GCILS WORKING PAPER SERIES NO. 11
DECEMBER 2021

THE ILC ARTICLES AT 20

A SYMPOSIUM

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GCILS.ORG/

The contributions to this Working Paper were first published on EJIL: Talk! (https://www.ejiltalk.org) in August 2021. They have been slightly adapted and updated.

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1. The ILC Articles at 20: Introduction to the Symposium

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The Articles on the Responsibility of States for Internationally Wrongful Acts (Articles), developed by the International Law Commission (ILC), turn 20 this year. On 9 August 2001 – 45 years after the first report by Special Rapporteur Francisco García-Amador on the topic, after 5 Special Rapporteurs and 34 reports by them – the ILC adopted the final text of the Articles, thus bringing to an end work that (in the words of Rosalyn Higgins) were it not for the Commission's broad understanding of responsibility, 'should on the face of it [have] take[n] one summer's work'.[3] On 12 December 2001, the UN General Assembly 'noted' the Articles and commended them to the attention of Governments in December.[4] Since then, reflected in successive reports compiled by the UN Secretary-General, the Articles have become the obvious reference point for debates about State responsibility: they are invoked, applied, cited, criticised, studied by nearly everyone working in or with international law, from undergraduate students to investment tribunals, and even domestic courts.[5] They reflect international law's everyday, routine, application: mostly unspectacular, sometimes pedestrian; dramatic only rarely. What is more, most readers, users, students, critics have been quick to adopt the ILC's jargon and categories.

During the later stages of the ILC's lengthy work on the topic, and more so in the twenty years since the Articles' adoption, notions such as 'internationally wrongful act', 'attribution', and even forbiddingly bloodless terms such as 'circumstances precluding wrongfulness' and 'countermeasures' have become part of the canon. (Gladly, there is still some resistance to the dreadful acronym ARSIWA, but we fear it is waning…). 'The Articles' – in the words of one of their chief architects – 'have encoded the way in which we think about responsibility'.[6] At the same time, 'encoded' by the ILC, 'we think about responsibility' today mainly as rules that operate in the background: necessary to international law's functioning, at least as far as claims and disputes are concerned, but often fairly general – so that their impact on the outcome of such claims and disputes is not always felt.

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This set of reflections celebrates and assesses the ILC's exercise in 'encoding' the law of responsibility. It is prompted by an anniversary, which it celebrates with an eye to the future. It interrogates the fate of the Articles since 2001, and assesses their usefulness to contemporary and future work on State responsibility.

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[3] Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (OUP 1994) 148.
[4] UN Doc A/RES/56/83 (12 December 2001) (hereafter ILC Articles). The ILC's Commentary, published in Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, UN Doc A/56/10, at 31, will be referred throughout these contributions as 'ILC Commentary'.
[5] See e.g. UN Docs. A/62/62, A/62/62/Corr.1, A/62/62/Add.1, A/65/76, A/68/72, A/71/80, A/71/80/Add.1.
[6] James Crawford, 'The International Court of Justice and the Law of State Responsibility' in Christian J. Tams and James Sloan (eds) *The Development of International Law by the International Court of Justice* (OUP 2013) 81.

As the Articles cover a lot of this ground, so does this symposium: it comprises 11 contributions by a variety of authors, both well established and early-career, from academia and from practice (and sometimes both), bookended by two contributions by the organisers.

We begin with two personal reflections by ILC members. The first, by Bruno Simma, recounts his experience of working on this project as a member of the ILC during the second reading of the Articles – 'a generalist's dream' (in his words) for the human rights-minded international lawyer. The second one, by Patrícia Galvao Teles, reflects on the impact that the ILC's work on the Articles, and its approach to the final status of this project, has had on the ILC's current projects and its current approach to the topics it selects for consideration.

The symposium then addresses two main aspects of the Articles. First, the key choices that informed the ILC's work on the Articles. The ILC had to make some foundational choices in its work on the law of State responsibility. Many of these were explored in symposia published during the final stages, and at the time of completion, of the Articles by the ILC (in EJIL[7] and AJIL[8]). Our contributors reflect on the choices made: are they still relevant or justifiable today, and will they serve us well for the next few decades? Contributions by Fernando Bordin, Alex Mills, Santiago Villalpando, and Katja Creutz, explore issues involving the form of the Articles, the public/private divide, the success of the inclusion of multilateral obligations in the Articles, and the tension between the general and the special in light of Article 55 on *lex specialis*. These contributions address conceptual issues, but do so with a grounding in the real world – in light of the impasse in the Sixth Committee over the future status of the Articles; the increased privatisation of State functions; the growing number of claims of violation of *erga omnes* obligations non-injured States; and the inclusion of special responsibility rules and/or compliance mechanisms in particular fields of international law.

Second, the symposium addresses the 'life' of the Articles in specific fields of international law. Contributions by Helen Duffy, Kubo Mačák, Gabriel Bottini, Jan Yves Remy, and Ginevra Le Moli address how the Articles are used (or are not used) in, respectively, human rights law, humanitarian law, investment law, trade law, and environmental law. The questions tackled in these contributions include the following: how the Articles have been interpreted and applied; whether there are any issues arising in these fields that are not covered by the Articles; whether there are any candidate/putative 'special rules' of responsibility arising in these fields; what are the challenges faced by each of these fields in the next few decades, and whether the Articles adequately cater to them. The outlook here is decidedly practical: we know from the UN Secretary-General's compilations that the Articles are increasingly cited in decisions by international courts and tribunals, and by the parties to such disputes. But this bare data does not tell us what role the Articles play in each field of international law. Are the Articles relevant in the day-to-day of these fields, or are they mostly invisible and only become relevant exceptionally?

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As organisers, we have not tried to impose any rigid format on the contributions, which differ in style and approach, and in their balance between praise and criticism of the Commission's work. They share a starting-point, though: all contributors (some explicitly, some implicitly) accept the ILC's Articles as the framework of reference, and as a central document of

[7] 'Symposium: State Responsibility' (1999) 10(2) EJIL.
[8] 'Symposium: The ILC's State Responsibility Articles' (2002) 96(4) AJIL.

contemporary international law. As a result, this is a symposium about the Articles as agreed in 2001 – not about sets of Articles that might have been agreed, or about approaches to responsibility that might have been taken. This starting-point – or should we say: mind-set – is one we share as well. For both of us, the ILC's text has been a focus of our own work as academics and practitioners. In a sense, we have grown up professionally, and intellectually, in the shadow of this document, not least as PhD students trying to make sense of the Articles' approach to public interests claims [9] and the dubiously-named 'circumstances precluding wrongfulness'.[10] The looming anniversary, with a round number, to us seemed a good opportunity to take stock on where we are, and to think ahead to the challenges of the next few decades and the extent to which the ILC Articles can cater to them and where they will fall short. Will the Articles *as they are* continue to be relevant in the next few decades? Have the ILC's choices stood the test of time? Do the Articles matter in specialised fields – or is this the stuff for generalists only? Finally, will we ever see a *different* law of responsibility in our professional careers? These questions form the background to the contributions to this symposium on the 'ILC Articles at 20'.

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One final word, which we wish did not have to be written. By a sad coincidence, when we were preparing this symposium, the ILC's final Special Rapporteur on the topic and a 'chief architect' of the Articles in their 2001 version, Judge James Crawford, passed away on 31 May 2021. As his former doctoral students, we recall countless discussions with James on questions of responsibility, in which his effortless mastery of the topic was as obviously on display as his openness to debate the merits of the ILC's approach. The contributions to this symposium are part of the on-going conversation about State responsibility, encoded by the ILC's work led by James. We hope he would have found them worthy of note. And we hope you, as readers, will find them engaging.

[9] Christian J. Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP 2005).
[10] Federica Paddeu, *Justification and Excuses in International Law* (CUP 2018).

2. The ILC's Work on State Responsibility: Personal Reflections

Bruno Simma[11]

In 1995, the English version of the Commentary on the UN Charter I had organised and edited at the initiative and with the support of the German Foreign Office was presented to the UN in New York. Shortly thereafter, I got a phone call from an official of the UN Department at the Foreign Office who, after expressing the thanks of his Office for my involvement with the project, continued by remarking 'I think we owe you something'. Jokingly, I replied that Carl-August Fleischhauer, the German Judge at the ICJ at the time, had recently been elected for a second term, so that job was not available. But what then turned out in the further, more serious, course of our conversation was that the International Law Commission was a possibility: Christian Tomuschat, after having served ten years on the Commission, had signalled that he did not want to run for a third term and was I interested in the job? I did not hesitate for a moment and two years later I was preparing for my first summer with the Commission in Geneva.

At that time, I was a member of the UN Committee on Economic, Social and Cultural Rights established in the mid-1980s as a means for the International Covenant devoted to these rights to catch up with other modern UN human rights treaties as concerned monitoring States parties' performance. Coping with the challenge of devising a meaningful, transdisciplinary tool box for that purpose, with international lawyers being a small minority in the Committee, I soon came to see my task as that of defending the legal core of economic and social rights, of being a much-needed lawyer among 18 'droits-de-l'hommistes' representing a colourful, but not always transparent variety of backgrounds and expertise. I must confess that during my in years in the Committee I spent one or the other hour on little escapes to Salle 22 in the Geneva Palais des Nations, where the ILC was meeting and where I felt professionally more at home than in the slippery world of 'my' human rights.

Then, from 1997 to 2002, Salle 22 became my own workplace for the summer. And while before, in the UN's human rights community, I had regarded it as my task to function like the Committee's 'in-house' (generalist international) lawyer, now in the ILC, of which at the time I was the only member with a UN human rights 'past', I soon discovered that I now felt the other way round, namely having to protect 'my' human rights against attempts by certain fellow ILC members, as this endangered species' potential false friends, to turn these rights into 'bureaucratic small-change', to use Philip Allott's words.[12] Thus, during my time in the ILC, reflexes acquired in ten years in the UN human rights world kept me constantly on guard and sensitive vis-à-vis the appropriation of human rights by the international law 'mainstream'.

The 1997 session of the Commission was a great time to start for a 'droits-de-l'hommiste'. Not yet in the context of State responsibility, in regard to which the most important step was the appointment of James Crawford as Special Rapporteur for the topic, but for a grand, and sometimes quite heated, debate on the positioning of human rights treaties in the §Convention's

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[12] Philip Allott, *Eunomia: New Order for a New World* (OUP 1991) 288.

law on reservations. State responsibility in substance re-entered the stage in 1998 and from then on occupied pride of place in the ILC's attention until 2001, when the Commission delivered its final product to the General Assembly. 'Re-entered' the stage, because this last great, but also most controversial, chapter of the body of general international law had already been on the ILC's agenda for decades, cultivated by no less than four Special Rapporteurs. The first reading of a set of draft articles had been concluded in 1996; on the one hand giving provisional blessing to veritable paradigm changes in the field (like the distinction between 'primary' and 'secondary' rules and the development of State responsibility from a system of contract – tort thinking to a system with more objective, public-law features by placing traditional elements like fault and damage into the realm of the first of these categories – developments decisive for a sufficient coverage of international human rights law), but on the other hand also leaving in place some juridical time bombs, above all the concept of 'international crimes of states'. It was now the task of the Commission to bring the topic to fruition and the new Special Rapporteur made clear from the outset that the second reading had to be completed within four years. I am still full of admiration for the intellectual courage and resolve by which James led the Commission to reach this goal.

As to human rights, I dare say that the spirit of making the new draft a place for the systematic integration of these rights was present – mostly implicit, sometimes outspoken – at all the major steps the Commission now took towards the modernisation of State responsibility (for a fuller description see the contribution to this Symposium by Helen Duffy). I myself published an article on 'Human Rights and State Responsibility'.[13]

Work on the topic in 1998 was primarily devoted to the elimination of the famous/infamous concept of 'international crimes of states' (draft Article 19), which had almost monopolised, and politicised, the discussion on the responsibility project since the 1970s. The way the Special Rapporteur drove this incubus out of the draft was undeniably robust, but he managed to combine this with the conservation of 'ce qui reste des crimes', as Alain Pellet called it, in a mini-chapter on 'serious breaches of obligations under peremptory norms of general international law' (Articles 40 and 41).

I dare say that the deletion of the 'crimes' concept from the revised draft had no adverse effect whatsoever on the applicability of the final Articles to human rights violations.

Moving on, I remember the 1999 session of the ILC for my (successful) resistance against the one and only proposal by the Special Rapporteur with which I could not agree, namely to add to the 'circumstances precluding wrongfulness' taken over from the first reading text a provision entitled 'Non-compliance caused by prior non-compliance by another State', which would have justified immediate reciprocal non-performance of international obligations stemming from any source. I regarded such instant reciprocity as an unacceptable step backwards from the – modest enough – limitations developed in the law on reactions to treaty breaches and countermeasures.[14]

What I consider to be the decisive step in the direction of including human rights violations into the system of countering 'internationally wrongful acts' established by our Articles

[13] Bruno Simma, 'Human Rights and State Responsibility' in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations. Liber Amicorum Hanspeter Neuhold* (Eleven 2007) 359.

[14] For a more comprehensive analysis see my Separate Opinion in the ICJ case of the *Application of the Interim Accord of 13 September 1995 (The former Yugoslav Republic of Macedonia v. Greece)*, I.C.J. Reports 2011, pp. 695–708).

followed at the Commission's session in 2000, in the course of its second reading of provisions on the implementation of State responsibility. In traditional, bilateralist, law, the invocation of responsibility, the request for reparation and, if necessary, the enforcement of a return to legality by reprisals/countermeasures, was available only to a State directly injured by a breach. Such direct injury will occur only rarely in case of human rights violations, most of which are committed by a State against its own people, and if it does, it will allow recourse to diplomatic protection. No injury, no responsibility. And here, the Special Rapporteur, followed by the Commission, achieved a great leap forward by allowing the invocation of responsibility not only to (traditionally) injured States (Article 42), but also to 'other than injured States' in case of breaches of obligations *erga omnes* or *erga omnes partes* (Article 48). If States choose this path, they may claim cessation of the wrongful act, assurances and guarantees of non-repetition and, most importantly, reparation, in a human rights scenario obviously in the interest of the affected individuals. I remember extended thought processes devoted to the question of how to call these 'third' States, ending up accepting the term 'other than injured', correct and bloodless at the same time. There was quite a portion of progressive development embodied in the Article 42/48 distinction and it is thus quite remarkable that the ICJ has been ready to give it judicial blessing in two contentious cases involving human rights, at the first instance where the Court had the possibility to apply the concept, in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* decided in 2012, and then again in *Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (The Gambia v. Myanmar),* currently pending – a landmark example of joint law-making by the Commission and the Court.

Let me finish this brief *tour d'horizon* by strongly disagreeing with criticism of the 2001 Articles as being old-fashioned and backward looking (unsurprisingly expressed by several US authors), but particularly with the view that the State responsibility end-product does not go far enough in the concern for human rights. The ILC might not have met this challenge in all respects to the full satisfaction of the human rights 'community', but I have the personal impression that it went to the limit of what was acceptable to its 'customers', the member States of the United Nations. This became transparent in the opposition of significant States to the ILC's original intention of entitling also Article 48 category-States to take countermeasures, which led the Commission to retreat from this idea.

After the ILC had completed its work on State responsibility, I was fortunate to move from Geneva to The Hague. Looking back at the years I spent in these two cities, I confess that I remember the Commission as the place in which I felt happier and more excited, probably due to my earlier life as a scholar with all its freedoms, particularly the free choice of topics and projects for which I felt passionate. The 'humanisation' of State responsibility was such a project, a generalist's dream.

3. The Impact and Influence of the Articles on State Responsibility on the Work of the International Law Commission and Beyond

Patrícia Galvão Teles[15]

The International Law Commission's (ILC or Commission) decision, 20 years ago, to suggest the General Assembly (UNGA) to simply 'take note' of the draft articles on State Responsibility, instead of recommending their adoption as a treaty or the convening of a diplomatic conference, inaugurated a debate about 'codification light',[16] 'the paradox between form and authority'[17] or 'non-legislative codification',[18] to use some expressions from the literature.

As shown below, the decision has had an important impact on the Commission's works. It also influenced the Sixth Committee's approach to the outcomes of the Commission's works, characterised by systematic 'technical roll-overs' and postponed action.[19]

The ILC has, partly in reaction to these developments, sought alternative outcomes for its work such as draft conclusions, principles, guidelines, or studies. It is nevertheless important that the Commission continues to contribute towards the formulation of international treaties.

