The future of the Articles on State Responsibility: A matter of form or of substance?

Maurizio Arcari[*]

1. *Introduction*

If one took a cursory look at the comments made by States on the Articles on the responsibility of States for internationally wrongful acts (ARSIWA or 'the Articles') adopted in 2001 by the UN International Law Commission (ILC),[1] one could hardly be surprised by the number of general statements underscoring the critical importance of this text for the international legal order. From time to time, the Articles as a whole and the secondary rules on international responsibility herein codified have been qualified as 'the root of the international legal order and [...] the basis of the whole system of international law';[2] 'the most important aspect of international law';[3] or even 'the third structuring pillar [together with the Charter of the United Nations and the Law of Treaties

[*] Professor of international law, University of Milano-Bicocca. This text draws upon an article written in Italian and previously published in A Annoni, S Forlati, P Franzina (eds), *Il diritto internazionale come sistema di valori. Studi Francesco Salerno* (Jovene, 2021) 195-211.

[1] The text of the ARSIWA is reprinted 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 (2001) II/2 YB ILC 26-30 [hereinafter ILC Report 2001].

[2] See statement by the representative of Austria at the meeting of the Sixth Committee of the General Assembly held on 28 October 2004, UN Doc A/C.6/59/SR.15 (23 March 2005) at 14 para 92.

[3] See statement by the representative of Greece at the meeting of the Sixth Committee of the GA held on 23 October 2007, UN Doc A/C.6/62/SR.13 (12 November 2007) at 2 para 2.

codified in the Vienna Convention of 1969] of the international legal order set up after the Second World War'.[4] However, in the most recent debate on the topic held at the Sixth Committee of the General Assembly (GA), there arises an additional consideration, one which presents a special significance, particularly if considered against the previous statements concerning the 'structural pillars' of international law. In the summary records of the 2019 session, it is possible to read that 'State responsibility was one of the few foundational principles of international law that had not yet been codified in the form of a legally binding instrument'.[5]

That comment brings to the forefront the issue of the 'format' of a text intended to codify the general rules of international law on State responsibility.[6] As is well known, exactly twenty years after its approval by the ILC, the Articles still retain the character of a non-binding instrument. In 2001, the GA had merely 'taken note' of the Articles and brought them to the attention of States, without, however, prejudging the question of their future adoption in the form of a convention or other appropriate action.[7] Since then, the same solution has been essentially replicated by the GA in resolutions adopted cyclically every three years.[8]

[4] See the written observations of Portugal, in 'Responsibility of States for internationally wrongful acts. Comments and information received from Governments' UN Doc A/62/63 (9 March 2007) 4 para 4.

[5] See statement made by the representative of the Russian Federation at the meeting of the Sixth AG Committee held on 15 October 2019, UN Doc A/C.6/74/SR.13 (28 February 2020) at 6 para 36. In terms of legal scholarship, the 'paradox' of the absence of an international convention on the topic of State responsibility is highlighted by P Bodeau-Livinec, 'Responsibility of States and International Organizations' in S Chesterman, DM Malone, S Villalpando, A Ivanovic (eds) *The Oxford Handbook of United Nations Treaties* (OUP 2019) 599-600.

[6] See generally on the issue D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 AJIL 857-873; K Zemanek, 'Appropriate Instruments for Codification. Reflections on the ILC Draft on State Responsibility' in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* vol 2 (Editoriale Scientifica 2004) 897-918.

[7] See GA Res 56/83 of 12 December 2001, UN Doc A/RES/56/83 (28 January 2002) para 3, where the AG 'Takes note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments *without prejudice to the questions of their future adoption* or other appropriate action' (emphasis added).

