification on the limits of positive obligations. In this case, the ICJ found that Serbia violated its treaty obligation to prevent genocide in such a manner as to engage its international responsibility, although the commission of the crime was not attributable to the state.[47] The difference with the ECtHR cases mentioned above is that, although the ICJ judgment concluded that the crime was not attributable to the state, it did engage with the

[34]Ibid., at 35.

[35]Case concerning the United Kingdom's responsibility for the acts of teachers that denied rights contained in the ECHR (*Costello Roberts v. United Kingdom*, *supra* note 19).

[36]Case concerning Ireland's responsibility to breach the positive obligation to take measures to ensure that individuals are not subjected to mistreatment (*O'Keeffe v. Ireland* (ECtHR, 28 January 2014)).

[37]Crawford and Keene, *supra* note 1, at 181.

[38]Ibid., citing *Evaldsson and Others v. Sweden* (ECtHR, 13 February 2007), *Buzescu v. Romania* (ECtHR, 24 May 2005), and *Storck v. Germany* (ECtHR, 16 June 2005) as examples.

[39]Ibid.

[40]Crawford and Keene, *supra* note 1, at 182.

[41]*Kotov v. Russia* (ECtHR, 3 April 2012), concerning Russia's potential responsibility to protect the rights of private creditors.

[42]*Liseytseva and Maslov v. Russia* (ECtHR, 9 October 2014).

[43]Mowbray, *supra* note 13, at 227, citing *Ilhan v. Turkey* (ECtHR, 27 June 2000).

[44]For ICJ pronouncements regarding the rules of attribution see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168, at 242, para. 213; ICJ Advisory Opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62, at 87, para. 62.

[45]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 30.

[46]See *supra* note 36.

[47]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 30.

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

ARSIWA attribution test, whereas the ECtHR avoided dealing with the attribution question, in spite of the relevance it may have had for the final outcome of the cases. In its judgment, the ICJ looked separately at the duty to prevent genocide and the duty to punish its perpetrators as two separate yet connected obligations, emphasizing that the duty to prevent genocide has its own scope and should not be 'merged in the duty to punish', nor 'be regarded as simply a component of that duty'.[48]

Although in the judgment the ICJ clarifies that it does not 'purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for states to prevent certain acts', the judgment defines what constitutes a breach of the duty to prevent in the context of the case which can be helpful in the human rights sphere. The Court states that 'a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed', and that 'a state may be found to have violated its obligation to prevent even though it had no certainty, at the time it should have acted, but failed to do so, that genocide was about to be committed or was under way'.[49]

The Court also found that Serbia had violated its obligation to punish genocide under the Genocide Convention, engaging its international responsibility. Having examined whether the ICTY constituted an 'international penal tribunal' within the meaning of Article VI of the Convention, and whether it should be considered that Serbia had accepted the jurisdiction of such tribunal, the Court understood that Serbia had breached its duty to co-operate with the ICTY and thus was responsible for violating its obligation to punish genocide.[50]

Another relevant case is the *Congo* v. *Uganda* case on 'acts of armed aggression' against the Democratic Republic of the Congo.[51] The Court engaged in the attribution test in order to determine if the conduct of the Uganda Peoples' Defence Forces (UPDF) and of the officers and soldiers of the UPDF was attributable to Uganda. Having given a positive answer to that question, the Court found that Uganda was 'internationally responsible for violations of international human rights law … committed by the UPDF and by its members in the territory of the DRC' as well as for failure to prevent violations of human rights by the UPDF.[52]

3. Departing from the ARSIWA principles

Closely linked to the phenmenon analysed in Section 2, a second trend identified by Crawford and Keene in ECtHR case law is the 'explicit departures from the general principles on state responsibility in special cases'.[53] Motoc and Vasel argue that the ECtHR is advancing towards a higher degree of judicial integration in this area.[54] If the intention of the Strasbourg Court is indeed to advance towards more judicial integration, one possible justification of such departure from the ARSIWA principles could be the difficulties in applying some of them. This Section explores the issue.

3.1 The trend

In *Behrami and Saramati*,[55] the ECtHR applied an 'ultimate authority' test not founded in Article 6 ARSIWA, which establishes the rule for attribution of conduct of organs placed at the disposal of

[48]Ibid., at 220, para. 427.

[49]Ibid., para. 432.

[50]Ibid., para. 441.

[51]See *Democratic Republic of the Congo v. Uganda* case, *supra* note 44, paras. 213–14.

[52]See Section 4 below.

[53]Crawford and Keene, *supra* note 1, at 179.