The form of the draft articles and the compromise formula adopted

When the draft articles on State Responsibility were adopted on first reading in 1996, there seemed to be no question that they would eventually result in an international convention.[20] But the matter was not settled, and it was brought up again by Special Rapporteur James Crawford on second reading. Crawford favoured a different outcome: recommending the UNGA to take note of the draft articles and commend them to States, but avoiding 'a lengthy and possibly divisive discussion of particular articles'.[21]

When the Commission discussed the issue in 2001, its members were sharply divided.[22] Some favoured a convention. They pointed to the tradition of major ILC drafts being adopted as international conventions and argued that a treaty would give the rules additional certainty,

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[16] Santiago Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) VIII-2 Anuário Brasileiro de Direito Internacional 117.

[17] David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96(4) AJIL 857.

[18] Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63(3) ICLQ 535.

[19] Natalie Y. Morris-Sharma, 'The ILC's Draft Articles Before the 69th Session of the UNGA: A Reawakening?' (2017) 7(1) Asian Journal of International Law 1.

[20] ILC, Eighth report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur (14 and 24 May 1996) UN Doc A/CN.4/476 & Corr.1 (English only) and Add.1, paras 28, 35, 43 and 62, and discussion.

[21] ILC, Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/517 and Add.1, para 26.

[22] ILC, Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, paras 61-67.

reliability, and binding force, while consolidating a fundamental pillar of international law. In their view, adoption by a UNGA resolution would detract from the ILC's original intentions and cast doubt on the value of the text.

On the opposite side, others noted the risk of an unratified convention, which could weaken customary international law and result in 'reverse codification'; they noted the uncertainty of the effects of such a convention for parties and non-parties, and the dangers posed by possible reservations. Furthermore, a diplomatic conference would involve another lengthy process, likely affecting the sensible balance of the Commission's text. In contrast, a UNGA resolution would render the Commission's work an 'authoritative study of current rules'.

The views of States were also varied.[23]

Ultimately, the Commission recommended a compromise two-step approach: in the first instance, it recommended that the UNGA take note, and annex the text, of the draft articles in a resolution, with language emphasizing the importance of the subject; and, at a later stage, that it consider the adoption of a convention on this topic, if appropriate.[24]

Three factors weighted in the final decision of the Commission. First, the International Court of Justice's reliance on the draft articles before their conclusion in *Gabčíkovo-Nagymaros*[25] and *Cumaraswamy*,[26] strengthened the argument that the articles would remain relevant even if they were not turned into a treaty.

Second, the precedent of UNGA Resolution 55/153 (2001),[27] which, upon the Commission's recommendation took note of the articles on Nationality of Natural Persons in Relation to the Succession of States, and decided to consider them again at a later session.

Third, the absence of dispute settlement provisions in the draft meant that the Commission had more flexibility in selecting the form. The dispute settlement provisions adopted on first reading in 1996 had proved controversial, and the Commission had decided to remove them from the draft.[28] The Commission left it to the UNGA to decide whether to include a dispute settlement mechanism should a convention on the topic be adopted, while drawing the UNGA's attention to the provisions already drafted.

The UNGA followed the Commission's recommendation, and on 12 December 2001, adopted Resolution 56/83 taking note of the articles, annexing them to the resolution, commending them to the attention of Governments, and leaving open the question 'of their future adoption or other appropriate action'.[29] Ever since, the issue has been back on the agenda of the Sixth Committee every three years, but no decision to move towards the negotiation of a convention has been taken or seems within reach in the near future.

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[23] ILC, Comments and observations received from Governments, UN Doc A/CN.4/515 and Add.1–3.
[24] ILC, Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, paras 72-73.
[25] *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, e.g. paras 47, 50-53.
[26] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, p. 62, para 62.
[27] UNGA Res 55/153 (2001).
[28] ILC, Report of the International Law Commission on the work of its fifty-first session (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10.
[29] UNGA Res 56/83 (2002).

The impact of the two-step approach compromise formula and its influence on subsequent works of the Commission and of the Sixth Committee

Before the adoption of the draft articles on State Responsibility in 2001, the Commission had adopted sixteen sets of draft articles with the recommendation, followed in most cases, to the UNGA to take action towards concluding a convention. This was the case with the projects on: Reduction and Elimination of Future Statelessness (1954); Law of the Sea (1956); Diplomatic Intercourse and Immunities (1958); Consular Intercourse and Immunities (1961); Law of Treaties (1966 and 1982); Special Missions (1967); Representation of States in their relations with international organizations (1971); Prevention and punishment of crimes against diplomatic agents and other internationally protected persons (1972); State Succession in respect of Treaties (1974); Most-Favoured Nation Clause (1978); State Succession in matters other than Treaties (1981); Status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier (1989); Jurisdictional Immunities of States and Their Property (1991); Law of the non-navigational uses of international watercourses (1994); and Statute for an International Criminal Court (1994)). In contrast, there were only two topics that were proposed in a different format: the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950); and the Model Rules on Arbitral Procedure (1958).

After 2001, the Commission concluded sixteen topics:

- 4 sets of draft articles were recommended for a convention: Prevention of transboundary damage from hazardous activities (2001); Diplomatic Protection (2006), Protection of Persons in the Event of Disasters (2016); Crimes against Humanity (2019).
- 8 topics resulted in a different format: Conclusions of the Study Group on the Fragmentation of International Law (2006); Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (2006); Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006); Guide to Practice on Reservations to Treaties (2011); Final report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (2014); Most Favoured Nation clause (2015); Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (2018); and Draft conclusions on identification of customary law (2018); and,
- 4 topics were further adopted as draft articles, with a recommendation that the UNGA takes note, and considers the possibility of a convention at a later stage: Draft articles on the law of transboundary aquifers (2008); Draft articles on the effects of armed conflicts on treaties (2011); Draft articles on the responsibility of international organizations (2011); and Draft articles on the expulsion of aliens (2014).

The statistics are very clear: after the experience of 2001 with State Responsibility, half of the topics concluded were recommended to the General Assembly for the conclusion of an international treaty, and half of that was subject to the two-step approach recommendation, while the remaining half were subject to a format other than draft articles.

At the same time, only 1 convention has been concluded on the basis of Commission's draft articles since 2001: the 2004 Convention on Jurisdictional Immunities of States and their Property.[30]

The Sixth Committee, for its part, examines on a periodical basis all other proposals for conventions made by the ILC but postpones their consideration at regular intervals without taking action.[31]

As of 2021, in the current agenda, six topics are being developed as guidelines (Provisional Application of Treaties[32] and Protection of the Atmosphere),[33] conclusions (Peremptory norms of general international law (*jus cogens*)[34] and General Principles of Law),[35] principles (Protection of the environment in relation to armed conflicts)[36] or in the format of a Study Group (Sea-level Rise in relation to International Law),[37] whereas only two are being prepared as draft articles (Immunity of States Officials from Foreign Criminal Jurisdiction[38] and State Succession in respect of State Responsibility).[39] In these two cases, it is not yet clear whether the Commission will recommend adoption in treaty form.

Regarding the topic of Immunities of State Officials from Foreign Criminal Jurisdiction, the issue of form and the possible need for a compromise are increasingly evident as the first reading is being finalised. Contrary to State Responsibility, a 'reverse' compromise might likely be adopted on second reading: namely, to move towards a clear proposal for an international treaty.

It is also worth noting that while the compromise reached for ARSIWA was very much tailored to this project, the approach was then used in 4 other topics between 2008 and 2014 but was not resorted to in the last two sets of draft articles completed by the Commission on Protection of Persons in the Event of Disasters (2016) and Crimes against Humanity (2019).

If, on the one hand, the work on State Responsibility has left an indelible mark on the work of the ILC in many aspects, it is not a given that the two-step compromise solution above discussed will be used again soon, at least with regard to the topics that are currently on the

[30] 2004 UN Convention on Jurisdictional Immunities of States and their Property, adopted by the UN General Assembly Resolution 59/38, UN Doc. A/RES/59/38 (2004), 44 ILM 801 (2005).
[31] Extracts of resolutions adopted by the General Assembly, on the recommendation of the Sixth Committee, containing requests addressed to States, international organizations and the Secretary-General, Seventy-fifth session, 2020-21 (including requests adopted at prior sessions), prepared by the Secretariat of the Sixth Committee, Version of 2 March 2021 <https://www.un.org/en/ga/sixth/resolutions_extracts.pdf> accessed 5 November 2021.
[32] Provisional application of treaties, <https://legal.un.org/ilc/guide/1_12.shtml> accessed 5 November 2021.
[33] Protection of the atmosphere, <https://legal.un.org/ilc/guide/8_8.shtml> accessed 5 November 2021.
[34] Peremptory norms of general international law (*jus cogens*) <https://legal.un.org/ilc/guide/1_14.shtml> accessed 5 November 2021.
[35] General principles of law <https://legal.un.org/ilc/guide/1_15.shtml> accessed 5 November 2021.
[36] Protection of the environment in relation to armed conflicts <https://legal.un.org/ilc/guide/8_7.shtml> accessed 5 November 2021.
[37] Sea-level rise in relation to international law <https://legal.un.org/ilc/guide/8_9.shtml> accessed 5 November 2021.
[38] Immunity of State officials from foreign criminal jurisdiction <https://legal.un.org/ilc/guide/4_2.shtml> accessed 5 November 2021.
[39] Succession of States in respect of State responsibility <https://legal.un.org/ilc/guide/3_5.shtml> accessed 5 November 2021.

agenda and while the Sixth Committee continues its practice of periodical technical roll-overs in respect of proposals for conventions made by the Commission that it has before it.

The future of the International Law Commission's work

20 years after the adoption of ARSIWA and with the impact and influence that the solution followed by the Commission and the further behaviour of the UNGA Sixth Committee have had on the two institutions, it is important that both – individually and jointly – take stock.

There is no doubt that the future and continued relevance of the ILC depends on the topics it chooses, how they are chosen, and the reception of its work by States, international organisations, international courts and tribunals, and other relevant stakeholders.

While the ILC has been seeking alternative outcomes for its work, it is important that it keeps performing its task of codification and progressive development of international law also by drafting articles for future treaties that respond to the needs of States and of the international community.

For that purpose, increased self-reflection on the part of the Commission, but also more dialogue with its 'clients' for the identification of relevant topics, i.e. the UN member States in the framework of the Sixth Committee, are of the utmost importance for successful exercises of international multilateral treaty-making and for the United Nations to continue to play its fundamental role of a global legal forum and for the continued development of international law.

4. Still Going Strong: Twenty Years of the Articles on State Responsibility's 'Paradoxical' Relationship between Form and Authority

Fernando Lusa Bordin[40]

The year after the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) were completed, David Caron wrote an insightful piece decrying the 'paradoxical relationship' between form and authority that he thought the Articles embody.[41] He believed that the Articles were destined to become influential even though they are not formally binding and contain provisions involving a measure of progressive development of the law, and described that 'influence amid controversy' as a paradox. Caron's prediction has come to pass: in the past two decades, not only have the Articles been extensively cited by international courts and tribunals,[42] they have also had – potentially controversial provisions included – a profound influence on how we learn, teach and think about state responsibility.

The ARSIWA are no doubt one of the crowning achievements of the International Law Commission (ILC). Marvelling at their success, one runs the risk of overlooking the four decades of false starts, reboots and disagreement that preceded their completion. One also risks neglecting the rather unfavourable circumstances through which the codification movement had to navigate at the turn of the century. The appetite for concluding and ratifying codification conventions, which had peaked in the 1960s, was in steep decline. That led the ILC to change gear in the late 1990s. As Patricia Galvão Teles describes in her contribution, [43] the Commission stopped recommending that draft articles be sent to a conference of states for adoption as a treaty, at least in the first instance. What could at first glance be perceived as capitulation, a recognition of the Commission's diminishing role, proved instead to be a savvy move. By overstepping the traditional process, the ILC killed two birds with one stone: it managed to avoid the risk of failed codification conventions while furthering its own authority as an expert body. It championed a new blueprint of 'soft codification', or 'codification light',[44] to meet the challenges of a more pluralistic and fragmented globe.

While solving some problems, this shift in emphasis creates others. As I had the chance to discuss elsewhere,[45] the fact that codification instruments such as the ARSIWA have become shortcuts for the identification of international custom gives rise to a rule of law dilemma. Unlike in domestic systems, where codifications acquire content-independent authority when enacted by a legislature, the authority of international law codifications is typically content-dependent. Codification conventions often fail to attract widespread (let alone universal)

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[41] David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96(4) AJIL 857.
[42] UNGA, Responsibility of States for internationally wrongful acts, Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General, 21 April 2016, UN Doc A/71/80.
[43] See Galvão Teles in this symposium.
[44] Santiago Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) VIII-2 Anuário Brasileiro de Direito Internacional 117.
[45] Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63(3) ICLQ 535.

participation and are thus most successful when viewed as reflecting customary international law. And because 'soft codifications' such as the ARSIWA are never formally binding, any legitimate authority that they can claim is contingent upon whether they restate (or are perceived to restate) existing custom. But as the history of any codification project shows, behind every rule drafted on the basis of state practice, judicial precedent and academic commentary lie varying degrees of uncertainty and disagreement. To produce instruments that are sufficiently neat, prescriptive and comprehensive to be useful, the codifying agency has to make choices about how lingering disagreement is to be resolved. Even when those choices are justifiable or persuasive, they are never conclusive. The upshot is that the international lawyer is placed in a precarious position, where reasons to defer to conclusions reached by the codifying agency must be balanced against the intellectual duty to satisfy oneself that the codifying agency has actually done a good job. That can be particularly challenging in areas where the codifying agency purports to follow existing precedent but states themselves continue to disagree (as has been the case with the law of countermeasures).[46] In the end, international codifications cannot dispel all the uncertainty that inheres in the process of formation of international custom.

Caron was worried that the international legal profession, and in particular arbitrators without a solid background in public international law, would end up giving too much authority to the ARSIWA, failing to abide by the intellectual imperative to critique the ILC whenever appropriate. And the picture that emerges from the practice of the past twenty years is indeed one in which deference has prevailed over contestation. A striking example is provided by the International Court of Justice's reliance on draft article 33 (now Article 25) on the defence of necessity in the *Gabčíkovo-Nagymaros Project* case.[47] But do we have to regard this as a bad outcome? In other words, if some of the rules that the Commission articulated against a backdrop of disagreement are now more widely accepted, is that to be viewed as a regrettable development? My tentative answer is in the negative, for two main reasons.

First, the ARSIWA's long gestating period seem to have resulted in a set of provisions and commentaries that make a genuine and competent attempt either to restate existing law or to provide a grounded rationalisation of existing practice and principle. While the mandate of the ILC comprises not only the task of codifying the law but also that of contributing to its progressive development, non-binding instruments such as the ARSIWA can only make a significant contribution to practice if they comprise a claim to codify the law. The ILC has traditionally (and strategically) kept an ambivalent position as to the legal status of the rules it articulates, but it is clear, in the case of the Articles, that the aspiration was to produce a set of provisions that could be plausibly invoked as *lex lata*. It was in that spirit that the Commission eliminated from the project, on second reading, the concept of 'crimes of state' that had proved polarising from the outset. The appearance of moderation that the Commission conveyed by getting rid of that controversial notion has perhaps made it easier for it to 'sell' the more progressive elements in the ARSIWA – for example, Article 41, on consequences arising for all States from serious breaches of *jus cogens*, and Article 48, on standing to invoke

[46] Statement of Mr. Yang Xi at the 74th Session of the UN General Assembly on Agenda Item 75, Responsibility of States for Internationally Wrongful Acts, New York, 14 October 2019 <https://www.un.org/en/ga/sixth/74/pdfs/statements/resp_of_states/china_e.pdf> accessed 5 November 2021.
[47] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, e.g. paras 47, 50-53.

responsibility for breaches of obligations *erga omnes* and *erga omnes partes*. It was as if the Commission was assuring stakeholders that instead of suggesting big leaps forward it was simply joining the dots between the law of State responsibility and the proposition that certain international obligations are established in the collective interest. It is telling, in this connection, that the Commission made a point to concede, employing very careful language, that a couple of ancillary aspects of Articles 41 and 48 might amount to progressive development (namely, the obligation to co-operate in the suppression of serious *jus cogens* breaches and the right to ask for reparation for the beneficiaries of obligations owed to the international community as a whole).

Secondly, the participants in the decentralised international legal system have an interest in processes that allow for certain disagreements to be solved over time, wherever the chips may fall. That may be particularly true in the case of 'secondary rules' that, for all their systemic importance, do not concern the types of conduct of which States are most jealous. The advantage of 'soft codification' is that States get to delegate the hard work of research and analysis to an expert body, which they can steer while reserving a degree of plausible deniability. On the one hand, successful codifications such as the ARSIWA benefit States by making legal regimes more coherent, determinate and user-friendly. On the other hand, states retain the option of challenging individual provisions by retracing the Commission's steps and finding fault with them. Of course, doing so may become increasingly difficult, especially when the provision is later applied and endorsed in the case law. But that doctrinal path remains open, as exemplified by Serbia's critique of Article 10(2), on attribution of conduct in a situation of State succession, in the *Croatia v. Serbia* case.[48] Often, by choosing not to take that path, States quietly allow codified provisions to consolidate.