[8] See GA Res 59/35 of 2 December 2004, UN Doc A/RES/59/35 (16 December 2004); GA Res 62/61 of 6 December 2007 UN Doc A/RES/62/61 (8 January 2008); GA

Starting from 2004, the GA also asked the Secretary-General to prepare a 'compilation' of decisions of international courts and tribunals containing references to the ARSIWA,[9] with the likely aim of verifying, against the test of international judicial practice, the correspondence of the solutions embodied in the Articles with customary rules of international law. Although the compilations periodically updated by the Secretary-General have identified over 300 cases in which international courts have made express reference to individual provisions of the Articles,[10] this has so far, not been sufficient to unblock the issue of the final format of this text. While the most recent resolutions of the GA refer to the work of a special working group formed within the Sixth Committee and mention the intention to take a decision on the question of a convention on the international responsibility of States, the fact remains that the issue has once again been postponed until 2022.[11]

A glance at the debates that took place at the 2019 session of the Sixth Committee reveals that States are sharply divided between those who prefer to keep the text of the ARSIWA in its current format and those who consider its transposition into an international convention as unescapable.[12] The arguments of principle invoked in favour of one or the other solution also involve the broader issue of the appropriate methods

Res 65/19 of 6 December 2010, UN Doc A/RES/65/19 (10 January 2011); GA Res 68/104 of 16 December 2013, UN Doc A/RES/68/104 (18 December 2013); GA Res 71/133 of 13 December 2013, UN Doc A/RES/71/133 (19 December 2013); and, most recently, GA Res 74/180 of 27 December 2019, UN Doc A/RES/74/180 (27 December 2019).

[9] See UN Doc A/RES/59/35 (n 8) para 3.

[10] See the reports of the Secretary-General 'Responsibility of States for internationally wrongful acts. Compilation of decisions of international courts, tribunals and other bodies' UN Doc A/62/62 (1 February 2007) and Add 1 (17 April 2007) (reporting 131 cases of decisions containing references to the Articles); UN Doc A/65/76 (30 April 2010) (reporting 25 cases); UN Doc A/68/72 (30 April 2013) (reporting 56 cases); UN Doc A/71/80 (21 April 2016) and Add 1 (20 June 2017) (reporting 72 cases); UN Doc A/74/83 (23 April 2019) (reporting 86 cases).

[11] See most recently UN Doc A/RES/74/180 (n 8) para 9, where the GA decided to include the item in the agenda of its 77th session of 2022 and 'to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles'.

[12] See in this regard the report of the representative of Brazil, Chair of the Working Group on State responsibility, at the meeting of the GA Sixth Committee held on 11 November 2019, UN Doc A/C.6/74/SR.34 (29 November 2019) 3-4 paras 13-21.

for the codification of the general rules of international law, which seems to go beyond the specific case of secondary rules on the international responsibility of States.[13] However, the most recent discussions in the Sixth Committee reveal that, in a matter as delicate and critical as international responsibility, issues of form and of substance are intimately linked. Hence, the relevant debate suggests that there are more intricate questions, touching upon the content of the Articles under consideration, which appear to be at stake beyond the mere question of the 'format' of the codification instrument.

2. *The pros and cons of a convention on the international responsibility of States*

It is worthwhile to provide here an overview of the debate carried out both at the ILC and in the Sixth Committee of the GA on the appropriate 'format' for the Articles on international responsibility.

The topic had already been addressed by the ILC at the stage of the second reading of draft articles, when the problem arose of determining the action to be recommended to the GA under Article 23 of the Commission's Statute.[14] Introducing the issue at the ILC session of 1998, the special rapporteur James Crawford highlighted the 'considerable strategic importance' of the question. Contextually, he also recommended postponing the discussion of the eventual form of the draft articles at a time when their scope and content were finally determined, considering that 'deferring consideration of the form of the instrument has the desirable effect of focusing attention on its content'.[15] A few years later, when taking up the point at the ILC session of 2001, the special rapporteur

[13] See generally F Lusa Bordin, 'Reflections on Customary International Law. The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 ICLQ 535-567.

[14] According to art 23(1) of its Statute, after the adoption of a final draft and its inclusion in an explanatory report, the ILC may recommend to the GA: '(a) to take no action, the report having already been published; (b) to take note or adopt the report by resolution; (c) to recommend the draft to Members with a view to the conclusion of a convention; (d) to convoke a conference to conclude a convention'.