[54]I. Motoc and J. J. Vasel, 'The ECHR and Responsibility of the State: Moving Towards Judicial Integration. A View from the Bench', in van Aaken and Motoc, *supra* note 1.

[55]*Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (Admissibility) (ECtHR, 2 May 2007). See M. Milanovic and T. Papiç, 'As Bad as it Gets: the European Court of Human Rights's *Behrami and Saramati* Decisions and General International Law', (2009) 58(2) *International and Comparative Law Quarterly* 267.

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

a state by another state.[56] In *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the Court departed from the content of Article 16 ARSIWA, which establishes the responsibility of a state for aiding or assisting another state in the commission of an internationally wrongful act. In this case, the Court expanded the responsibility of Macedonia by departing from Article 16 ARSIWA. It developed a new 'acquiescence or connivance' rule to hold a third state responsible for the acts of another state on its territory, going beyond what ARSIWA provides.[57] In other cases, the ECtHR has mixed the concepts of jurisdiction and attribution in a way that is not consistent with the ARSIWA principles.[58]

Despite this apparent departure from the ARSIWA principles, for Motoc and Vasel, 'the EC[t]HR neither can nor intends to escape' the general international law framework, and convergence remains a question of 'how to align the EC[t]HR with, and integrate it into, the omnipresent realm of international law'.[59] They argue that the way the ECtHR has used the *lex specialis* principle may serve, among other means, 'as a helpful tool in accomplishing that task and creating a dynamic and harmonious mobile structure or web architecture between the general and the specific'.[60]

This proposed approach reopens the debate about *lex specialis*. The special and autonomous nature of human rights was acknowledged by states participating in the negotiations of ARSIWA. They noted that the draft articles would not apply to self-contained legal regimes, such as those on the environment, human rights, and international trade, which had been developed in recent years.[61] This vision was broadly questioned by scholars,[62] dispute resolution bodies (particularly investment arbitration tribunals),[63] and by the ILC's Study Group on Fragmentation of International Law, which acknowledged the special nature of human rights but clarified that no existing legal regime is fully self-contained.[64]

According to Special Rapporteur Crawford and the ILC, 'there is a presumption against the creation of wholly self-contained regimes in the field of reparation'[65] and 'none of the treaty regimes in existence today is self-contained in the sense that the application of general international law could generally be excluded'.[66] Therefore, whenever there is an overlap between the general international law of state responsibility and the *lex specialis*, the question is whether

[56]Criticism for such departure can be found in ILC, Giorgio Gaja, Special Rapporteur, 'Seventh Report on Responsibility of International Organizations' (27 March 2009), 26 UN Doc. A/CN.4/610; K Mujezinovic Larsen, 'Atribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test?', (2008) 19 EJIL 509, 528.

[57]Crawford, Keene, *supra* note 1, at 189.

[58]See *infra* note 72.

[59]Motoc and Vasel, *supra* note 54, at 211.

[60]Ibid.

[61]Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session prepared by the Secretariat, contained in the Report of the International Law Commission on the work of its fifty-first session (1999), UN Doc. A/CN.4/504, 9, para. 15.

[62]For Pellet, 'although perfectible, the new rules of state responsibility are indeed applicable to responsibility of states in cases of serious violations of human rights' (A. Pellet, 'Responsibility of States in Cases of Human-rights or Humanitarian-law Violations', in J. Crawford et al. (eds.), *The International Legal Order: Current Needs and Possible Responses* (2017), 230–51). See also Boerefijn, *supra* note 12, at 170–1; A. Kouassi, *La responsabilité internationale pour la violation des droits de l'homme* (2016); C. Thiele, 'Das Verhältnis zwischen Staatenverantwortlichkeit und Menschenrechten', (2011) 49(4) *Archiv des Völkerrechts* 343; B. Simma, 'Human Rights and State Responsibility', in A. Reinisch et al. (eds.), *The Law of International Relations, Liber Amicorum Hanspeter Neuhold* (2007), 359–82, at 381; A. Cassese, *International Law* (2001), 208; A. Pellet, 'Human Rightism and International law', (2000) 10 *Italian Yearbook of International Law* 3; R. McCorquodale, 'Impact on State Responsibility', in M. Kamminga et al. (eds.), *The Impact of Human Rights Law on General International Law* (2009), 235–4, 251.

[63]J. Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility', (2010) 25(1) *ICSID Review* 127.

[64]ILC Study Group on Fragmentation of International Law, 'Study on the Function and Scope of *Lex Specialis* Rule and the Question of Self-Contained Regimes: An Outline' (2004), para. 3.3.