The solid case that the ARSIWA makes to restate the law and the interest of States in having a robust systematisation of the rules of State responsibility may be part of the explanation for the Articles' successful run in the past twenty years. One may even question whether the relationship between form and authority in them is that 'paradoxical' after all. But if that relationship accounts for the strength of the Articles, it also points to their inherent vulnerability. For one, some States seem to be growing warier of 'soft codifications' produced by the ILC. The Commission is under greater pressure to be more transparent in commenting on the legal status of individual provisions,[49] and it has been even suggested that comments made by States ought to be published together with (and as a counterweight to) the Commission's outputs.[50] In addition, the ARSIWA themselves are being targeted by an increasingly large and vocal group of States advocating for a diplomatic conference to adopt a convention on State responsibility,[51] which would allow for a re-examination of the ILC rules.

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[48] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Pleadings, 11 March 2014, CR 2014/14, para 54.

[49] Sixth Committee Debate on the Report of the International Law Commission on the Work of its 70th Session, Statement of the United States of America <https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/us.pdf> accessed 5 November 2021.

[50] ILC, Report of the International Law Commission on the work of its seventieth session (2018), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-third session, prepared by the Secretariat, April–7 June and 8 July–9 August 2019, UN Doc A/CN.4/724.

[51] Federica I. Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments' (2018) Max Planck Yearbook of United Nations Law 83.

At a time of political volatility, it is hard to predict how the ARSIWA will fare in the next twenty years and beyond. The adoption of a convention on State responsibility might side-line the Articles, but it could equally cement their legacy while allowing them to enjoy a dimmed (but still relevant) existence as an interpretative aid, much like the 1966 draft articles that provided the negotiating text for the 1969 Vienna Convention on the Law of the Treaties.[52] If the convention were to depart substantially from the Articles, the latter's fate would depend on the former's success: a widely ratified convention would undermine the Articles while a divisive convention might create an incentive to continue referring to them as a starting point for the identification of custom. But though it is impossible to know what the future holds, there are few observers who believe that the basic structure and content of the ARSIWA are at serious risk. Even States pushing for a diplomatic conference praise [53] the Articles and recognise[54] that the ILC has struck a balance that deserves to be preserved. The authority that the Articles have been enjoying is not only real: it also feels earned.

[52] Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, vol. II, 187.

[53] Statement of Mr. Shi Xiaobin at the 71st Session of the UN General Assembly on Agenda Item 74, Responsibility of States for Internationally Wrongful Acts, New York, 7 October 2016 <https://www.un.org/en/ga/sixth/71/pdfs/statements/resp_of_states/china_e.pdf> accessed 5 November 2021.

[54] United Nations Sixth Committee, Responsibility of States for internationally wrongful acts (Agenda item 75), <https://www.un.org/en/ga/sixth/74/resp_of_states.shtml> accessed 5 November 2021.

5. Protecting Community Interests: Solidarity Measures within the State Responsibility Regime?

Santiago Villalpando[55]

The ultimate test to assess any new development of international law is simple: *has it made the world a better place*? In 2001, the invisible college of international lawyers[56] had welcomed the International Law Commission (ILC)'s bold decision to codify, within its Articles, a regime of State responsibility towards the international community as a whole, devoting to the topic countless lectures, colloquia, articles and even entire monographs. But, twenty years later, has this codification made the world a better place?

The foundation of the regime of responsibility towards the international community as a whole, which goes beyond the traditional canons of bilateralism and self-help, rests on two levels of solidarity.

There is, first, *active solidarity*, enshrined in certain secondary rules applicable to all breaches of obligations owed to the international community as a whole (*erga omnes*). According to the Articles, any State has a *right* to invoke the responsibility of the wrongdoer, which implies a prerogative to claim the cessation of the wrongful act and assurances and guarantees of non-repetition, as well as the performance of the obligation of reparation in the interest of the injured State or the beneficiaries of the obligation breached (Article 48). Initially, the ILC had suggested that, in such cases, any State would also be entitled to take countermeasures. However, the – let's call it 'sceptical' – reaction of the Sixth Committee convinced the Commission to fall back on a milder provision (Article 54), which states that the Articles '[do] not prejudice the right of any State … to take lawful measures against [the State breaching an obligation *erga omnes*] to ensure the cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligations breached'. In its commentary, the ILC explained that '[p]ractice on this subject is limited and rather embryonic,' but went on to describe several 'examples' of such 'lawful measures', some of which clearly constituted countermeasures.[57]

The problem is that active solidarity remains subject to the goodwill of States that are not directly affected by the wrongful act to support the cause of the injured State or the beneficiaries of the obligation breached. Indeed, the *omnes* have a right to invoke responsibility, but no duty to do so. And while the international community has reacted to certain breaches of obligations *erga omnes* (unlawful uses of force, human rights violations, war crimes, etc.), calling for their end and redress to the victims, it has often remained indifferent to other

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[56] Oscar Schachter, 'The Invisible College of International Lawyers', (1977-1978) 72(2) *Northwestern University Law Review* 217.
[57] ILC Articles Commentary, Art 54, para 3.

geopolitical or humanitarian tragedies, sacrificed at the altar of *Realpolitik*. One should add a verse in John Lennon's *Imagine* about imagining all the people exercising their right to invoke responsibility towards the international community as a whole…

Still, there are some signs that times are a-changing. On two recent opportunities in which it was seized by 'States other than an injured State' (respectively, Belgium and The Gambia) alleging breaches of the Torture and the Genocide Conventions, the International Court of Justice (ICJ) has unambiguously – and without much controversy – recognised their *locus standi*, on the understanding that these conventions impose obligations 'owed by any State party to all the other States parties' and therefore allow 'any State party …, and not only a specially affected State, to invoke the responsibility of another State with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end.'[58] Long gone is the summer of '66![59]

There is also another level, this one of *passive solidarity*, which inspires a second set of rules in the Articles applicable to serious breaches of obligations under peremptory norms of general international law (*jus cogens*). When there is a gross and systematic failure by a State to fulfil obligations deriving from *jus cogens*, all States have, in addition to the rights above, a number of *obligations*, namely: to cooperate to bring to an end through lawful measures (again!) the serious breach; not to recognise as lawful a situation created by such serious breach; and not to render aid or assistance in maintaining that situation (Article 41). In other words, in certain serious cases, States are not simply afforded the *opportunity* to react to breaches of obligations owed to the international community as a whole, but are actually *required* to behave in a certain way, so as to obtain their cessation and curtail their negative effects.

The limited scope of this set of obligations should not fool us. Their very existence enshrines an enhanced level of solidarity, which *The Three Musketeers* would surely have recognised. Indeed, one could argue that all States are made accountable to the international community as a whole for the performance of such secondary obligations, which are therefore 'obligations *omnium erga omnes*', i.e. owed by all States to all States. *All for One and One for All*. Unfortunately, *Twenty Years After*, the translation of these ideals into geopolitical reality is, once again, rather grim, with the international community ignoring some blatant serious breaches, or simply paying lip service to calls for their cessation. There are also some bright spots here, though, such as the ICJ's reaffirmation of elements of its 1971 *Namibia* precedent[60] (which had inspired this part of the ILC Articles) in the context of the 2004 *Wall* advisory

[58] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 449, para. 68 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 17, para 41.
[59] *South West Africa (Ethiopia* v. *South Africa)(Liberia* v. *South Africa*), Second Phase, Judgment, I.C.J. Reports 1966, p. 6
[60] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 55-6, para. 122-125.

opinion[61] (although one would still have to wait two further years for the Court to recognise, in 2006, the underpinning concept of *jus cogens*).[62]

Now, if the question is whether all this has made the world a better place, there may be little reason to celebrate. Aggression, genocide, mass breaches of human rights and humanitarian law, racial discrimination or torture (let's not even get into the thorny topic of massive pollution of the atmosphere or of the seas, at one point mentioned by the ILC)[63] have not ended, nor noticeably decreased. Moreover, the efforts of the international community to react to such heinous acts do not seem to have taken hold on the ILC's Articles, probably too byzantine for the public. The 'responsibility to protect' has come into fashion (and gone out of it, apparently), promoting ideas of solidarity similar to those proclaimed by the Articles, but purposefully staying away from the strictures of the law. Rather than 'responsibility', modern regimes prefer to rely on 'compliance' and 'cooperation' to promote the common good. And the ILC's toning down of the controversial notion of 'crimes of State' has failed to convince either diplomatic circles to pursue a convention – a matter which is still pending in *Waiting for Godot* fashion – nor international judges to invoke those specific provisions with the same enthusiasm they have shown towards other Articles.

In sum, there is still a lot of work to be done. Twenty years after, it might be time for the invisible college of international lawyers to go beyond its passive admiration of the Articles and, taking advantage of the fact that these are not (yet) straightjacketed into a convention, push the cause a step forward. There are indeed many aspects of the regime of State responsibility towards the international community as a whole, which the ILC has left largely unexplored. For instance:

- What are the rules that govern the invocation of international responsibility by the 'beneficiaries of the obligation breached', when these are persons or entities other than States (a matter which Article 33, paragraph 2, cautiously kept for another day)?
- What precisely may the injured State and those that the ILC elliptically called 'States other than the injured State' do to react to breaches of obligations *erga omnes*? Two decades after Article 54, is there any room to finally go beyond a mere 'without prejudice' clause?
- Are the basic obligations *omnium erga omnes* identified by the ILC and the ICJ really enough, and shouldn't they be progressively developed to provide better protection of collective interests?
- To what extent are the classical forms of reparation and assurances and guarantees of non-repetition able to provide adequate redress for serious breaches of international law, taking into account that the collective injury caused by those breaches is often irreversible or of astronomical proportions?

[61] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 200, para. 159.
[62] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 32, para. 64.
[63] Draft Article 19, para. 3(d), as proposed on first reading, in Yearbook of the International Law Commission, 1976, Vol. II, Part Two, p. 75.

- Shouldn't the ILC's old idea– proposed in the first reading of the Articles,[64] but then abandoned – of establishing institutional mechanisms for the implementation of responsibility towards the international community as a whole be reconsidered so as to ensure the effectiveness of the ILC's codification?

Of course, in the short run, this may do little to convince political circles to act to safeguard the common good. But providing theoretically solid and practically viable legal tools to pave the way to make the world a better place is what we are supposed to do as international lawyers. After all, as the preamble of UNESCO's Constitution proclaims: since wars begin in the minds of men [and women], it is in the minds of men and women that the defences of peace must be constructed. We have done this several times in the past – with the concepts of *actio popularis*, *jus cogens*, obligations *erga omnes*, crimes of State, and indeed the ILC Articles – and there is no reason not to carry on. Or we could turn to gardening, which certainly makes the world a better place.

[64] See Yearbook of the International Law Commission, 1995, Vol. II, Part Two, pp. 54-57.

6. State Responsibility and Privatisation: Accommodating Private Conduct in a Public Framework

Alex Mills[65]

One of the foundations of modern international law is the separation of an international realm in which State public activity is regulated from the realm of commercial markets and private law relations. The international dimensions of private law are shaped by public international law, but more directly governed by rules of private international law which allocate authority between domestic legal orders (or, perhaps increasingly, to arbitral tribunals and transnational law). The boundary between these domains – an important and contested public-private distinction in international law – is policed by legal rules at both the international and domestic level. In the first half of the twentieth century, one principal concern was whether acts by public authorities should sometimes be characterised as private and regulated by domestic law and courts, and thus the rule that State immunity does not cover commercial acts was crystallised, alongside other comparable exclusions. This symposium contribution is focused on the opposite concern – whether the conduct of ostensibly private actors should sometimes be characterised as public, and thus included in the domain of public international law. In particular, it considers the impact of the privatisation of State functions on the question of attribution for the purposes of State responsibility. Privatisation raises particularly challenging questions concerning attribution, because it is often designed to transfer control and thus responsibility away from the State.

When reading the relevant rules on attribution in the Articles and Commentary, the tension between two opposing influences is striking: on the one hand, the need to defer to States on matters falling within their internal affairs; and on the other, the need to provide for universal international rules which are effective regardless of those internal arrangements. A foundational problem thus arises as to which body of law – national or international – should be responsible for determining whether an act or actor is public or private in character. The guidance provided by the Articles is limited and somewhat ambivalent.

Article 4 addresses the basic principle that the conduct of State organs is attributable to the State, and that 'organ' includes any person or entity with that status under internal law. Importantly, however, domestic law organ status is sufficient but not necessary. In addition, under Article 5:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

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The Commentary explains that:

> The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.[66]

But should domestic or international law determine what is 'governmental authority' and what is a 'public or regulatory function' for these purposes? The Commentary further explains that:

> the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[67]

Elsewhere in the Commentary it is similarly affirmed that 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law'.[68] What is implicit in these provisions is that international law must have its own concept of what is a 'public function', its own sense of when a body 'in truth' acts as a State organ. To put this another way, although the Articles profess deference to domestic law, this is subject to 'a certain limit'[69] beyond which they appear to require their own definition of the 'essential' functions of government.

This issue can be particularly significant in the context of privatisation. Sometimes privatisation is merely a change in ownership of a market participant – this might occur, for example, where a State-owned airline which is already subject to free competition is privatised. Sometimes, however, privatised entities carry with them expressly public regulatory power – where, for example, an airline exercises delegated powers of immigration control or quarantine.[70] Between these examples lie a wide variety of situations in which the entity may not have public power as defined in domestic law, but may nevertheless exercise regulatory authority (for example, through contracts, or licences, or defining industry standards) with the express or tacit support of the State. The Commentary suggest that these situations may not be captured by Article 5:

> The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.[71]

With respect, however, this is in tension with the idea that 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that

[66] ILC Articles Commentary, Art 5, para 1.
[67] ibid Chapter II, para 6.
[68] ibid Art 4, para 11.
[69] ibid Art 5, para 6.
[70] ibid Art 5, para 2.
[71] ibid Art 5, para 7.

status under its own law'.[72] Article 5 requires at least a partially independent and international determination of what is 'in truth' governmental.

The context in which these rules have been most tested in practice is international investment law. The relationship between privatisation and investment law has dual aspects. First, privatisation is frequently the door through which foreign investment is invited by a State – investment disputes often arise because the State subsequently seeks to regulate an entity which is operating in a newly-constructed and perhaps problematic market space (such as privatised water or electricity supplies). This context may also raise concerns about whether the State might be held responsible for a failure to prevent wrongs committed within that space, when the State has undertaken not to interfere in market activity as part of the process of privatisation. How much space does privatised health care, for example, leave for State obligations to ensure the right to health, not least in a pandemic? The quest to establish human rights obligations for private actors is in part an effort to fill this potential gap, but one which is yet (at best) imperfectly realised. Contractual obligations or regulatory oversight may provide alternative mechanisms of accountability, and may even be required as a matter of human rights law, but even willing States may not always be in a sufficiently strong position to negotiate or operate robust mechanisms.

Second, where privatisation has occurred (international or otherwise), a distinct question may arise concerning whether the State is responsible for acts of the private entity which affect a foreign investor, because that entity is exercising what is 'truly' governmental authority. There is an extensive and growing practice here (indeed, too many arbitral awards to list), in which tribunals are frequently caught in the dilemma posed by the Articles – to what extent should this determination be based on a deference to national law, and to what extent should it reflect an international standard? A context-sensitive approach is generally adopted, and is of course frequently valuable as a legal device to ensure the appropriate application of the law – but if the context is rules of domestic law which are within the control of one of the parties, the effect may not be flexibility but rather a deference through which privatisation facilitates an evasion of State responsibility. Umbrella clauses in investment treaties may also transform domestic contract law breaches into international wrongs, crossing the boundary between public (international) and private (domestic), although these have given rise to further and distinctive attribution (or attribution-adjacent) complexities where the contracting party is a separate legal entity from the host State.

None of this is intended to be too strident a criticism of the Articles, even if they have not proven easy to apply in difficult cases – they were and remain one of the most significant developments in modern international law, and an enduring tribute to their concluding Special Rapporteur, the late lamented Professor James Crawford. Offering some kind of codification of what constitutes a governmental function for the purposes of international responsibility would be an invidious task, and one at least in tension with international law's professed aspirations of universality and political neutrality. Certainly it would be difficult to suggest that the years of investment tribunal practice since the Articles were adopted have added significant clarity. Perhaps the task is one better not attempted at all given the complex and varied dynamics of State governance, although it would undoubtedly be helpful if guiding principles

[72] ibid Art 4, para 11.

could be identified. For example, where international law imposes extensive positive and negative obligations on States in a certain field, like criminal law enforcement, could that be an indication that it should be considered a core exercise of governmental authority even if privatised (such as in a privatised policing or prison system)? More work is needed on these questions; the point of this symposium contribution is simply to highlight a tension in the Articles in this context – that they are caught between the need to defer to States in respect of their internal organisation, but also to ensure that privatisation does not too readily permit an evasion of responsibility.