[15] See J Crawford, 'First Report on State Responsibility' UN Doc A/CN.4/490 and Add. 1-7 (24 April-12 August 1998) reprinted in (1998) II/1 YB ILC 9 paras 39-42.

reiterated that the matter of the final form of the draft on State responsibility 'is one of policy for the Commission as a whole' and emphasized the impact that the overall balance achieved in the text still under discussion would have in this choice. Outlining the available alternatives, Crawford expressed his personal preference for the simplest and most practical solution, consisting of a resolution of the GA taking note of the text and commending it to Governments.[16]

In the ensuing debate, the members of the Commission were divided on the different options.[17] Some voices were adamant in recommending that the GA should convene a diplomatic conference to adopt a convention: in particular, it was emphasized that only the transposition of the draft into a binding treaty, besides corresponding to the previous practice followed by the ILC in the codification of the law of treaties, could guarantee the need for legal certainty in such a critical area as the international responsibility of States.[18] Conversely, other members of the ILC underscored the uncertainties that would be carried out by the reopening of negotiations on the draft articles in a diplomatic conference of States; further to this, the additional risk was evoked that the text of a convention resulting from this negotiation would fail to receive the number of ratifications necessary for the entry into force, thus eventually leading to a 'decodification' of the topic of State responsibility.[19] In the context of this confrontation, the entangling between the formal question of the final form of the draft and the substantive issue concerning the scope and content of the rules herein codified was also mentioned. In particular, according to some, the fact that certain provisions of the draft incorporated *de lege ferenda* solutions would made their adoption by a diplomatic conference of States highly problematic; conversely, for others the very aspect of the progressive development of the law of international

[16] See J Crawford, 'Fourth Report on State Responsibility' UN Doc A/CN.4/517 and Add 1 (2-3 April 2001) reprinted in (2001) II/1 YB ILC 7 para 26.

[17] The debate on this issue, with the various options presented, is summarized in ILC Report 2001 (n 1) 24-25 paras 61-67.

[18] See 'Summary records of the meetings of the fifty-third session 23 April-1 June and 2 July-10 August 2001' (2001) I YB ILC eg the statements of Economides (at 11 paras 13-17), Momtaz (at 13-14 paras 35-36), Kateka (at 14 paras 37-38), Herdocia Sacasa (at 19-20 paras 7-9).

[19] ibid eg the statements of Yamada (at 7 paras 2-4), Hafner (at 10 paras 2-10), Galicki (at 13 paras 29-31), Pellet (at 15 paras 41-42).

responsibility covered by the articles called for an authoritative confirmation through a convention instrument.[20]

Following this debate, informal consultations led the members of the Commission to converge on a 'two-stage approach' for solving the problem.[21] In the end, at the same time as adopting the second reading of the draft, the ILC recommended that the GA in a first stage take note of the articles on international responsibility and attach their text to a resolution; and further recommended that the GA postpone to a second stage the possible decision on the convening of a diplomatic conference for the adoption of a convention.[22]

As already mentioned, the 'light' approach[23] suggested by the ILC was endorsed by the GA in 2001 with regard to the first stage and then reaffirmed with minor variations in the following years; no decision has yet been reached by the GA on the second, more demanding, stage. Without it being necessary to explore in detail the positions expressed by individual States,[24] it can just be mentioned that two conflicting positions, respectively in favour of the conclusion of a convention on the international responsibility of States and of the maintenance of the ILC text in its current form, have coalesced within the GA Sixth Committee. It can be added that the reasons put forward in support of one or the other

[20] See on this point the exchange of views between Rosenstock, Dugard, Pellet, Tomka, Economides, Brownlie and Crawford, ibid 16-17 paras 50-60.

[21] See special rapporteur Crawford's account of the outcome of these informal consultations, ibid 66-67 paras 61-65.

[22] See the ILC's recommendations to the GA in ILC Report 2001 (n 1) 25 paras 72-73: '[the Commission recommend] to the General Assembly that it take note of the draft articles ... in a resolution, and that it annex the draft articles to the resolution ... [the Commission recommend] that the General Assembly consider, at a later stage, and in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles on responsibility of States for internationally wrongful acts with a view to concluding a convention on the topic'.

[23] See the thoughtful expression used in this regard by S Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) 8 Brazilian YB Intl L 117 ff.

