

## Recent case-law of the ICJ and its significance for International Law

### OC - (ILA-14143) - STATE RESPONSIBILITY FOR BREACHES OF POSITIVE HUMAN RIGHTS OBLIGATIONS: THE ICJ AND THE POTENTIAL FOR MORE SYSTEMATIC USE OF STATE RESPONSIBILITY IN THE HUMAN RIGHTS SPHERE

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Professional involvement:

- Visiting Lecturer and Researcher in Public International Law, King's College London, The Dickson Poon School of Law (February 2018 – present)
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- PhD in Law ("Doctor Europaeus"), University of Navarra, School of Law, Spain (2010)
- BA in Law, University of Navarra, School of Law, Spain (2006)
- BA in Economics, University of Navarra Faculty of Economics, Spain (2006)

Positions held:

- Consultant, United Nations University Centre for Policy Research (March -May 2019): Operations coordinator of the team working with the UN Special Rapporteur on Contemporary Forms of Slavery, Urmila Bhoola, in preparation for her upcoming report to the UN General Assembly
- Consultant, UN Office on Drugs and Crime, Division for Treaty Affairs (September 2017 - September 2018)
- Legal Research Officer, European Union Agency for Fundamental Rights, Vienna, Austria (November 2016 - September 2017)
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- Lecturer in Public International Law and EU Law, University of Murcia, School of Law, Murcia, Spain (November 2010 - September 2013)
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Research interests:

Public International Law, State Responsibility, Modern Slavery, Human Rights Law, Migration and Refugee Law, Corruption, Fragility of States, Sustainable Development, Rule of Law, International Economic Law, EU Law.

Selected presentations:

- 'Human trafficking and corruption', at Conference The Palermo Convention Against Transnational Organize Crime 2003-2018: Implementing the Treaty System, Macrocrimes Center, University of Ferrara, Ferrara, 10 May 2019.
- 'Human rights impact assessment and monitoring under the EU Generalised Scheme of Preferences: the Uzbek cotton industry as a case study', III LAWTTIP Joint Conference, King's College London 21-22 March 2019.
- 'Are States accountable for modern slavery?', King's College Human Rights, Development and Global Justice Series, London, 12 February 2019.
- 'State responsibility for modern slavery: uncovering and bridging the gap', United Nations Headquarters, New York, 31 January 2019.
- 'Modern slavery as State policy and other forms of involvement of the State in modern slavery', King's College London, London, 16 November 2018.
- 'Emerging trends and strategic responses in combating human trafficking', discussant at King's Human Rights, Development and Global Justice Seminar, London, 15 November 2018.
- 'State involvement in modern slavery: state responsibility as an avenue for accountability', 2018 Annual Conference of the International Association of Lawyers (UIA), Porto, 31 October 2018.
- 'How to respond to the current violations of international asylum and human rights law? Reflections from a human rights clinic in Palermo (Sicily)', discussant at King's Human Rights, Development and Global Justice Seminar, London, 25 October 2018.

- 'Domestic servitude in diplomatic households', Workshop on State Responsibility for Modern Slavery, New York, 20 July 2018.

Selected publications:

- 'State responsibility for modern slavery: uncovering and bridging the gap', *International and Comparative Law Quarterly*, July 2019 (with Dr Philippa Webb). Peer reviewed.

- 'Slavery in Domestic Work: The Potential for State Responsibility?', *EJIL: Talk!*, Blog of the *European Journal of International Law*, September 2018 (with Dr P Webb).

- 'Euro-Latin-American cooperation against corruption and its impact on human rights', *ARAUCARIA Ibero-American Journal on Philosophy, Politics and Humanities*, 2018. Peer reviewed.

- 'Implementation of Sustainable Development Goals: Crosscutting analysis', in *International Society and Sustainable Development Goals*, pp. 561-583, 2016.