Two final modest conclusions may be offered. A State considering whether and how to privatise a particular function or entity ought to take into account that a loss of governmental control does not necessarily equate to an avoidance of State responsibility. Privatisation may exclude the State from profits, but not necessarily from international legal liability. And it ought perhaps to be acknowledged that in this context the Articles have an unavoidable but hidden ambivalence, and that rather than clearly demarcating the boundary of the international and the domestic they provide a context in which the contours of what constitutes a 'true' exercise of governmental authority are and will continue to be tested and contested. In the context of these public-private characterisation issues, it is perhaps better to think of the Articles not as contributing a set of codified problem-solving rules, but rather as providing an intellectual architecture which shapes and sharpens the ways in which these questions are confronted by international lawyers.

7. The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An Appraisal

Katja Creutz[73]

The twenty-year old Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) are considered one of the cornerstones of international law and they are widely referenced by international judicial bodies.[74] They form a unified regime of responsibility, expressing the core ideas of responsibility applicable to the breach of any and all obligations of States (ARSIWA, Article 12), at least in principle. Still, the rules have not regulated the issue of State responsibility to the full extent,[75] and the different elements of ARSIWA – the conditions for the existence of an internationally wrongful act, the content and implementation of responsibility – are relevant to a varying degree. Many open issues remain regarding the conditions for the existence of an internationally wrongful act, and while the content of State responsibility with reparation is widely accepted, the serious breaches regime has remained weak so far. What is more, few international lawyers would describe implementation of responsibility, which largely relies on self-help and collective countermeasures, as well-functioning. Several uncertain issues, such as the appropriate level of attribution, collective countermeasures, and how to share responsibility between several actors, have indeed received much attention by international lawyers.

One of the reasons for the tenacity of the ARSIWA despite being the product of 'codification light'[76] and containing some underdeveloped rules (on which see Bordin, in this symposium), is the fact that they make explicit use of the legal principle *lex specialis derogat legi generali*. The general and residual nature of the rules of State responsibility is established in Article 55: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.' States are thus free to take a different approach to responsibility than that prescribed by the general rules which, according to the ILC, they often do.[77] As a result, responsibility in international law is regulated by a core of rules that are applicable in a general and residual way (which I here call 'the centre'), and specifically agreed rules which complement or deviate from this core. This triggers the question: How far can States deviate before the centre gives way?

The relationship between general and special rules

The relevance of the general rules depends to a large extent on how we understand the relationship between general and special rules, if the issue is left open by the special rule

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[74] UNGA, Responsibility of States for internationally wrongful acts, Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General, 23 April 2019, UN Doc. A/74/83.
[75] Guy S. Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law' in Malgosia Fitzmaurice and Dan Sarooshi (eds) *Issues of State Responsibility before International Judicial Institutions* (Hart 2004) 75.
[76] Santiago Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) VIII-2 Anuário Brasileiro de Direito Internacional 117.
[77] ILC Articles Commentary, Art 55, para 1.

itself.[78] For universalistically inclined scholars,[79] the general rules apply as a starting point unless there are special rules governing the legal situation, either in part or in full. As was noted by the ILC Study Group on the Fragmentation of International Law: 'No rule, treaty, or custom, however special its subject-matter…applies in a vacuum'.[80] The fallback on general rules thus arguably happens frequently as there exists very few truly self-contained regimes (if at all), a fact that stresses the resilience of the general framework.

The relationship between the general and the special rules is nevertheless delicate and debated. On the one hand, the *lex specialis* embodied in Article 55 has ensured the continued relevance of the general rules because it allows States to create and apply complementary – or even wholly different – rules of State responsibility; on the other hand, if the special rules deviate more and more from the responsibility ideas embodied in the general rules this can undermine them. This latter possibility of special rules rendering general rules without use was not seen as a danger in the ILC when it pondered the matter. In fact, when the ARSIWA were finalised it was never expected the general rules to manage solely on their own.[81] The issue of whether the centre will hold was not effectively raised concerning ARSIWA, in contrast to the drafting of the Articles on the Responsibility of International Organizations (ARIO) where the subject was addressed.[82]

The significance of the general rules varies between different branches of international law. At the one end of the spectrum we find self-contained regimes, such as WTO law, which leaves little room for the application of general rules of State responsibility (see Jan-Yves Remy's contribution in this symposium); at the other end there are branches such as global health law, which the whole set of general and residual rules applies to in principle.[83] But there are also fields of international law that rely on responsibility constructions that are highly different from ARSIWA. The deviation from the general rules can be considered so extensive that it effectively forms a crack to the centre of State responsibility. Moreover, some fields of international law have shifted focus to completely different responsibility regimes, which arguably reduces the application of State responsibility and its centre altogether.[84] Both of these movements 'away from the centre' are addressed next.

The fragmentation of responsibility

There exist problems or situations in the contemporary world that the centre of State responsibility cannot address in a satisfactory manner. This may be due either to the heinous nature of the act or omission (requiring a more stringent responsibility regime) or the need to foster a more cooperative arrangement (requiring a less stringent responsibility regime). One

[78] ILC Articles Commentary, Art 55, para. 3.
[79] Bruno Simma and Dirk Pulkowski, '*Leges Speciales* and Self-Contained Regimes' in James Crawford et al (eds) *The Law of International Responsibility* (OUP 2010) 139.
[80] ILC, 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, 13 April 2006, UN Doc A/CN.4/L.682, para. 120.
[81] James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96(4) AJIL 874.
[82] ILC, Responsibility of International Organizations, Agenda Items 3, 14 February, 13 April and 8 August 2011, UN Doc A/CN.4/636 and Add. 1–2, Comments and observations received from Governments, pp. 130-131
[83] Sienho Yee, 'To Deal with a New Coronavirus Pandemic: Making Sense of the Lack of Any State Practice in Pursuing State Responsibility for Alleged Malfeasances in a Pandemic—*Lex Specialis* or *Lex Generalis* at Work?' (2020) 19(2) Chinese Journal of International Law 237.
[84] Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* CUP 2020).

branch of international law, which reconceptualises the centre, is international environmental law with its focus on non-adversarial models of responsibility, emphasizing non-compliance procedures and capacity-building rather than pitching States against each other. The traditional bilateral approach of State responsibility fits poorly with addressing climate change,[85] for instance, with regard to issues of causation, the incalculable number of victims and the means of reparation.

When it comes to responding to serious violations of international law, such as genocide or other atrocities, attention and resources have shifted from State responsibility to international criminal responsibility – a qualitatively different kind of responsibility regime. The serious breaches regime of ARSIWA has been considered toothless and having little signalling effect, and the desire to go beyond reparation to ensure punishment and presumed concomitant deterrence is manifested in international criminal responsibility.[86] While international criminal responsibility represents the hardening of the approach embodied by the centre of State responsibility, there are also efforts to soften up the centre. Liability for lawful acts generating harm constitutes such an example and effectively contributes to the fragmentation of the law of State responsibility. The will to ensure adequate compensation, for example, in cases of oil pollution or nuclear damage, shows that States have sought solutions where the centrality of wrongfulness is de-emphasised. In addition, there is a will to broaden the sphere of responsible actors beyond the State.

The resilient but less relevant centre of State responsibility

Irrespective of the fragmentation of responsibility and the variations in the application and aptness of the general rules forming the centre of State responsibility, the rules continue to attract interest and praise. One reason for this pertains to the frequent occurrence of ARSIWA in international judicial decisions – a development which is likely to continue. It may be worth noting, however, that occasionally the referencing to ARSIWA may be more about 'signposting' than about qualitative usage (for example, in investment treaty arbitration[87]). The mindset of the international lawyer will also support the resilience of the centre. The rules have allowed international lawyers to maintain and advance the basic proposition that international law is really hard law and that legal consequences ensue from breaches. The international lawyer working for the government needs the rules to sustain her construction of the rules-based international order in international diplomacy, as does the theoretically inclined international lawyer focusing on the constitutionalisation of the international legal order.

While the centre will remain – sometimes in the foreground, sometimes in the background – alternative responsibility thinking will persist because States wish to highlight penalisation or compensation in some responsibility matters.[88] There is no reason to believe that this development will reverse in the future even while the adolescent ARSIWA continues to mature. That naturally raises the question of whether calling the general and residual framework 'the centre' is still justified, and whether we will witness more and more special responsibility regimes only loosely connected to the ARSIWA, if at all. With the current international

[85] Christian Tomuschat, 'Global Warming and State Responsibility' in Holger Hestermeyer et al (eds) *Law of the Sea in Dialogue* (Springer 2011) 3.
[86] Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (CUP 2020) 167-168.
[87] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Review 132.
[88] Pierre-Marie Dupuy, 'The International Law of State Responsibility: Revolution or Evolution?' (1989) 11(1) Michigan Journal of International Law 105.

negotiating climate being characterised by uncertainty and lack of States' trust in each other, it is nevertheless difficult to envisage in what issue areas States could agree upon new special regimes. The need for functionally different responsibility regimes will nevertheless endure, as the centre cannot fulfill all the purposes international lawyers tend to ascribe to it.

8. Articles on Responsibility of States for Internationally Wrongful Acts and Human Rights Practice

Helen Duffy[89]

How should we consider the relationship between the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and human rights practice as it has evolved over the past 20 years? Provocative positions have at times been expressed. At one end of the spectrum are assertions of the 'irrelevance' of ARSIWA to human rights treaties,[90] or the latter being presented as '*lex specialis'* in respect of ARSIWA as a whole[91] (see also Katja Creutz's contribution in this symposium). At the other, is a maelstrom of academic criticism when human rights courts appear to dare to depart from the ARSIWA framework. Behind these positions lurk serious questions as to the influence that ARSIWA *has* had, and *should* have. Simply put, how much do the Articles actually matter to the challenges facing human rights today?

A detailed analysis of ARSIWA's contribution and potential obviously goes beyond the remit of this blog. But a few reflections are offered on i) the nature of ARSIWA's real, and growing, influence; ii) areas of progress and tensions; and iii) some of the challenges ahead, if ARSIWA's potential in this area is to be realised.

Understanding the influence on 'human rights practice'

The human rights field has grown exponentially since the adoption of ARSIWA in 2001. Oft-cited in support of ARSIWA's increasing relevance is the mounting number of references in supranational human rights judgments.[92] To understand the influence of ARSIWA, however, we need to ask not only whether, but *how* and *why*, ARSIWA is invoked in human rights litigation. We should also look beyond strictly 'human rights' courts to the range of other (quasi-)judicial actors increasingly engaged in human rights adjudication (e.g. ICJ, ECOWAS,[93] ECJ[94] or ICSID)[95] citing ARSIWA. In a growing body of jurisprudence across a broadening range of adjudicators, ARSIWA's relevance is explicit and implicit in judgments, nestled in individual opinions (revealing their background role in deliberations) or evident in the submissions of parties and interveners, which in turn trigger judicial reference.

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[90] Malcolm D Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in Malgosia Fitzmaurice and Dan Sarooshi (eds) *Issues of State Responsibility before International Judicial Institutions* (Hart 2004) 139.

[91] *Case of the 'Mapiripán Massacre' v. Colombia*, IACtHR Judgment of September 15, 2005 (Merits, Reparations and Costs), para 107.

[92] UNGA, Responsibility of States for internationally wrongful acts, Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General, 21 April 2016, UN Doc A/71/80 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/112/80/PDF/N1611280.pdf?OpenElement.

[93] *Benson Olua Okomba v. Republic of Benin*, ECOWAS, Case No. ECW/CCJ/JUD/05/17, Judgment, 10 October 2017, p. 20 < http://www.courtecowas.org/wp-content/uploads/2019/02/ECW_CCJ_JUD_05_17.pdf >.

[94] *Gerhard Köbler and Republik Österreich*, Case C-224/01, Preliminary Reference, [2003] ECR.

[95] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002.

We also need to look beyond the courts, to other actors that interpret, apply and use international law to protect human rights, and to State practice. As illustrated below, ARSIWA has been reflected in UN resolutions, national cases, General Comments,[96] international and national enquiries, NGO submissions, and States' positions. More important than the number of references in judgments may be this harnessing, by a broader range of human rights actors, of the vocabulary and values of ARSIWA to frame demands in relation to responsibility and response.

Invoking ARSIWA: Progress & Tensions

The shift towards increased engagement with ARSIWA is quantitative and qualitative. Much early engagement took a 'cut and paste' approach from ARSIWA to the applicable law sections of judgments, without explaining its role. But practice reveals a distinct, if uneven, shift towards more meaningful engagement, to various ends.

At times these references to ARSIWA have not been decisive, but lent authority to judgments as reflecting principles or even 'cornerstones' of international law.[97] Thus, the African Court,[98] the IACtHR[99] and the ECtHR[100] cited ARSIWA to clarify the scope of *de facto* organs, to push back against attempts to justify non-compliance with international obligations by reference to domestic law (amnesties or blocked political participation),[101] or to underscore the need for 'full reparation', for example.[102]

However, as two groups of issues illustrate, regard to the Articles has also been erratic and controversial, with ARSIWA apparently ignored in some contexts, and central to legal claims in others.

Overlooking ARSIWA?

The ECtHR and the IACtHR have occasionally been criticised for 'avoiding' or 'reinventing' ARSIWA attribution rules. This has raised speculation as to whether special human rights

[96] HRC 'General Comment No 36: The Right to Life (Advance unedited version)' (30 October 2018) UN Doc CCPR/C/GC/36 para 63.
[97] *Likvidejama P/S Selga v. Latvia and Lucija Vasilevska v. Latvia*, ECtHR, App. Nos. 17126/02 and 24992/02, 1 October 2013, paras. 64-65 and 95 http://hudoc.echr.coe.int/fre?i=001-127689.
[98] *In the Matter of Lohé Issa Konaté v. Burkina Faso*, ACHPR, Application No. 004/2013, Judgment.
[99] *Case of Ruano Torres et al. v. El Salvador*, IACtHR, Judgment of October 5, 2015 (Merits, reparations, costs).
[100] *Agim Behrami and Bekir Behrami v. France and Ruzhdi Saramati v. France, Germany and Norway*, ECtHR, Applications Nos. 71412/01 and 78166/01, 2 May 2007 http://hudoc.echr.coe.int/fre?i=001-80830.
[101] *Case Gelman v. Uruguay*, IACtHR Judgment of February 24, 2011 (Merits and Reparations); *Tanganika Law Society and The Legal and Human Rights Centre v. Tanzania* and *Mtikila v. Tanzania*, ACHPR, App. Nos. 009/2011 and 011/2011, <https://fr.african-court.org/images/Cases/Decision/DECISION-%20Requete%20%20No%20009-011-2011-%20Rev%20Christopher%20Mtikila%20v.%20Tanzania.pdf>
[102] *Beneficiaries of Late Norbert Zongon, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabè Movement on Human and People's Rights v. Burkina Faso*, ACHPR, App. No. 013/2011 <https://www.african-court.org/en/images/Cases/Ruling%20on%20Reparation/Application%20No%20013-2011%20-%20Beneficiaries%20of%20late%20Norbert%20%20Zongo-Ruling%20on%20Reparation.PDF>; *Georgia v. Russia (I)*, ECtHR, App. No. 13255/07, 31 January 2019, para. 21 http://hudoc.echr.coe.int/fre?i=001-189019.

considerations arose, IHRL was applied as *lex specialis* (Article 55), ARSIWA was misapplied, or whether the human rights e Courts were themselves just misunderstood.

A striking example is the Behrami case.[103] The ECtHR resorted to an 'ultimate authority' test to determine that conduct of the UN Mission in Kosovo was attributable to the Security Council, excluding the responsibility of respondent States. The Court in this case was addressing a State responsibility question, yet its approach was a 'clear departure'[104] from Article 5 without the 'clear expression' of *lex specialis*.[105] It was also at odds with the purpose and principles of IHRL. One, arguably, for the 'misapplication' category.