[24] For a detailed examination of the positions of States in the Sixth Committee, updated at the 2016 session of the GA, as well as for a review of the reasons in favour of one or the other position, see FI Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments (2018) 21 Max Planck YB United Nations L 83 ff. Previously, see also J Crawford, S Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959 ff.

orientation do not deviate from those which had already emerged during the debates at the ILC. On the one hand, the demand for an authoritative determination of the general rules on international responsibility through a negotiation involving all States and resulting in a binding document, has been asserted.[25] On the other hand, the danger that a negotiation carried out by a diplomatic conference could reopen and alter the delicate balance achieved by the codification work of the ILC on State responsibility, as well as produce a convention text possibly destined never to enter into force, has been advanced.[26]

Against these positions of principle, which the different groups of States have almost invariably repeated throughout the sessions of the Sixth Committee over the past two decades, it is interesting to note that some new elements had emerged during the most recent discussion held in the Sixth Committee of the GA in 2019. On that occasion, some States pointed out that the review of case law prepared by the Secretary-General, while important in providing evidence of the wide use of the ARSIWA in judicial practice, cannot hide the fact that some of its parts or provisions still remain controversial and are poorly applied.[27] In the same vein, other States have pointed out the risks that a selective or contradictory judicial application of the Articles could produce in terms of fragmentation of the general rules on international responsibility.[28] Finally, more straightforwardly, some States have expressed their growing unease with the fact that the cyclical three-year discussion on the form of the Articles has distracted attention from the substantive problems of the subject matter.[29] In the same vein, a more frequent examination of the

[25] See, by way of example, the written comments to the Articles by Mexico and Portugal, 'Responsibility of States for internationally wrongful acts. Comments and information received from Governments' UN Doc A/71/79 (21 April 2016) respectively 4-6 and 6-7.

[26] See for instance the written comments of Australia and the United Kingdom, ibid respectively 2-3 and 7-8.

[27] See for example, albeit with opposing conclusions about the final form of the Articles, the views expressed by China, the United States and the Russian Federation at the meeting of the Sixth Committee held on 15 October 2019, UN Doc A/C.6/74/SR.13 (n 5) respectively 3-4, para 17; 5 paras 25-26; and 6-7 paras 36-38.

[28] See the statements of the representatives of Portugal and Micronesia, ibid respectively 10 paras 61 and 64.

[29] See the statement of the representative of South Africa at the Sixth Committee meeting held on 16 October 2019, UN Doc A/C.6/74/SR.15 (7 January 2020) 2 para. 1:

topic of State responsibility by the Sixth Committee, to be carried out on an annual basis and focusing on substantive and procedural issues involved in the application of the Articles, has been called for.[30]

Taken together, the latter expressions of discontent by States reveal that, in the debate on the fate of the ARSIWA, matters of form are inevitably intertwined with questions of substance, bearing upon the content of the secondary rules on international responsibility. It is on the latter questions that we must now briefly focus our attention.

3. *A matter of form or of substance? Some unsettled questions under the ARSIWA*

One of the strongest arguments put forward by States to argue that the ARSIWA should be retained in their present form is that this text, notwithstanding its status as a non-binding instrument, has proved to have an impact on practice and, in particular, has been widely used in international case-law.[31] This argument is corroborated by the data provided for in the various compilations of judicial practice prepared by the Secretary-General, which attest to the considerable 'quantitative' impact of the Articles, which have been quoted in several decisions of international courts and tribunals. However, if one turns their attention to the 'qualitative' side of the matter, the feedback is revealed to be much more controversial. Most of the judicial cases reported in the compilations of the Secretary-General refer to the provisions included in part one of the Articles (concerning the 'international wrongful act of a State' or the origin of international responsibility), while the number of relevant precedents decreases considerably if one turns their attention to part two (concerning the 'content of the international responsibility of a State' or the consequences of international responsibility) and cover very few cases

'[...] the focus of the Committee's deliberations should be shifted from the appropriateness of developing a convention to substantive aspects of the matter'.

[30] See the statement of Mexico, UN Doc A/C.6/74/SR.13 (n 5) 5 para 28: 'To break the impasse, the Committee should consider the topic on an annual basis, to allow for more substantive discussions than the triennial cycle allow[s]'.