[65]Third report on State responsibility, Special Rapporteur J. Crawford, 2000, UN Doc. A/CN.4/507, 50, para. 329.

[66]*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 2006, UN Doc. A/CN4/L682, para. 172.

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

the specific provision of the special rule or treaty was intended to be cumulative with or exclusive of the ARSIWA, and that is a matter of interpretation in each case.[67]

3.2 The contribution of the ICJ

Although the ICJ has not dealt directly with the question of whether a specific rule was intended to be cumulative with or exclusive of the ARSIWA, its case law provides clarification.

An important contribution of the Court in this regard is in its judgment in the *Military and Paramilitary Activities in and against Nicaragua* case.[68] When addressing the human rights violations by Nicaragua alleged by the US, the Court states that 'where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves' as long as 'the mechanisms provided for therein' function.[69] On these grounds, it can be argued that when human rights treaties provide no meaningful enforcement in case of states alleging violations by other states, recourse to the general law of responsibility should be available.[70] Although the Court does not define the criteria to determine when a mechanism functions, it implicitly acknowledges the possibility of applying the international law of state responsibility to violations of international human rights obligations.

Another relevant contribution of the ICJ in this regard is in the *Diallo* case, in which the Court deferred to the interpretation of the Human Rights Committee and emphasized that:

> [a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[71]

The Court went on to clarify that the priority is 'to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled'.[72]

As many, including Cançado Trindade, have emphasized, the ECHR is not a 'self-contained regime'.[73] But the *lex specialis* principle described by Motoc and Vasel is a 'weaker form(s) of limited deviation' inspired by complementarity.[74] In the *Catan* case,[75] the Court emphasized the 'obligation to take account of the relevant rules and principles of international law and to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part'.[76] This judgment has, nevertheless, been criticized[77] for confusing the

[67]J. Crawford, *State Responsibility, the General Part* (2013), 103–6.

[68]*Military and Paramilitary Activities in and against Nicaragua*, *supra* note 30.

[69]Ibid., at 134, para. 267.

[70]Simma, *supra* note 62, at 365.

[71]*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment: Merits of 30 November 2010, [2010] ICJ Rep. 639, para. 66.

[72]Ibid.

[73]A. Cançado Trindade, 'Conclusion. Reflections on the 2015 Strasbourg Conference', in van Aaken and Motoc, *supra* note 1, at 303.

[74]Motoc and Vasel, *supra* note 54, referring to B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', (2006) 17 EJIL 490, and to D. M. Banaszewska, 'Lex specialis', in *Max Planck Encyclopedia of Public International Law* (2015), para 8.

[75]*Catan and Others v. the Republic of Modova and Russia* (ECtHR, 19 October 2012), on Russia's control of a region in Moldova.

[76]Ibid., para 136.

[77]Crawford and Keene, *supra* note 1, at 190.

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

distinction between jurisdiction and attribution. In the *Jaloud* v. *The Netherlands* case,[78] the Court made various references to the ARSIWA, a timid but limited engagement with the international law of state responsibility that continued in the *Chiragov and Others* v. *Armenia* case.[79] In this case, although the Court engages with the ARSIWA for determining jurisdiction, it could have referred to it more substantively in the merits phase.[80]

The idea of a *lex specialis* principle as a weak form of limited deviation inspired by complementarity that Motoc and Vasel refer to is a very interesting one and seems to be aligned with the decision of the ICJ in the *Diallo* case. However, the case law of the Strasbourg Court on this matter does not seem to show a clear direction towards further judicial integration. The increasing dialogue established between courts,[81] particularly encouraged by Judge Higgins during her term as President of the ICJ, could help advance towards further judicial integration and contribute to a more harmonized application of the ARSIWA.

4. The ICJ and upcoming opportunities for clarification of ARSIWA principles

As Judge Jennings, former President of the ICJ, emphasized, the ICJ is 'thought of as being generally well suited to the settlement of disputes. But in so doing it has also a vital role in the development and elaboration of general law'.[82] In that role, further clarification on positive obligations and on some ARSIWA provisions by the ICJ could contribute to a more systematic use of the international law of state responsibility by the ECtHR and ultimately to a stronger protection of human rights. This Section looks at ICJ case law relevant to this research, and identifies areas in which the ICJ could provide further clarification.