However, other case commentary may reflect misunderstanding as to the questions the Court was asking and answering. For example, when the ECtHR found States responsible on account of their 'acquiescence and connivance'[106] in CIA rendition (first in *el Masri*), it may not have been misapplying the attribution test as some have suggested, but finding a failure of broader 'positive obligations' of due diligence under IHRL. This view[107] is borne out by subsequent ECtHR rendition cases (eg. *Abu Zubaydah* cases[108]) and frequent reference to 'acquiescence' as a basis for failure of positive obligations in the Interamerican system.[109] Indeed, the IACtHR has been explicit that in light of such findings it considered it *'unnecessary to rule on the alleged direct responsibility of the state'.*[110]

Such an approach may be practical and understandable, yet come at a price. Failing to address attribution where the State has breached primary obligations may not be strictly necessary to resolve the dispute, but it overlooks the normative and political value of attributing conduct to the State, and that the distinct implications for reparation (including what it required to ensure non-repetition). ARSIWA therefore deserves greater attention, not to qualify or restrict positive obligations, but to complement them as an *additional* basis of responsibility.

Aiding and Assisting, and Collectivising Responsibility

ARSIWA has however assumed a central role in contexts where multiple States shared responsibility for wrongs. This is illustrated by the 'war on terror' which shares a 20th anniversary with ARSIWA. In light of e.g. CIA torture, arbitrary detention at Guantanamo, and associated impunity, ARSIWA came into its own by providing a framework to understand the

[103] *Behrami v. France*, 46 ILM 746, 747 (2007).
[104] James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 187.
[105] Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 Int'l L Stud 310.
[106] *El-Masri v. The Former Yugoslav Republic of Macedonia,* App no. 39630/09 (ECtHR, 13 December 2012), para 176.
[107] Helen Keller and Reto Walther, 'Evasion of the International Law of State Responsibility? The ECtHR's Jurisprudence on Positive and Preventive Obligations under Article 3' (2020) 24(7) International Journal of Human Rights 957.
[108] *Husayn (Abu Zubaydah) v. Poland,* ECtHR, App No. 7511/13 (24 July 2014); *Husayn (Abu Zubaydah) v. Lithuania,* ECtHR, App No. 46454/11 (18 July 2018).
[109] Eg *Juridical Condition and Rights of Undocumented Migrants*, IACtHR, Advisory Opinion OC-18/03 of 17 September 2003, para 104.
[110] *Omera Carrascal and others v. Colombia,* IACtHR, Judgment of 21 November 2018 (Merits, Reparations and Costs), para 36.

multi-State 'global spiders web of complicity.'[111] UN Special Rapporteurs, NGOs,[112] parliamentary enquiries,[113] national judgments[114] and pleadings (including a recent UNWGAD claim by this author against 7 States with shared responsibility)[115] have all framed the provision of logistical support, refuelling planes or facilitating interrogation in terms of Article 16. This newfound power of 'aiding and assisting' has been central to arguments by rights advocates in other contentious contexts, such as in legal challenges to arms sales to Saudi Arabia.[116]

Likewise, Articles 40, 41 and 48, on the universal collective interest in rights protection, and consequences for '*all States,'* have found authoritative expression in several ICJ opinions and cases (*the Wall,*[117] *Belgium v Senegal,*[118] *Gambia v. Myanmar*[119] and *Chagos Islands*).[120] National courts have considered their relevance to the admissibility of torture evidence,[121] immunities[122] and duties to cooperate to end torture.[123] UN special rapporteurs,[124] NGOs[125] and parliamentarians have invoked them to increase pressure on States to act, including on Guantanamo and torture prevention.

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[111] Committee on Legal Affairs and Human Rights Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Draft report – Part II (Explanatory memorandum), AS/Jur (2006) 16 Part II 7 June 2006, <https://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf> accessed 5 November 2021, 9.

[112] Human Rights Watch, '*No Questions Asked' Intelligence Cooperation with Countries that Torture* (2010) <https://www.hrw.org/sites/default/files/reports/ct0610webwcover.pdf> accessed 5 November 2021.

[113] UK Parliament, Human Rights Joint Committee - Twenty-Third Report Allegations of UK Complicity in Torture, 21 July 2009 < https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm> accessed 5 November 2021.

[114] *Belhaj and another (Respondents) v Straw and others (Appellants*) [2017] UKSC 3, para 77.

[115] Human Rights Practice, Petition to: United Nations Working Group on Arbitrary Detention in the matter of *Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah) v. Governments of the United States of America, Kingdom of Thailand, Republic of Poland, Kingdom of Morocco, Republic of Lithuania, Islamic Republic of Afghanistan, United Kingdom*, 30/4/2021.

[116] Human Rights Watch, Amnesty International and RW (UK) Submissions in UK Legal Cases Concerning Arms Sales to Saudi Arabia, 10/2/2017 < https://www.hrw.org/news/2017/02/10/human-rights-watch-amnesty-international-and-rw-uk-submissions-uk-legal-cases#> accessed 5 November 2021.

[117] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136.

[118] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Judgment, I.C.J. Reports 2012, p. 422.

[119] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3.

[120] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95.

[121] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56.

[122] *Ferrini v. Federal Republic of Germany*, Italian Court of Cassation, March 11, 2004.

[123] *Al Rawi and others (Respondents) v The Security Service and others* (Appellants) [2011] UKSC 34.

[124] See, eg, Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Human Rights Council, UN Doc A/HRC/22/52, 1 March 2013, at para 30 (fn 62).

[125] *Al Nashiri v. Poland*, ECtHR, App. No. 28761/11 (16 February 2015), paras. 447-450 http://hudoc.echr.coe.int/fre?i=001-146044.

Challenges ahead & unfulfilled potential

ARSIWA has breathed new life into the law of State responsibility, and made it more accessible and relevant to a range of human rights actors, as practice makes clear. What does that growing practice say about how to characterise the relationship and challenges for the future?

Clearly, it is no longer open to question that the two are interconnected**.** If there can be a fully self-contained legal regime, IHRL is not it.[126] There may be special rules, such as derogation and limitation provisions vis-à-vis Article 25 on 'necessity'.[127] There is also a detailed body of IHRL on positive obligations, whose flexibility is crucial to IHRL's relevance and preventive potential to address key current challenges, from the multiplicity of unaccountable actors to the climate crisis (as booming human rights climate litigation attests). These rules will understandably be central in human rights judgments, and should not be curtailed, but complemented, by ARSIWA.

Undoubtedly, relationship tensions have been fuelled by lack of clarity and transparency by the Courts themselves. The recent shift to a more articulate approach to ARSIWA, whether, when and why it might be applied is therefore promising. [128]

Challenges may also derive from shortcomings or uncertainties of the Articles themselves. These should be addressed as ARSIWA is interpreted and applied in practice, so as to ensure their relevance and impact. ARSIWA's State centricity, blind to individuals as claimants or those to whom reparation is due, is an obvious limitation, or even anomaly, in the enforcement of IHRL today. On the other side, the overwhelming realities of non-State actor violations call for engagement with their responsibility. This has led to crucial, if incomplete, developments in IHRL since 2001, such as the Ruggie Principles on corporate responsibility [129] or the recent UN experts statement on organised armed groups. [130] As the primary rules of international law evolve, can ARSIWA keep pace? State practice citing Article 16 (by analogy) as precluding 'aiding and assisting' non-State groups in Syria,[131] may suggest one form of evolution, but there is a long way to go.

The ever more complex, fluid and opaque relationships between States and the non-State entities increasingly engaged in security, immigration and other public functions, gives ARSIWA a crucial role in the legal conceptualisation of those relationships. But their relevance

[126] Christian J. Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP 2009) 254.
[127] Cedric Ryngaert, 'State Responsibility, Necessity and Human Rights' (2010) 41 Netherlands Yearbook of International Law 79.
[128] E.g. *Big Brother Watch and others v. United Kingdom*, ECtHR, Apps no 58170/13, 62322/14 and 24960/15 (13 September 2018), para 420 and *Omera Carrascal and others v. Colombia*, IACtHR, Judgment of 21 November 2018 (Merits, Reparations and Costs), para 36.
[129] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31, endorsed by Human Rights Council Res 17/4, 16 June 2011.
[130] Joint Statement by independent United Nations human rights experts* on human rights responsibilities of armed non-State actors, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E> accessed 5 November 2021.
[131] 'Syria: Austrian Position on the Position of Arms Embargo', *The Guardian*, 13 May 2013 https://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf> accessed 5 November 2021.

may also be challenged by ARSIWA's stringent standards that may not reflect those unfolding relationships. Moreover, the Article 8 test requires proof of 'direction or control of *conduct'*, rarely available in the clandestine world of IHRL violations. It is perhaps no coincidence that advocates and courts have been reluctant to engage with attribution, in favour of positive obligations. What 'established in law' requires, for the exercise of government functions under Article 5,[132] or whether the knowledge requirement under Article 16 includes constructive knowledge, so States cannot hide behind 'wilful blindness,' should all be further clarified as practice develops. It remains to be seen whether the rules are interpreted and applied, as human rights courts have often insisted, in a way that is 'practical and effective, not theoretical and illusory'.[133]

Ultimately, we see significant complementarity, and a relationship yet to meet its potential. The most crucial test of this is enforcement – the Achilles heel of the IHRL system. Before ARSIWA was adopted in 2001, James Crawford wrote that:

> One of the most important modern ideas about international obligations is that at least some obligations are universal in scope, and cannot be reduced to bundles of bilateral interstate relations [but]owed to the 'international community as a whole'.[134]

Bruno Simma referred to ARSIWA as this 'community interest coming to life.'[135] At a factious time for human rights in a divided world, the expressive power of this idea should not be underestimated. These values must be given effect in practice, including through collective invocation of responsibility and collective counter-measures. Egregious wrongs, massive threats and inadequate responses – from Myanmar to Palestine, Syria to Guantanamo Bay, or globally from the scourge of modern slavery[136] to climate tipping points (WewerinkeSingh)[137] – demand urgent collective responses, and a closer partnership between ARSIWA and human rights practice.

[132] See Mills in this symposium.
[133] *Mehmet Eren v. Turkey*, ECtHR, App no 32347/02 (14 October 2008), para 50.
[134] James Crawford, 'Responsibility to the International Community as a Whole' (2001) 8(2) Indiana Journal of Global Legal Studies 307.
[135] Bruno Simma, 'Human Rights Before the International Court of Justice: Community Interest Coming to Life?' in Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice*, (OUP 2013) 301.
[136] Philippa Webb and Rosana Garciandia, 'State Responsibility for Modern Slavery: Uncovering the Accountability Gap' (2019) 68 (3) ICLQ 539.
[137] Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart 2019).

9. Strengthening the Rule of Law in Time of War: An IHL Perspective on the Present and Future of the Articles on State Responsibility

Kubo Mačák[138]

International humanitarian law is one of the oldest areas of international law. As such, it was unsurprisingly a key source for the International Law Commission in its work on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereafter 'Articles'). This is apparent, among other things, from the frequent references to IHL in Special Rapporteur Crawford's First [139] and Second [140] reports or in the final text of the Articles with commentaries.[141]

The Articles have also had significant impact on the application and interpretation of IHL over the past two decades. They have become an indispensable resource in analysing State responsibility for violations of IHL both in theory and in practice. This can be seen in the growing number of references to the Articles in decisions of international tribunals, including those concerning specific questions of IHL (see e.g. the 2007 report by the UN Secretary General for several examples[142]).

It is also confirmed by the prominent role given to the Articles in IHL studies, such as the ICRC's *Updated Commentaries on the 1949 Geneva Conventions*, which consider the law of State responsibility – as reflected in the Articles – to constitute a key part of the legal framework within which the Conventions must be interpreted and applied.[143]

These developments have contributed to creating a rich and complex relationship between IHL and the law of State responsibility. In this contribution, I will discuss how the coexistence of these two bodies of law fosters respect for IHL and then offer some thoughts from an IHL perspective on the possible future development of the law of international responsibility.

Ensuring respect for IHL through interlocking structures of legal responsibility

Most of the time, the Articles are almost invisible in the interpretation and application of IHL. The building blocks of State responsibility, attribution and breach, are simply accepted as a

[138] Legal adviser at the International Committee of the Red Cross (ICRC). The author is grateful to Thibaud de la Bourdonnaye for his research assistance.
[139] ILC, State Responsibility, First report on State responsibility, by Mr. James Crawford, Special Rapporteur, 1998, UN Doc A/CN.4/490 and Add. 1–7.
[140] ILC, State Responsibility, First report on State responsibility, by Mr. James Crawford, Special Rapporteur, 1999, UN Doc A/CN.4/498 and Add. 1–4.
[141] See, eg, ILC Articles Commentary, Art 7, para 4; Art 8, paras 4 and 5; Art 10, paras 9 and 16; Art 21, para 3; Art 25, paras 19 and 21; Art 40, paras 5 and 17; Art 50, paras 7 and 8.
[142] UNGA, Responsibility of States for internationally wrongful acts, Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General, 21 April 2016, UN Doc A/71/80.
[143] ICRC, *Commentary on the Third Geneva Convention* (CUP 2021), Introduction, paras 110-115.

given. For example, to say that a Detaining Power would violate IHL by failing to provide prisoners of war with sufficient food,[144] means that:

- the camp authority's failure would be an omission *attributable* to the State to which it belongs (typically under Article 4 of the ILC's Articles, because armed forces are a State organ),[145] and
- such conduct would *breach* that State's obligation under Article 26 GCIII to provide prisoners with sufficient food rations.[146]

However, certain challenges posed by armed conflicts make it essential to examine the interaction between the Articles and IHL more closely.

Firstly, as secondary rules, the Articles may be complemented by specific primary obligations, including those contained in IHL. This is the case, for example, with respect to establishing the responsibility of States in relation to violations of IHL committed by other States—such as when one State spreads misinformation designed to encourage violations of IHL by another State's armed forces. As noted by Lawrence Hill-Cawthorne, the Articles leave a prominent 'accountability gap' with respect to such conduct.[147] This is because the ILC commentary considers mere encouragement of wrongful conduct (i.e., unaccompanied by 'concrete support') as insufficient to give rise to responsibility of the acting State.[148]

Therefore, it is of crucial importance that IHL includes a general obligation to respect and ensure respect for IHL (see Common Article 1,[149] Article 1 API,[150] and Rule 144 ICRC CIHL Study).[151] This obligation applies at all times. The ICRC's Updated Commentary explains that the duty to ensure respect includes a negative obligation to refrain from encouraging, aiding,

[144] Kubo Mačák, 'GCIII Commentary: If I can't feed you, do I have to let you go?', October 2020 < https://blogs.icrc.org/law-and-policy/2020/10/22/gciii-commentary-if-i-cant-feed-you/> accessed 5 November 2021.
[145] ICRC, IHL Database, Customary IHL, Rule 149. Responsibility for violations of International Humanitarian Law, < https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule149> accessed 5 November 2021.
[146] Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), Article 26.
[147] Lawrence Hill-Cawthorne, 'GCIII Commentary: Common Article 1 and State responsibility', January 28 2021, < https://blogs.icrc.org/law-and-policy/2021/01/28/gciii-commentary-common-article-1-state-responsibility/> accessed 5 November 2021.
[148] ILC Articles Commentary, Chapter IV of Part One, para 9.
[149] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Article 1.
[150] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977), Article 1.
[151] ICRC, IHL Database, Customary IHL, Rule 144. Ensuring Respect for International Humanitarian Law *Erga Omnes*, < https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144 > accessed 5 November 2021.

or assisting violations of the Conventions,[152] which *complements* the relevant secondary rules on State responsibility, thus 'fill[ing]' or at least narrowing the said accountability gap.[153]

Secondly, IHL may also provide for standards of responsibility that diverge from the Articles. In theory, this is unproblematic, because the ILC commentary acknowledges that the Articles 'operate in a residual way' and may thus be overridden by special rules of international law.[154] However, the specialty of a given rule of IHL may not always be easy to establish, given that most IHL treaty rules predate the Articles and thus do not expressly state that they displace the general rules in the Articles.

Perhaps the best-known example in this respect is the longstanding debate about the level of control by a foreign State over a non-State armed group necessary for the attribution of that group's conduct to the said State under Article 8 of the ILC's Articles. As far too much ink[155] (including mine[156]) has been spilled over this clash between the so-called 'overall control' and 'effective control' tests, let's rather choose a different illustration.