- 'El Sistema Europeo Común de Asilo: propuesta de reforma de la regulación vigente', [The Common European Asylum System: Proposal for Amendment of the Current Regulation], in María Ángeles Sotes (coord.), *Emigración, identidad y países receptores* [Migration, Identity and Reception Countries], pp. 231-250, Tirant lo Blanch, 2014.

- *De los Estados fallidos a los Estados frágiles: un reto para el Derecho Internacional Contemporáneo*, [From Failed States to Fragile States: a Challenge for Contemporary International Law], Comares, 2013, 311 pp.

Languages:

English (Proficient), French (Proficient), German (Intermediate), Spanish (Mother tongue), Basque (Mother tongue).

## Abstract

This paper will analyse the potential and challenges of applying the International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) to breaches of states' positive human rights obligations, looking at case-law of the ICJ. Challenging the view that the international human rights framework is a self-contained regime and *lex specialis* under Article 55 ARSIWA, and exploring the reasons for underutilization of the legal framework for state responsibility for breaches of such obligations, I argue that the law of state responsibility should be applied more systematically to those breaches to guarantee full protection of human rights, be it in inter-state litigation before the International Court of Justice (ICJ), in regional human rights courts, in arbitral tribunals, or in fora alternative to litigation, including decisions of UN monitoring bodies.

Human rights treaties create obligations for states to act in order to protect the rights contained in them. Positive human rights obligations, a concept developed by human rights courts<sup>[1]</sup> and UN monitoring bodies,<sup>[2]</sup> include obligations to actively prevent, protect and punish, and those human rights treaties envisage the consequences of the failure to fulfil such obligations. States have not traditionally been open to using the International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) explicitly to hold other states accountable for breaching their positive human rights obligations. When a breach of those obligations occurs, there is a preference for human rights treaties and mechanisms, as specialized frameworks that should be applied in the first place. However, when looking more closely at the reasoning of human rights courts and treaty bodies, certain principles of the international law of state responsibility are increasingly recognizable.

This article argues that a more systematic application of the law of state responsibility to breaches of positive human rights obligations, be it in inter-state litigation before the ICJ, in regional human rights courts or in fora alternative to litigation, would supplement human rights mechanisms and 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'.<sup>[3]</sup> Uncovering the reasons for that underutilization, this article explores what would be the added value of that approach. It does so by analysing the contribution of the International Court of Justice (ICJ), as well as human rights treaty bodies, regional human rights courts and other relevant sources, to clarifying the rules that apply in the intersection between human rights law and the international law of state responsibility.

States have not indicated much willingness to litigate human rights disputes as such before the ICJ, even though it is legally possible. 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'.<sup>[4]</sup> Nevertheless, there is potential for a greater contribution by the Court. '[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'.<sup>[5]</sup>

The contributions of the Court weigh in favour of the application of the ARSIWA to breaches of positive human rights obligations. It is desirable that the Court take any upcoming opportunity to provide greater clarity on the challenges and nuances of the applicability of the law of state responsibility to such breaches. That would contribute to a more systematic use of those rules in the human rights sphere, and ultimately to guaranteeing greater protection of human rights.

The article will explore the four areas of the law of state responsibility where practice illustrates the potential of this approach: the dichotomy between *lex specialis* and general international law; who may invoke state responsibility; attribution of an act to the state; and the consequences of state responsibility.

[1] In order to understand the concept of positive human rights obligations the case law of the ECHR is relevant. Although the Court has not provided a definition of positive obligations and the boundaries between positive and negative obligations are not always precisely defined, its case law sheds light on what can be considered a positive obligation (H. Tomlinson QC, 'Positive Obligations under the European Convention on Human Rights', ALBA Summer Conference 2012, at 9). In this regard, see L. Lavrysen, *Human rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights* (2016); A. Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

[2] UN monitoring bodies have also formulated positive obligations in their work under the individual complaints procedure (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).

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

[4] 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), 301-325, 319.

[5] V. Gowlland-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), 109-145, 111.

**Palavras-chave : international court of justice, human rights, state responsibility**