One aspect that remains blurry and on which the ICJ could usefully elaborate is the distinction between positive obligations and other obligations. A landmark ICJ case on human rights and state responsibility where the Court clarified that difference is the *Congo* v. *Uganda* case on 'acts of armed aggression' against the Democratic Republic of the Congo,[83] the 'first judgment in the Court's history in which a finding of human rights violations was included in the dispositif'.[84] The Court found Uganda responsible for failure to prevent violations of human rights by the UPDF. In its decision on provisional measures, the Court called on both states to 'take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights'.[85] In its decision on the merits, the Court analysed the duty to secure respect for the applicable rules of international human rights.[86]

[78]This distinction was analysed in further detail in the *Jaloud v. The Netherlands* case, although the distinction between jurisdiction and attribution was not fully clarified. Two judges expressed dissenting opinions in a matter that showed the difficulties of harmonizing the ECHR system with the ARSIWA (*Jaloud v. the Netherlands* (ECtHR, 20 November 2014)). See also M. Milanovic, 'Jurisdiction, Attribution and Responsibility in Jaloud', *EJIL:Talk!*, 11 December 2014, available at www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/.

[79]*Chiragov and Others v. Armenia* (ECtHR, 16 June 2015).

[80]Crawford and Keene, *supra* note 1, at 196.

[81]As Higgins reminds, 'there is increasing reference in the jurisprudence of human rights treaty bodies to the International Court's judgments. And the Court, for its part, has begun to refer to the practice of treaty bodies in the context of its own judicial work' (R. Higgins, 'Human Rights in the International Court of Justice', (2007) 20 *Leiden Journal of International Law* 745, at 748). See also D. Spielmann, 'Fragmentation or partnership? The Reception of ICJ Case-law by the European Court of Human Rights', in M. Andenas and E. Bjorge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (2015), 173–90.

[82]Sir Robert Jennings, *The Role of the International Court of Justice in the Development of International Environmental Law* (1992), 241. See also S. R. S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (2007), 29.

[83]See *Democratic Republic of the Congo v. Uganda*, *supra* note 44.

[84]See Simma, *supra* note 8, at 309.

[85]*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, 1 July 2000, [2000] ICJ Rep. 111, at 129, para. 47.

[86]See *Democratic Republic of the Congo v. Uganda*, *supra* note 44.

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

The Court examined the applicable human rights treaties and concluded that Uganda had violated Articles 6(1) and 7 of the ICCPR, Articles 4 and 5 of the African Charter on Human and Peoples' Rights, Article 38(2-3) of the Convention on the Rights of the Child, and Articles 1, 2, and 3(3-6) of the Optional Protocol to the Convention on the Rights of the Child, all of them provisions to which both Uganda and the Democratic Republic of the Congo were parties.[87] On this basis, it concluded that Uganda was 'internationally responsible for violations of international human rights law ... committed by the UPDF and by its members in the territory of the DRC' and, what is more relevant to our research question, 'for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law'[88] in the occupied territory.

While not differentiating in its analysis the two sources of international responsibility for those human rights violations, the Court distinguishes in paragraph 220 the responsibility attributed to Uganda for the human rights violations committed by the UPDF from its responsibility for failing to fulfil its positive obligations to prevent, protect and punish. The Court will soon be considering the reparations phase in this case. In an unprecedented situation, the Court will consider reparations for mass violations of human rights for the first time. One may hope, moreover, that any reparation awarded in that judgment will provide further clarity on the above distinction, made in paragraph 220 of the merits judgment, between responsibility attributed to Uganda for acts of the UPDF, on the one hand, and responsibility for positive obligations, on the other.

Two pending cases before the Court could be opportunities for examining the limits of positive obligations in the intersection between the law of state responsibility and human rights: *Ukraine* v. *Russian Federation*, which concerns alleged violations by Russia of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and *Qatar* v. *United Arab Emirates* which concerns alleged violations by UAE of certain rights guaranteed by the CERD, including the right to marry and choose a spouse, the right to public health and medical care, the right to education and training, the right to property, work and equal treatment before tribunals. In particular, the separate opinions of Judge Cançado Trindade to both ICJ Orders on provisional measures emphasize relevant aspects of state obligations in those cases.