For instance, would an Occupying Power be responsible for the breaches of IHL that its soldiers commit in the occupied territory on their own initiative, while on leave and out of uniform? This scenario raises the issue of responsibility for private (i.e., unauthorised) conduct of members of State armed forces. The relevant general rule as formulated by the ILC is that a State is only responsible for unauthorised conduct of its organs or agents if they are acting with at least 'apparent authority'.[157] Under this approach, if the soldiers' conduct was private and not 'cloaked with governmental authority' – as evidenced by the absence of uniform and so on – it would not be attributable to their State.[158]

By contrast, a party to an armed conflict is responsible for '*all acts* committed by persons forming part of its armed forces' (Article 3 of the Hague Regulations,[159] Article 91 API,[160] emphasis mine). This comprehensive and unconditional formulation indicates that under IHL, it is immaterial whether the soldiers acted with real, apparent, or no authority at all. As Marco

[152] ICRC, *Commentary on the Third Geneva Convention* (CUP 2021), commentary on common Article 1, para 191.
[153] Lawrence Hill-Cawthorne, 'GCIII Commentary: Common Article 1 and State responsibility', January 2021, < https://blogs.icrc.org/law-and-policy/2021/01/28/gciii-commentary-common-article-1-state-responsibility/> accessed 5 November 2021.
[154] ILC Articles Commentary, Art 55, para 2; see further Katja Creutz's contribution to this symposium.
[155] See, e.g., Marko Milanovic, 'State Responsibility for Genocide' (2006) 17(3) EJIL 553; Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649; Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 ICLQ 493; Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict' (2015) 97 IRRC 1227.
[156] Kubo Mačák, *International Armed Conflicts in International Law* (OUP 2018) 39–47.
[157] ILC Articles Commentary, Art 7, para 8.
[158] *Petrolane, Inc v. Iran,* (1991) IUSCT Case No. 131, para 83.
[159] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907), Article 3.
[160] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977), Article 91.

Sassòli has argued, this IHL rule is the *lex specialis*, which prevails over the general rule of State responsibility.[161]

This example demonstrates that IHL can bolster the protections available in armed conflict also by establishing a secondary rule of State responsibility that *diverges* on a particular point from the Articles. This is a reflection of IHL's nature as a body of law specifically designed for times when normal responsibility structures have collapsed. Its interaction with the Articles thus contributes to the protection of victims of war and, more broadly, to the rule of law during armed conflicts.

Responding to the changing nature of warfare through future development of the law

As it is often said (though the origin of the quote isn't entirely clear[162]), 'it is difficult to make predictions, especially about the future'. Instead of engaging in such risky endeavours, I will thus highlight two aspects of the changing nature of warfare, which may require a clarification of the law of international responsibility in the Articles' third decade. These relate to the rapid development of new technologies of warfare and the growing engagement of non-State actors in armed conflicts.

Firstly, since 2001, the use of cyber operations during armed conflicts has become a reality,[163] leading to new challenges in the application of existing rules of international law. For instance, the fact that cyberspace provides technical possibilities for actors to cover their traces has brought the 'attribution problem'[164] into sharp relief. Existing modes of attribution, as reflected in the Articles, undoubtedly apply 'whether the conduct is carried out by cyber or any other means'.[165] However, analysis of specific incidents suggests that these rules may be 'too stringent for the attribution of cyber operations to States'.[166] In this respect, the growing trend of issuing national positions on the application of international law to cyber operations presents an opportunity for States to clarify how the relevant standards apply, taking into account the particularities of cyberspace.[167]

Relatedly, increasing autonomy in weapon systems has given rise to concerns about the diffusion of responsibility and a potential 'accountability gap' due to the loss of human control.[168] As responsibility for compliance with IHL cannot be transferred to machines,

[161] Marco Sassòli, *International Humanitarian Law* (Elgar 2019) 86.
[162] The Economist, Letters to the Editor, July 15 2007 < https://www.economist.com/letters-to-the-editor-the-inbox/2007/07/15/the-perils-of-prediction-june-2nd> accessed 5 November 2021.
[163] See, e.g., Tilman Rodenhäuser and Kubo Mačák, 'Even 'cyber wars' have limits. But what if they didn't?', EJIL: Talk!, 9 March 2021, < https://www.ejiltalk.org/even-cyber-wars-have-limits-but-what-if-they-didnt/> accessed 5 November 2021.
[164] David D. Clark and Susan Landau, 'Untangling Attribution' (2011) 2 Harvard National Security Journal.
[165] ICRC, 'Position paper: International humanitarian law and cyber operations during armed conflicts', (2020) 102 (913) International Review of the Red Cross 481, 491.
[166] Tomohiro Mikanagi and Kubo Mačák, 'Attribution of cyber operations: an international law perspective on the Park Jin Hyok case' (2020) 9(1) Cambridge International Law Journal 51, 74.
[167] For further information see <https://cyberlaw.ccdcoe.org/wiki/Category:National_position > accessed 5 November 2021.
[168] ICRC, 'International humanitarian law and the challenges of contemporary armed conflicts', Report, 32IC/15/11 (2015) 46.

software, or weapon systems.[169] parties to armed conflicts – and ultimately, human beings – remain responsible for the consequences of their use. However, holding individuals and parties to armed conflicts responsible for resulting IHL violations may be practically challenging. Autonomous weapons that incorporate AI, especially machine learning, present particular difficulties due to lack of predictability, understandability and explainability of their functioning.[170] Ongoing efforts at the Convention on Certain Conventional Weapons[171] to agree on the applicable normative and operational framework therefore present a key opportunity for adopting new binding rules on autonomous weapons and clarifying responsibilities for their use.[172]

Secondly, today there are hundreds – if not thousands – of armed groups around the world,[173] many of whom are involved in armed conflicts. According to the ICRC, non-State parties to armed conflicts currently outnumber States by a ratio of nearly 2:1 and their absolute number continues to grow.[174] Although it is generally accepted that non-State armed groups possess international legal personality for the purposes of IHL, in light of their unprecedented proliferation, it is concerning that the exact contours of their responsibility under international law remain unclear.

The ILC's Articles expressly exclude from their scope questions of the responsibility under international law of non-State entities.[175] However, that does not mean that the Articles are entirely silent with respect to IHL violations committed by non-State actors. They do confirm that States are responsible for such violations if these are attributable to them, including when the State instructed, directed, or controlled the underlying conduct (Article 8). They also codify the responsibility for the conduct of insurrectional movements that become the new governments of States (Article 10).

Still, beyond those links to States, it remains controversial whether violations of primary rules of IHL entail legal consequences for non-State armed groups as collective entities and if so, what those consequences might be.[176] In his First Report on State Responsibility, Special

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[169] Neil Davidson, 'A legal perspective: Autonomous weapon systems under international humanitarian law' UNODA Occasional Papers, No. 30 , 7, <https://www.icrc.org/en/download/file/65762/autonomous_weapon_systems_under_international_humanitarian_law.pdf > accessed 5 November 2021.

[170] ICRC, 'Autonomy, artificial intelligence and robotics: Technical aspects of human control, 2019', 13-21, <https://www.icrc.org/en/document/autonomy-artificial-intelligence-and-robotics-technical-aspects-human-control> accessed 5 November 2021.

[171] See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001, < https://www.un.org/disarmament/the-convention-on-certain-conventional-weapons/> accessed 5 November 2021.

[172] ICRC, 'Position on Autonomous Weapons Systems' (12 May 2021), < https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems> accessed 5 November 2021.

[173] Jelena Pejic, Irénée Herbet and Tilman Rodenhäuser, 'ICRC engagement with non-State armed groups: why and how', Humanitarian Law and Policy, 4 March 2021, <https://blogs.icrc.org/law-and-policy/2021/03/04/icrc-engagement-non-state-armed-groups/> accessed 5 November 2021.

[174] Thomas DSM [thodsm] Twitter thread, 30 April 2021: <https://twitter.com/thodsm/status/1388128271842398212> accessed 5 November 2021.

[175] ILC Articles Commentary, General Commentary, para. 4(d).

[176] Veronika Bílková, 'Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?' in Noemi Gal-Or et al (eds) *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill 2015) 263.

Rapporteur Crawford noted that the responsibility of such groups, including for breaches of IHL, could 'certainly be envisaged'.[177] Whether and how the law of international responsibility applies to non-State armed groups thus requires further work.

Conclusion

Since their adoption in 2001, the ILC's Articles have brought a welcome degree of legal clarity that permeates all specific areas of international law, including IHL. As illustrated in this contribution, the co-application of the Articles and IHL also contributes to enhancing the rule of law during armed conflicts. At the same time, the nature of warfare has significantly evolved over the past twenty years. These developments have underscored the need for the regime of international responsibility to also continue to adapt to remain relevant and respond to new challenges, including those posed by the emergence of new technologies and the proliferation of non-State actors.

[177] ILC, First report on State responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/490 and Add. 1–7, 1998, 53, para. 272.

10. The Articles on Responsibility of States for Internationally Wrongful Acts and the making of international investment law

Gabriel Bottini[178]

In modern international law, the relationship between State responsibility and the protection of foreigners and their property is one of cross-fertilisation and even common origin. When in 1924 the League of Nations commenced its efforts to codify international law, state responsibility was included as one of the subjects for potential international regulation. It was referred to as the 'Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners'.[179] In his first report of 1956,[180] at the beginning of the ILC's own work on State responsibility, García Amador referred to the issue of damage to the person or property of foreigners as the 'principal subject of the literature, private and official codifications and judicial decisions which treat of the responsibility of States'.[181] Ago himself spoke of the initial 'confusion of the two subjects'.[182]

For the last 20 years, ARSIWA has been part of the everyday workings of investment tribunals. International investment agreements (IIAs), particularly BITs concluded between the 1980s and early 2000s, have few if any provisions directly governing the conditions for and consequences of a breach of the treaty. Thus, reference to ARSIWA was arguably necessary for the resolution of investment disputes. With few exceptions (such as *Bayindir v Pakistan*[183]), investment tribunals' decisions show little or no reflection as to whether any adaptation of the rules in ARSIWA is needed to apply them to such disputes.

IIA claims involve a foreign investor and a State (or State entity), rather than a State-to-State dispute, and thus potential responsibility *vis-à-vis* private parties rather than another State. Further, by definition, IIA claims' fundamental basis is a treaty. Yet the object of these claims are investments in the territory of the host State, which typically entails close connections between the IIA claim and parties, assets, and claims subject to local law. Are the general rules in ARSIWA well-suited for the hybrid nature of IIA claims? In the absence of *lex specialis* in the applicable IIA, investment tribunals have rarely deviated from ARSIWA to resolve issues of State responsibility (for exceptions, see *CPI v Mexico*,[184] *Cargill v Mexico*[185]), even where the application of the general rules has been frequent, such as on attribution and reparation. However, the wealth of investment tribunal decisions discussing State responsibility concepts provides a basis for the development of more precise rules on specific aspects. For example, is

[178] Partner in the Madrid office of Uría Menéndez. Note: I thank Adelaida Torres Rovi for excellent research assistance.
[179] League of Nations publication, V. Legal, 1927.V.I (document C.196.M.70.1927.V), p. 5.
[180] ILC Yearbook, 1956, vol. II, document A/CN.4/96, p. 181. See also ibid, 1957, vol. II, document A/CN.4/106, p. 104.
[181] ibid, p. 181.
[182] ibid, p. 105.
[183] *Bayindir v. Pakistan*, ICSID Case No ARB/03.29, Award, 27 August 2009, para 130.
[184] *Corn Products International v. Mexico*, ICSID AF Case No ARB/(AF)/04/1, Decision on Responsibility, 15 January 2008, paras 161-179 (finding that the international law on countermeasures is not applicable to NAFTA claims).
[185] See also *Cargill Inc v. Mexico*, ICSID Case No ARB/(AF)/05/2, Award, 18 September 2009, paras 420-430.

it possible to develop general criteria on when a person or entity is exercising elements of governmental authority for the purposes of ARSIWA Article 5 (Mills)?[186] Or as to which are the valuation techniques that render the most reliable results in assessing material damage?

This contribution focuses on two concepts of the law of State responsibility that have contributed significantly to the architecture of international investment law (IIL). First, the principle in ARSIWA Article 3 that '[t]he characterization of an act of a State as internationally wrongful is governed by international law' and that '[s]uch characterization is not affected by the characterization of the same act as lawful by internal law'. Second, the 'circumstances precluding wrongfulness' provided for in ARSIWA and their relation to provisions in IIAs circumscribing the scope of the parties' obligations. The treatment of these two concepts in IIL may hold lessons for general international law, not least as to the (possible) function of national law in State responsibility determinations and the nature and effect of circumstances precluding wrongfulness.

ARSIWA Article 3 and the contract-treaty distinction

ARSIWA Article 3 is a key provision that defines the role of international law and national law in determining the lawfulness of State conduct. The ILC explained that Article 3 means that 'the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned'.[187] Yet it also noted that 'in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility', although this is because 'either the provisions of internal law are relevant as facts in applying the applicable international standard' or 'they are actually incorporated in some form, conditionally or unconditionally, into that standard'.[188]

The *ad hoc* Committee in *Vivendi I* relied on the 'general principle' in Article 3 to distinguish between a breach of an IIA and a breach of contract.[189] Claims deriving from each type of breach are subject to their own proper forum and applicable law (international law and the law of the contract respectively). Although the scope of the contract-treaty distinction has not yet been fully spelled out, it is one of the factors behind investment arbitration's exponential growth. The reason is that it has largely prevented respondent States from effectively relying on contract or national law provisions to raise jurisdiction/admissibility and even merits defences. More generally, the principle in ARSIWA Article 3 and related ideas have been used to relegate national law to a secondary role in the resolution of investment disputes while speaking of the 'independence' of treaty claims.

This is an unwarranted application of the principle in Article 3, which may be attributed, first, to the fact that investment tribunals have arguably read too much into the *Vivendi I* annulment decision. This decision does not speak of the 'independence' of treaty claims but rather uses

[186] See Mills in this symposium.
[187] ILC Articles Commentary, Art 3, para 1.
[188] ibid, para 7.
[189] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (I), ICSID Case No. ARB/97/3, Decision on Annulment 3 July 2002, para 97.

the concept of 'fundamental basis',[190] which suggests a prominent yet not exclusive role of international law in treaty claims. The *Vivendi I ad hoc* Committee even acknowledged that 'municipal law will often be relevant—in assessing whether there has been a breach of the treaty'.[191] Second, it must be recognised that in *Vivendi I* and even in the ILC's materials there is a tension between, on the one hand, the broad statement that the characterisation of an act of a State as internationally wrongful 'is not affected' by its characterisation in national law and, on the other hand, the recognition of the potential relevance of national law 'to the question of international responsibility'.

Yet, the primacy of international law may be preserved without denying a role for national law in the determination of international responsibility. In fact, the lawfulness of an act under national law *may affect* the assessment of whether the same act is internationally wrongful, particularly in fields such as IIL. For example, whether national law has been breached is often material in investment tribunals' determinations of whether there has been a breach of the fair and equitable treatment standard. The ILC suggests that here national law is relevant as a fact or that it has been (implicitly) incorporated into the international standard. However, a more apt characterisation is that determining international responsibility here requires a composite legal analysis, made up of elements of national and international law (with international law prevailing in case of conflict). National law may not be used to justify a breach of international law, which ultimately (but not necessarily exclusively) governs State responsibility.

Defences under investment treaties and circumstances precluding wrongfulness

Respondent States have relied on both IIA provisions and circumstances precluding wrongfulness as shields against investment claims. In considering the IIA provisions used as defences by States, investment tribunals have struggled particularly with determining the precise relationship between so-called non-precluded measures provisions (NPMs), such as Article XI of the Argentina-US BIT, and circumstances precluding wrongfulness. The *CMS* case, where Argentina raised defences based on Article XI and the state of necessity under ARSIWA Article 25, serves to illustrate investment tribunals' evolving views on that relationship.

The *CMS* Tribunal treated Article XI and the state of necessity under Article 25 as essentially the same necessity plea, albeit under treaty and customary law respectively.[192] Accordingly, leaving aside specific aspects of Article XI such as whether it was self-judging,[193] the NPM provision and the state of necessity were apparently subject to the same requirements.

The *CMS* Annulment Committee's view was fundamentally different (and the one that eventually prevailed in investment arbitration jurisprudence). According to the Committee, 'Article XI specifies the conditions under which the Treaty may be applied' and 'is a threshold

[190] ibid, paras 100-101.
[191] ibid, para 101.
[192] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case ARB/01/8, Award, Award, 12 May 2005, paras 304-394.
[193] ibid, paras 366-374.

requirement: if it applies, the substantive obligations under the Treaty do not apply'.[194] Conversely, 'Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations' .[195] The Committee left open the issue 'whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility',[196] yet it was clear that if Article XI applied, no breach of the Treaty had occurred.[197]

This is the crucial point. NPMs and other defences based on a provision of the IIA define the scope of the obligations assumed by the States parties, in the same way as the rest of the provisions of the IIA (unless otherwise stated). The precise way in which the substantive IIA provisions (including NPMs) interact inevitably depends on the interpretation of each treaty. But if the interpretation leads to the application of a treaty-based defence, there is no incompatibility with the treaty and thus no reason to even consider whether reparation is due: at a conceptual level, not even a *prima facie* breach would exist. Otherwise, one would be interpreting treaty provisions in isolation, when in fact everything should be 'thrown into the crucible'. However, if a circumstance precluding wrongfulness applies, both in the case of justifications and excuses, there exists an act that is *prima facie* a breach of the treaty, which is then rendered lawful by a defence external to the IIA. The act is thus not wrongful, but this *prima facie* breach allows for the application of ARSIWA Article 27 and the consideration of whether, in the circumstances, compensation for any material loss is due.

Conclusion

ARSIWA and IIL have common ancestors and, although they eventually grew apart, have continued to influence each other. On the one hand, investment tribunals have relied on ARSIWA Article 3 to affirm the primacy of treaty obligations. However, they have probably gone too far in downgrading national law, particularly given its necessary role in regulating national and foreign investments alike. On the other hand, investment tribunals eventually correctly distinguished between treaty defences and circumstances precluding wrongfulness. There is however still a need to further develop international law rules on the latter circumstances. The distinction between justifications and excuses could, for example, determine whether or not reparation is due (and whether a *prima facie* breach is justified or excused could hinge on the facts of each case rather than on abstract legal concepts). Be that as it may, what is clear is that IIL, as the most prolific source of decisions touching on State responsibility, will influence the future development of the principles contained in ARSIWA.

[194] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case ARB/01/8, Award, Annulment Decision, 25 September 2007, para 129.
[195] ibid.
[196] ibid, para 132.
[197] ibid, para 133.

11. The Application of the Articles on Responsibility of States for Internationally Wrongful Acts in the WTO Regime

Jan Yves Remy[198]

In this short contribution, I consider the unique application of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) to the special regime of the World Trade Organization, an organisation that has had a variable relationship with international law over the years. Consistent with Article 55 of ARSIWA which privileges 'special rules' of responsibility only to the extent that they seek to derogate from the general framework, a WTO panel in *Korea – Government Procurement* has confirmed the 'residual' application of general international law norms, including ARSIWA, when it stated that they apply 'to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement'.[199] The contribution considers first circumstances where WTO rules, as well as panels and (the erstwhile) Appellate Body interpreting them, contract out of the general framework of ARSIWA; it then sets out the circumstances in which ARSIWA has been directly or indirectly referenced and/or applied; and concludes with future areas in which the application of ARSIWA might arise at the WTO.

Contracting out of ARSIWA

Exceptionally for a regime in international law, WTO provisions disapply ARSIWA in at least two areas: prospective remedies and responsibility for non-wrongful acts.

First, under Article 31(1) of ARSIWA, an internationally wrongful act entails an obligation to afford retrospective reparation, whether in the form of restitution or compensation, such that the State to which the obligation is owed can be placed in the situation it would have been in had the breach not occurred. According to Articles 35 and 36(1) restitution constitutes the primary form of full reparation, with compensation being owed where restitution is materially impossible or involves 'a burden out of all proportion to the benefit deriving from restitution instead of compensation.'

While WTO norms do not expressly opt out of the principle of full reparation and the subsequent obligation of restitution and/or compensation, Articles 3.7 and 22.1 of the Dispute Settlement Understanding (DSU) clarify that the respondent's primary obligation following an adverse finding in a WTO dispute is to *withdraw* the WTO-inconsistent measure. As such, WTO adjudicatory bodies have consistently found that remedies under WTO law can only be prospective.[200] Exceptionally, in *Australia – Leather (21.5)*, a WTO panel held that 'repayment in full of the prohibited subsidy'[201] was necessary in order to 'withdraw the subsidy' under Article 4.7 of the Agreement on Subsidies and Countervailing Measures (ASCM),[202] in that

[198] Director of the Shridath Ramphal Centre for International Trade Law, Policy and Services (SRC) at the University of the West Indies, Cave Hill Campus, Barbados.
[199] WTO Panel Report, *Korea – Measures Affecting Government Procurement WT/DS163/7* (6 November 2000).
[200] WTO Appellate Body Report, *United States – Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil – AB-2008-2* (2 June 2008) para. 239.
[201] WTO Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RE* (21 January 2000), at para. 6.48.
[202] ibid.

case because subsidies consisting of one-time payments could not be properly withdrawn. While the panel's remedy essentially reflects the principle of full reparation, its finding has remained of limited precedential value.

Second, WTO law provides a deviation from paragraph 4(c) of the General Commentary to ARSIWA which provides that ARSIWA does not govern attribution for non-wrongful acts. Under WTO law, however, certain categories of WTO-consistent measures may be subject to dispute settlement, including 'non-violation' claims under GATT Article XXIII:1(b) which allow WTO Members to initiate disputes 'whether or not [they] conflict with the provisions of this Agreement.' Moreover, WTO Members may demand the withdrawal of subsidies which are not *per se* WTO-inconsistent ('prohibited') yet cause 'adverse effects' within the meaning of Article 5 of the ASCM (and are thus 'actionable').

Residual Application of ARSIWA

By contrast, in the realms of countermeasures and attribution of conduct, WTO adjudicatory bodies seem comfortable in directly referencing ARSIWA provisions.

First, as part of their interpretative exercise, panels and the Appellate Body have on several occasions read a proportionality requirement into WTO rules on countermeasures, basing themselves on Articles 49 and 51 of ARSIWA. For instance, in *US – FSC*, in deciding whether certain countermeasures were 'appropriate' under Article 4.10 of the ASCM, the panel referred to the Commentary on Article 51 of the ARSIWA, noting that 'a negative formulation of proportionality that stipulates that countermeasures must not be disproportionate, as is the case of the [ASCM] provides a greater degree of latitude to the imposing country than a positive formulation'.[203] Similarly, in *US – Line Pipe*, in interpreting Article 5.1 of the Safeguards Agreement which provides that safeguards shall only be applied 'to the extent necessary to prevent or remedy serious injury and to facilitate adjustment', [204] the Appellate Body referenced Article 51 to find that safeguard measures must observe a proportionality obligation such that they can only counter serious injury caused by imports but not injury caused by other unrelated factors.

Another area where ARSIWA provisions are often cited is attribution of conduct. Chapter II of ARSIWA (Article 4-11) has been invoked when examining measures taken by entities other than the central government of a WTO Member. Recently, in *Saudi Arabia – Protection of IPRs* a panel noted that, in accordance with Article 4(1) of ARSIWA, a Member is responsible 'for actions at all levels of government (local, municipal, federal) and for all actions taken by any agency within any level of government'.[205] Citing Article 8, it went on to state that 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

[203] WTO Panel Report, *United States - Tax Treatments for 'Foreign Sales Corporations'*, WT/DS108/R (8 October 1999) paras. 5.58-5.62.
[204] WTO Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/18 (31 July 2002), paras. 251-260.
[205] WTO Panel Report, *Saudi Arabia - Measures concerning the Protection of Intellectual Property Rights - Communication from Qatar*, WT/DS567/8 (5 October 2020), para. 7.50

direction or control of, that State in carrying out the conduct'.[206] As a result, 'the fact that acts or omissions of private parties 'may involve some element of private choice' did not negate the possibility of state attribution.[207] Similarly, in *US – Coated Paper (Indonesia)*, in response to an argument by Indonesia that certain debt buy-backs had been performed in violation of Indonesian law such that the individuals involved in the same could not bind Indonesia's government, the panel held that it is 'well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law', citing Articles 4 and 7 of ARSIWA in support.[208]

Contentious areas of overlap between ARSIWA and specific WTO norms

There are some areas where the application of the ARSIWA is less straightforward, but there is nonetheless an attempt to rely on them, with some caveats.

For instance, although ARSIWA provisions do not define the scope of primary norms of international law, WTO panels and Appellate Body have, sometimes controversially, referenced ARSIWA as part of an 'interpretative' exercise when in fact they may been substituting the applicable primary norms with ARSIWA norms on attribution, thus arguably modifying the rights and obligations of WTO Members. Most (in)famously, in *US – AD/ CVD (China)*, China argued that certain of its State-owned enterprises and State-owned commercial banks were not 'public bodies' within the meaning of Article 1.1(a)(1) of the ASCM, such that their support was not a 'subsidy'.[209] China argued that an entity granting a financial contribution may only be a public body if it is vested with 'governmental authority', and the mere exercise of 'control' by a government would fall short of this requirement. In referencing Article 5, the Appellate Body agreed with China, that 'state ownership, while not being a decisive criterion, may serve as evidence indicating, in conjunction with other elements, the delegation of governmental authority'.[210] The Appellate Body was careful to add, however, that the question was 'not whether certain of the ILC Articles are to be applied, that is, whether attribution of conduct of the state-owned enterprises at issue to the Government of China is to be assessed pursuant to the ILC Articles instead of Article 1.1(a)(1) of the [ASCM].'[211]

Another possible area of interest arises in the context of the ARSIWA framework regarding the 'circumstances precluding wrongfulness'. Chapter V of Part One of the ARSIWA sets out the circumstances precluding wrongfulness, namely, consent, self-defence, countermeasures, force majeure, distress, and necessity (Articles 20-25). It can be inferred, *a contrario*, from the text of Article 27(a) that the State would be under no obligation to make reparation for conduct incompatible with the obligation while the circumstance precluding wrongfulness lasts: after all, while the circumstance is in place, the State is not required to comply with that obligation. While it has been suggested that WTO norms provide enough regulatory discretion to render

[206] ibid.
[207] Ibid, para. 7.51.
[208] WTO Panel Report, *United States — Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/6 (6 December 2017), para. 7.179.
[209] WTO Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379 para. 316.
[210] WTO Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379 (11 March 2011), para 316.
[211] ibid.

the rules on 'circumstances precluding wrongfulness' unnecessary, WTO adjudicatory bodies have yet to pronounce on the issue. In *Peru – Agricultural Products*, the Appellate Body did not deem Peru's defence of consent under Article 20 of ARSIWA relevant to the interpretation of the provisions at issue, and thus did not decide whether consent could serve to justify the additional duty to which Guatemala had allegedly consented by signing a free trade agreement with Peru.[212]

Seeing that the applicability of Articles 20-25 of ARSIWA to the WTO covered agreements has not been completely discarded by WTO adjudicatory bodies, some scholars have emphasised the wording of the chapeau of Article XX GATT 1994 ('nothing in this Agreement shall be construed to prevent […]') to suggest that if the WTO exception clauses applies, and there is a finding of no-breach, then there is no need to turn to the defences in the law of State responsibility. After all, the defences in the law of responsibility apply only where there is a prima facie breach of obligations under a treaty, and to establish this prima facie breach of the treaty it is necessary to ascertain whether any WTO-treaty exceptions are applicable.

Two areas where ARSIWA may have relevance in the future ?

Given the state of world affairs, it is not unlikely that ARSIWA might be invoked in WTO law in two circumstances. First, Article 10 of ARSIWA provides that insurrection movements that become the new government is an act of State. While the provision has never been tested in a WTO dispute, international investment law has recently seen a series of disputes involving illegally annexed territories or measures taken by transitional governments. As international trade measures have been increasingly serving as a proxy for the advancement of broader geopolitical interests – consider for instance the current trade wars between the US and China -this may be an issue on the horizon.

A second area arises from the proliferation of multilateral development banks and the 'normalisation' of fiscal and monetary stimulus policies amidst the COVID-19 pandemic. A WTO panel may be asked whether acts taken jointly by multiple Members under the aegis of an international organisation, NGO or development fund give rise to joint or several responsibility. In *Turkey – Textiles,* the panel cited the ILC Commentaries to ARSIWA to support its view that an organ common to States could be an act of each State whose common organ it is.[213] It is unclear whether a WTO adjudicatory body faced with the question of shared responsibility or shared attribution today will follow that approach, particularly in light of the ILC's Draft Articles on the Responsibility of International Organizations, which contain special rules on shared attribution and responsibility for government-to-government international organisations.

[212] WTO Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products,* WT/DS457/AB/R (20 July 2015), para. 5.103

[213] WTO Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31 May 1999) para. 9.42.

12. State Responsibility and the Global Environmental Crisis

Ginevra Le Moli[214]

This contribution explores some aspects of the ILC's ARSIWA as they concern the global environmental crisis. The understanding of environmental degradation has changed over time from a bilateral/horizontal issue to a community one. Even within the latter frame, the enormity of the challenge is now much better understood. The ARSIWA captures some aspects of both framings, but others are left ambiguous or simply left out.

There are three main systems of 'secondary rules', i.e. rules describing the consequences of behaviour inconsistent with rules requiring environmental protection: the ARSIWA, which cover 'State responsibility' triggered by a 'breach' (and the analogous draft for international organisations); the system of Multilateral Environmental Agreements (MEAs), which include both primary and secondary rules, the latter mostly in the form of compliance systems triggered by 'non-compliance'; and treaty-based civil liability regimes (on nuclear power or oil pollution damage) applicable to certain private or public entities (including States as operators and tanker owners) triggered by the occurrence of harm (irrespective of fault).

The ARSIWA only define secondary rules triggered by 'breach' by 'States' only. Within this narrower space, two main framings are possible, which are visible in the understanding of both the primary rules (a wide range of environmental protection duties) and the ARSIWA secondary rules: the bilateral and 'horizontal' frame and the community or 'vertical' frame. At the level of primary rules, the first refers to the basic scenario involving a bilateral relationship between two States, in which the primary rule protects State interests (not the environment as such).[215] The second scenario, instead, covers situations where the obligation breached is owed to a group of States or the international community as a whole, as in the case of pollution of the high seas or the Area, climate change or biodiversity loss.

In an environmental context, in both the bilateral/horizontal and community/vertical frames, several issues arise at the three levels of the ARSIWA: (i) the definition of the triggering event the ARSIWA (Part I); (ii) the specific legal consequences resulting from an internationally wrongful act (Part II); and (iii) the processes partly described in the ARSIWA (Part III).

Environmental harm as a problem of *bon voisinage*

In the traditional bilateral frame, the triggering event is in principle straightforward. Yet, the fact that environmental degradation is often the result of action of a variety of entities separate from the State introduces some complications at the level of either attribution of conduct or, when the conduct at stake is a State omission to regulate, of degree of diligence. Whether due diligence is a matter of primary or secondary rules is less important here than the fact that, under some key primary rules (e.g. the prevention principle or Article 192 UNCLOS), a State may be deemed diligent despite the fact that private operators have effectively caused

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[215] *Trail Smelter Case (United States of America, Canada)* (1941) RIAA 1905.

significant harm.[216] That opens an important loophole, with even greater repercussions for the global commons (e.g. unsustainable fishing practices in the high seas).

At the level of consequences, the ICJ has somewhat modernised the conception of what is reparable, indeed compensable, in *Costa Rica v. Nicaragua*, where it noted that 'damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law'. [217] The Court recognised, without implying any change in customary law, that the ordinary rules of reparation are flexible enough to encompass notions such as ecosystemic services, as argued by Costa Rica.

As for implementation, the most complex issue concerns environmental harm caused in a cumulative manner by the action of a plurality of States the effects of which are felt by many or all States. In a bilateral context, the typical example would be pollution by several riparian States (or by a range of entities in each riparian State) of a shared watercourse. In addition to the aforementioned attribution/diligence-related complications, two others arise from the cumulative or 'composite' nature of the breach and the plurality of responsible/injured States. The ARSIWA specifically addressed this scenario in Articles 15(1) (composite acts), 46 (plurality of injured States) and 47(1) (plurality of responsible States), but some ambiguities remain. One concerns composite acts made of acts/omissions of several States which do not constitute, for any or for some of those States, a composite breach of an obligation. Another is the lack of clarity regarding the relations among responsible States. A third more general issue concerns the non-linearities involved in environmental processes. To put it simply, should a State that adds the straw that breaks the camel's back be responsible for placing an additional straw or for breaking the camel's back?

Environmental harm as a regulatory problem

The community frame refers to breaches to environmental obligations that are generally owed either to all States parties to a treaty (*erga omnes partes*) or to the community of States as a whole (*erga omnes*), including peremptory norms. This specificity of some primary rules may have important consequences for secondary rules.

With respect to the triggering event, the attribution and diligence-related problems discussed in relation to the bilateral framing remain relevant, and they are further complicated by the need to determine what primary rules protecting the environment may amount to a 'peremptory norm' and what composite acts/omissions may amount to a 'serious breach' under Article 40 ARSIWA. There is evidence that the prevention principle as enshrined in the UNCLOS entails *erga omnes* obligations,[218] but there is also evidence that it is not a peremptory norm.[219] Is that enough to trigger the aggravated consequences of Article 41?

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[216] *Arbitration between the Republic of the Philippines and the People's Republic of China*, PCA Case No 2013-19, Award (12 July 2016) para. 972–975.

[217] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15, para. 42.

[218] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 180.