In *Qatar* v. *UAE*, Judge Cançado Trindade refers to positive obligations, mentioning the IACtHR Advisory Opinion on the *Juridical Condition and Rights of Undocumented Migrants*,[89] according to which states cannot discriminate, nor tolerate discriminatory situations to the detriment of those persons. Emphasizing this element of the Advisory Opinion, he is acknowledging separate obligations of states not to discriminate and not to tolerate discriminatory situations, in line with the distinction set by the Court in *Congo* v. *Uganda*.[90] The separate opinion does not explicitly set out the implications of the difference between these two obligations for state responsibility, but it could be inferred from the spirit of the opinion that the breach of both would give rise to it. In the same sense, in *Ukraine* v. *Russian Federation*, he refers to the 'Drittwirkung effect', as the ICSFT and the CERD 'cover likewise inter-individual relations, without thereby excluding the subsequent consideration of state responsibility (as to the merits), even if by omission'.[91] Second, he highlights 'the autonomy of the international responsibility that

[87]Ibid., at 244, para. 219.

[88]Ibid., para. 220.

[89]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Judgment (Provisional Measures) of 23 July 2018, [2018] ICJ Rep., Separate Opinion of Judge Cançado Trindade, para. 19; IACtHR, *Advisory Opinion* n. 18 of 17 September 2003.

[90]See *Democratic Republic of the Congo v. Uganda*, *supra* note 44.

[91]*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment (Provisional Measures) of 19 April 2017, [2017] ICJ Rep. 104, Separate Opinion of Judge Cançado Trindade, para. 52.

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press

non-compliance with them (provisional measures) promptly generates',[92] which is separate from the potential responsibility pertaining to the merits of the case.

The final judgments of the Court in these cases could be an opportunity for it to clarify the implications that the distinction between the obligation not to discriminate and the obligation not to tolerate discriminatory situations may have, if any, for state responsibility. It could also be an opportunity for the Court to go back to the question of responsibility for non-compliance with provisional measures in the context of human rights cases. As no reference to these two elements has been made in the ICJ decisions on these cases so far, nor in other separate or dissenting opinions, such development in the final judgment would be surprising but welcome.

As shown above, it is not only the limits of positive obligations that remains unclear. The difficulties in applying certain ARSIWA provisions, such as Articles 5, 8, and 16, appear to be one of the causes for the broad interpretation of certain ECHR rights and departure from certain ARSIWA principles, or at least its choice to not engage with them in an explicit and open way. The ICJ has already provided clarification on 'effective control' and other ARSIWA principles, as some illustrative examples above show.[93] Despite these clarifications, the application of the 'effective control' principle remains a challenge in the ECHR system and others, generating the 'slippage' problem analysed in Section 2 and the broad interpretation of some ECHR rights giving rise to positive obligations. Therefore, when opportunity arises, the ICJ could provide further clarification on this and other ARSIWA provisions that continue posing challenges of implementation in practice. This could contribute to the judicial integration towards which the ECtHR is arguably moving.

5. Conclusions

This article argues that the ICJ could have a key role in increasing the applicability of ARSIWA by the ECtHR, through clarification of some ARSIWA principles in its case law. This would contribute to a more coherent application of state responsibility and ultimately to greater protection of human rights. As Hessbruegge indicates, 'the law of state responsibility always adapted more or less swiftly to each momentous change in the nature of the state and its relations with its members' and 'one has to ask where the law of state responsibility will go in the years to come'.[94]

The ICJ, 'as a mainstream interpreter of general international law', has produced 'the most important decisions on state responsibility'.[95] In a moment characterized by a fruitful dialogue between the ICJ and human rights courts and treaty bodies, pending and potential cases could be an opportunity for the Court to unpack some aspects of the international framework of state responsibility. An explicit clarification in upcoming ICJ judgments of the aspects tackled in this article would be welcomed, as it could facilitate a more systematic use of ARSIWA by the ECtHR. It is now common to see 'the same human rights claims surfacing in diverse fora, including the ICJ, human rights courts, and treaty bodies'.[96] This creates a unique context for those courts and treaty bodies to identify methods to ensure accountability of states breaching human rights obligations. As the principal judicial organ of the United Nations, the ICJ is best placed to lead the way.

[92]Ibid., para. 77.

[93]See *supra* note 30.

[94]J. A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', (2004) 36(2) *New York University Journal of International Law and Politics* 265.

[95]I. Brownlie, 'State responsibility and the International Court of Justice', in M. Fitzmaurice et al. (eds.), *Issues of State Responsibility before International Judicial institutions* (2004), 11–18, at 11.

[96]See Higgins, *supra* note 81, at 749.

Cite this article: Garciandia R (2020). State responsibility and positive obligations in the European Court of Human Rights: The contribution of the ICJ in advancing towards more judicial integration. *Leiden Journal of International Law* **33**, 177–187. https://doi.org/10.1017/S0922156519000591

https://doi.org/10.1017/S0922156519000591 Published online by Cambridge University Press