[219] ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Yearbook of the International Law Commission, 2006*, vol. II, Part Two, 38; *Responsibilities in the Area*, 2011, para. 125-135; *Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India* (2013) 31 RIAA 1, 358, para 111.

The ARSIWA suggests the negative, but the ICJ derived these aggravated consequences, textually taken from the ARSIWA, from breaches of *erga omnes* obligations of humanitarian law by Israel.[220] An additional complication here concerns the differential character of consequences. If two States, in their bilateral relations, have agreed to derogate from the prevention principle, which is possible as observed by the tribunal in *Indus Water Kishenganga*, can other States hold the State implementing this derogation responsible (in the case, limiting the amount of water flowing in a watercourse for environmental purposes)? And then, perhaps the most complex issue of all, is that of the reparation of inaction/action leading to the crossing of environmental tipping points. That issue entirely exceeds the architecture of the ARSIWA and, indeed, of any system of secondary rules so far.

Finally, the shortcomings of the 2001 ARSIWA with respect to the processes of invocation of State responsibility by States 'other than the injured State' are well-known and very relevant here. The case law of the ICJ suggests some degree of activation of the rule underlying Article 48,[221] but only the ITLOS Seabed Chamber has referred to it explicitly.[222] Paragraph 7 of the ARSIWA commentary had anticipated this possibility. By contrast, the question of counter-measures by States other than injured States against a State massively contributing to global climate change or ecosystems collapse remains open, as it was left by Article 54 ARSIWA.

Filling Gaps

Some of the gaps and ambiguities of the ARSIWA to handle environmental harm are addressed in the other systems of secondary rules.

With respect to the bilateral framing, 'civil liability' systems organise the reparation of damage, irrespective of the loophole mentioned earlier. Liability is channeled towards the economic operator who conducts the regulated activity (e.g. the owner of the tanker transporting oil or of the nuclear facility producing electricity), the industry that benefits (e.g. the oil industry for additional layers of compensation) or the State (which provides this additional compensation in the nuclear liability regimes). However, this comes at a price. Their strict liability systems cover only very specific situations (nuclear accidents and oil pollution damage) and they are not applicable to States as subjects of international law. With the exception of damage caused by space objects,[223] there is no regime of strict liability of States in international law. In the efforts of the ILC to design such a system, strict liability of States – which was the very core of the initiative – was eventually left out, with the process resulting only in a set of 2001 Articles on Prevention (focusing on primary norms) and a set of 2006 Principles of Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities' (mere guidelines focusing on civil liability of operators, not States).

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[220] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, paras. 155-158; but see Separate Opinion of Judge Kooijmans, para 37-51).

[221] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, paras. 30-50; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, paras. 64–70; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 3, para 39-42).

[222] *Responsibilities in the Area*, 2011, para. 180.

[223] Convention on International Liability for Damage Caused by Space Objects (concluded 29 March 1972, entered into force 1 September 1972) 961 UNTS 187, Art. 2.

Similarly, a possible alternative to the shortcomings of the community frame is constituted by compliance management regimes in MEAs. These processes do not require either harm or even breach to be triggered, and they can set in motion by a wide range of actors, including other State parties but also Secretariats and in some cases the public. However, this approach also comes at a price. The secondary rules triggered by possible 'non-compliance' can only lead to non-binding recommendations. Their content is defined by the relevant Committee's terms of reference and it never includes compensation. Another alternative avenue would be to enforce the primary rules of these agreements in the context of broader standards of due diligence provided for in domestic law or human rights. Climate litigation is growing exponentially, and it has led to some remarkable success stories.[224] Yet, these cases have so far unfolded at the domestic level and under secondary rules of domestic law, even when human rights were at stake (see here, here, here). They signal, however, the potential for public interest litigation at the international level, illustrated by applications pending before the European Court of Human Rights.[225]

All in all, the global environmental crisis is increasingly showing the significant limitations of systems of secondary rules, not only the ARSIWA but also those systems specifically designed to tackle environmental degradation. In the environmental context, unsurprisingly, the best form of reparation is to prevent harm in the first place.

[224] Sandrine Maljean-Dubois, 'Climate Change Litigation', *Max Planck Encyclopedia of Public International Law* (2018); Ivano Alogna et al, *Climate Change Litigation: Global Perspectives* (Brill 2021); Francesco Sindico and Makane Moïse Mbengue, *Comparative Climate Change Litigation* (Springer 2021).

[225] E.g. discussed by Jelena Bäumler, 'Sustainable Development made justiciable: The German Constitutional Court's climate ruling on intra- and inter-generational equity' (*EJIL: Talk!, 8 June 2021)* <https://www.ejiltalk.org/sustainable-development-made-justiciable-the-german-constitutional-courts-climate-ruling-on-intra-and-inter-generational-equity/> accessed 5 November 2021; Benoit Mayer, 'Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?' (*EJIL: Talk! 3 June 2021)* <https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/> accessed 5 November 2021; and Helen Duffy and Lucy Maxwell, 'People v Arctic Oil before Supreme Court of Norway – What's at stake for human rights protection in the climate crisis?' (*EJIL: Talk! 13 November 2020)* <https://www.ejiltalk.org/people-v-arctic-oil-before-supreme-court-of-norway-whats-at-stake-for-human-rights-protection-in-the-climate-crisis/> accessed 5 November 2021' on the applicability of the European Convention on Human Rights, see Jenny Sandvig et al, 'Can the ECHR Encompass the Transnational and Intertemporal Dimensions of Climate Harm?' (*EJIL: Talk! 23 June 2021)* https://www.ejiltalk.org/can-the-echr-encompass-the-transnational-and-intertemporal-dimensions-of-climate-harm/> accessed 5 November 2021.

13. Dithering, Trickling Down, and Encoding: Concluding Thoughts on the 'ILC Articles at 20 'Symposium

Federica Paddeu and Christian J. Tams

Twenty years ago, the ILC's efforts at clarifying the rules of State responsibility came to an end. On 12 December 2001, the UN General Assembly duly 'took note' of the Articles on State responsibility, and commended them to the attention of Governments in Resolution 56/83.226 A few months earlier, in August of that same year, the ILC had finalised its work, begun in earnest almost four decades earlier and on its agenda for even longer, of spelling out 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.[227] The conclusion of the ILC's work was no last-minute victory snatched from the jaws of defeat. What had begun in sub-committee meetings in early 1963, where Roberto Ago and encouraged the Commission to focus on the secondary rules of responsibility,[228] ended not with a dramatic vote after multiple extensions of a conference — but in an orderly, perhaps even slightly anticlimactic process, faithfully recorded in the ILC Report for 2001:

> 'At its 2709th meeting, on 9 August 2001, the Commission decided … to recommend to the General Assembly that it take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and that it annex the draft articles to the resolution.'[229]

Much the same can be said for its final adoption in 2001. Introducing the draft of resolution 56/83 in the Sixth Committee, the Ecuadorian delegate stated that:

> 'the adoption on second reading by the International Law Commission of the draft articles on responsibility of States for internationally wrongful acts constituted the successful conclusion of a topic that had been on the Commission's agenda since its inception.'[230]

The adoption of the now 'Articles on State responsibility'[231] did not go unnoticed among international law observers, if only because it meant that the perennial project of State responsibility now disappeared from the ILC's agenda. But it did not prompt instant cheers and jubilations either. 'Conventionalist' commentators were unhappy with the recommended outcome: in their view, State responsibility, of all topics, cried out for a treaty, perhaps yet another Vienna Convention – so the ILC's decision to play it safe and go for a 'take note'

[226] UNGA Res 56/83 (2002).
[227] See para 1 of the introductory commentary to the ILC Articles.
[228] ILC, Report by Mr. R. Ago, Chairman of the Sub-Committee on State Responsibility, 16 January 1963, UN Doc A/CN.4/152.
[229] ILC, Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, UN Doc A/56/10, at 25.
[230] UNGA Sixth Committee, Fifty-sixth session, Official Records, Summary record of the 27th meeting, 19 November 2001, UN Doc A/C.6/56/SR.27, para 35. Not much was said during the GA plenary debate either: UNGA, Fifty-sixth session, Official Record, Summary Records of the 85th plenary meeting, 12 December 2001, UN Doc A/56/PV.85.
[231] Note that Resolution 56/83 speaks of the 'draft articles' in the preamble, but then refers to the 'Articles' in its operative part and in the Annex, thus signalling that 'this was it' – at least in substance.

approach seemed underwhelming. The 'community interest crowd', having grudgingly come to terms with the demise of 'Article 19 crimes', mourned the loss of provisional draft Article 53,[232] adopted in the interim text of 2000: this had expressly recognised a right of third-party countermeasures – but it met with some opposition in the Sixth Committee, and was replaced by the 'fudgy' Article 54 that continues to puzzle interpreters. But even among those that saw the wisdom of these decisions – on form, on Article 19, on countermeasures – relief, perhaps exhaustion, was dominant, not triumph. And by the time the news had sunk in, and relief may have turned into delight or pride, the world discussed 9/11, invasions in Afghanistan, and the war on terror, those other, rather more dramatic international law events of the second half of 2001.

So how did the story continue? It certainly did not end on 9 August 2001. Looking at the institutional side, the ILC had only passed on the baton to the General Assembly (GA). If the ILC at times, during the four decades since 1962, had seemed to dither on State responsibility, the GA has made dithering its modus operandi. Following the ILC's suggestion, the General Assembly, as noted, duly 'took note' of the Articles on State responsibility, and commended them to the attention of Governments in Resolution 56/83.[233] Other than that, though, in its engagement with State responsibility the GA has remained hesitant. It regularly discusses the topic, but then postpones the item for three years, before discussing further – and postponing again. The reason for this is simple: the GA Sixth Committee has agreed to proceed by consensus, and so far States' preferences have not permitted consensus to emerge. Many States seem to share the views of the conventionalist observers sketched out above; they would wish to convene a diplomatic conference to adopt a text in treaty form. Other States would prefer their adoption as a declaration or resolution in the GA; others still would maintain the status quo, with no further action. The number of States expressly supporting the treaty option has increased over the years (now at over 90), while the number of States opposing it has remained relatively constant: smaller in number, but firm in its resistance, and so far successful in blocking any move towards the adoption of a GA declaration or a treaty conference. In its most recent session, in 2019,[234] the Sixth Committee and its Working Group on State responsibility considered proposals to overcome the stalemate (including the possibility of considering procedural options on future action, or to increase or decrease the regularity with which the GA discusses the topic) – but none were followed. Like on groundhog day, the GA is now poised to reconsider the question in 2022. By which time 21 years will have passed since the adoption of the Articles – roughly twice as long as Roberto Ago needed to lay the foundation of the Articles in his eight reports (1969-1980), and five times as long as it took the Commission to complete the second reading of the project (1997-2001).

While the GA has dithered, the Articles have trickled into the day-to-day operation of international law and settled into the consciousness of international lawyers. As the high road of treaty-making and GA declarations is blocked, the Articles have travelled by the low road: NGOs and domestic courts cite them, as do scholars, governments and the ICJ. Sometimes,

[232] Christian J. Tams, 'All's Well That Ends Well, Comments on the ILC's Articles on State Responsibility' (2002) 62 ZaöRV 759.
[233] UNGA Res 56/83 (2002), Note that the Resolution speaks of the 'draft articles' in the preamble, but then refers to the 'Articles' in its operative part and in the Annex, thus signalling that 'this was it' – at least in substance.
[234] United Nations Sixth Committee, 74th Session, Responsibility of States for internationally wrongful acts (Agenda item 75), <https://www.un.org/en/ga/sixth/74/resp_of_states.shtml> accessed 5 November 2021.

notably in the early 2000s, such citations may have been in the form of simple signposting.[235] But over time, the Articles have sunk in; they now are the obvious reference point for any debate about State responsibility, trigger serious engagement and sometimes directly shape outcomes. The ILC, to reiterate James Crawford's point emphasised in our introductory contribution, has 'encoded the way we think about State responsibility'.[236] It has done so in the two senses of the word 'code'. By offering a systematisation of the rules in this field, the ILC has left international law with a 'code' in a legal sense. But perhaps as importantly, the ILC has also provided international lawyers with a way of speaking about, and articulating questions of, responsibility, with concepts and a terminology – with a 'code' in a lexical sense. This terminology can be forbidding, but it sticks. And so, reflecting the inescapable presence of the ILC Articles in legal discourse, students of 2021 effortlessly use the ILC's burdensome term 'circumstances precluding wrongfulness' (where 'defences' might have done), often to non-sensical effect,[237] and ageing teachers feel the need to explain what they mean by 'reprisals' (a term branded as regressive by the ILC). And beyond the terms, the ILC's encoding has left us with a mindset for thinking about responsibility: as an objective concept not necessarily dependent on fault or damage; as a general notion applying to custom and treaty breaches alike; as a system of law setting out no primary obligations, but a set of general defences and remedies; and so on and so forth.

The ILC did not, to be sure, invent the law of State responsibility: its synthesis drew on case-law, State practice, and scholarly commentary. But it came up with the blueprint; it moulded the law, and it notably distilled from the mass of material a number of general categories through which we now approach this area of law – internationally wrongful acts, attribution, aid and assistance, etc. This is no mean feat, and the fact that we hardly notice it today only reflects the success of the encoding exercise. For there were alternative approaches, notably in British scholarship: one only need to look at Ian Brownlie's *System of the Law of Nations, State Responsibility*,[238] or Philip Allott's 'Unmaking' article from 1988,[239] the former proceeding from specific causes of action and claims rather than an omnibus notion of wrongfulness, the latter unconvinced that responsibility as a category, situated somewhere 'between illegality and liability',[240] could do much useful work. But those alternatives, those other mindsets for thinking about responsibility, have faded from view; if we discuss responsibility today, we speak the 'code' of the ILC and think in its categories.

The contributions to the symposium reflect this, and they illustrate the breadth of the ILC's influence. From climate change to global trade to the conduct of hostilities, few fields of international law are shielded from the ILC's categories, which have brought, as Kubo Mačák notes in his contribution, 'a welcome degree of clarity that permeates all specific areas

[235] See on this James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Review 132.
[236] James Crawford, 'The International Court of Justice and the Law of State Responsibility' in Christian J. Tams and James Sloan (eds) *The Development of International Law by the International Court of Justice* (OUP 2013) 81.
[237] Federica Paddeu, 'Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law', in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020), 203.
[238] Ian Brownlie, *System of the Law of Nations, State Responsibility, Part I* (OUP 1983).
[239] Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29(1) Harvard Journal of International Law 1.
[240] ibid., at 6 (his fn. 18).

of international law'. For the most part (and this, too, is reflected in the contributions) this broad influence does not run very deep: by design, the ILC's framework stays clear of the primary rules; its main role is to supply categories and structures, which can be can be dispensed with by special rules under Article 55. As an exercise in unification, the ILC's residual Articles are modest, but this explains (in Katja Creutz's term) their 'tenacity' – and it explains how quickly they have been embraced by agents of international law over the course of the past 20 years: the ICRC, human rights bodies, investment tribunals and many more rely on the Articles to embed their arguments in the ILC's general categories, and thereby to enhance their own authority. All this happens to a text of which the GA has merely 'taken note', and which gains normative force through accretion, as recorded in the Secretary-General's successive compilation of decisions.[241] 'Codification light' seems to have done the trick; the low road has proved a remarkably swift gateway towards authority during the first twenty years of the ILC's text.

Has this affected the Articles; have they evolved in their 20-year journey? It seems to us that, for the most part, developments so far have left the ILC's framework and even its rules largely unchanged. This is no doubt in part because of their flexibility; provisions such as Articles 1-3, somewhere between the timeless and the banal, do not require regular updating. What is more, deviations from the ILC's framework can easily be explained away as a *lex specialis*, leaving the residual regime unaffected. But perhaps it is time, as the Articles enter their third decade, to begin to consider cautious updates and fixes. To give just one example, judging from Alex Mills's contribution to this symposium, the provisions on attribution would benefit from a careful check-in: perhaps their public-private divide needs to be finessed, at the very least, to fit a world of lean government.

Whatever the GA ultimately decides, the Articles are not the final word on State responsibility. As highlighted by our contributors, current developments and problems do not always fit neatly into the rules codified in the Articles. The rules of State responsibility will need to continually adapt as the character of States' interactions shift: whether by modification of the general rules, or by the development of specialised rules within individual fields of international law, or both. Some rules of State responsibility of the future may, and most likely will, be different from those in the Articles: we may see new or different rules on attribution, on defences, and so on. But if individual rules on responsibility may change over time, the blueprint provided by the Articles is likely to endure.

[241] UNGA, Responsibility of States for internationally wrongful acts, Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General, 23 April 2019, UN Doc A/74/83.