[31] Cf. eg the written comments of Germany and the Netherlands in 'Responsibility of States for internationally wrongful acts. Comments and information received from Governments' UN Doc A/65/69 (14 May 2010) respectively at 3 and 5-6.

relevant for the provisions of part three (concerning the 'implementation of the international responsibility of a State'). To give an example limited to the most recent compilation, covering the period from 1 February 2016 to 31 January 2019, among the 166 references to the Articles contained in decisions herein collected, as many as 100 concern the provisions of part one, 59 relate to the part on the content of international responsibility, only 5 concern the part on the implementation of international responsibility, and 2 concern the final provisions of the Articles.[32] In sum, an examination of the disaggregated data provided for in the compilation seems to justify the United Kingdom's recent assertion that 'it is still premature to say that [the Articles] reflect in their entirety customary international law or a settled consensus of views among States. There remains a varied spectrum of State views concerning a number of issues'.[33]

It is obviously not possible here to enter into a systematic review of all the problematic aspects that affect the scope and content of ARSIWA. However, it may be worth considering a few issues, each selected with reference to the three main parts of the Articles, in respect of which relevant practice appear to provide controversial suggestions.

3.1. *Issues relating to part one of the ARSIWA (the 'origin' of international responsibility)*

To begin with part one of the Articles, it is appropriate to point out that a considerable disproportion exists in international case-law between the number of decisions relevant for the provisions on the attribution of the conduct to the State (the so-called 'subjective element' of international responsibility) and those dealing with the breach of an international obligation (the so-called 'objective element' of international responsibility).[34] This can be explained in the light of the fact that the latter

[32] See 'Compilation of decisions of international courts' UN Doc A/74/83 (n 10). The numbers mentioned in the text refer to individual citations of the Articles, which can be mentioned several times in the context of a single court decision. This explains the significantly lower number of decisions listed in the 2019 compilation, which amounts to 86.

[33] See 'Responsibility of States for internationally wrongful acts. Comments and information received from Governments' UN Doc A/74/156 (12 July 2019) 4-5.

[34] The Secretary-General's compilation of 2019 refers to 63 decisions of international courts and tribunals concerning the articles on the attribution of the wrongful conduct to

provisions were drastically curtailed by the ILC in the transition between the first and second reading of the draft. As is well known, in particular the articles concerning the breach of obligations of conduct, of result and of prevention of a given event[35] were removed from the draft due to their controversial nature.[36] Among the various factors that led to this decision by the ILC, there was the consideration that the distinction between obligations of conduct, result and prevention appeared to be poorly and inconsistently applied in international case-law.[37]

However, a glance at the judicial practice after 2001 seems to justify a different conclusion. In its judgment of 2007 relating to the dispute between Bosnia and Herzegovina/Serbia and Montenegro, the International Court of Justice (ICJ) qualified the obligation to prevent genocide as 'one of conduct and not of result', in the sense that a State cannot be considered under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide, but rather only to employ all means reasonably available to prevent genocide, 'so far as possible'. The Court specified that '[a] State does not incur responsibility simply because the desired result is not achieved', but only when it is shown that it has manifestly failed to take all measures to prevent genocide which were within its power and which might have helped to prevent genocide; and it added that '[i]n this area, the notion of "due diligence" [...] is of critical importance'.[38] On the other hand, the Court considered that a State

the State (arts 4-11), as opposed to only 8 citations of provisions relating to the breach of an international obligation (arts 12-15): see 'Compilation of decisions of international courts' UN Doc A/74/83 (n 10) 9-24.

[35] See arts 20, 21 and 23 adopted on first reading by the ILC at its sessions of 1977 and 1978, respectively reprinted in (1977) II/2 YB ILC 9-11 and (1978) II/2 YB ILC 78-79.

[36] For an exhaustive reconstruction of the issue see A Marchesi, 'The Distinction between Obligations of Conduct and Obligations of Result following its Deletion from the Draft Articles on State Responsibility' in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* vol 2 (Editoriale Scientifica 2004) 827-852.

[37] See in particular 'Report of the International Law Commission on the work of its fifty-first session (3 May-23 July 1999)' reprinted in (1999) II/2 YB ILC 59 paras 147-149.

[38] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment 26 February 2007) [2007] ICJ Rep 220-221 para 430. The Court added that 'A State does not incur responsibility simply because the desired result is not achieved' (ibid).

could be held responsible for the breach of the obligation to prevent genocide 'only if the genocide was actually committed' and, in support of the latter conclusion, referred to the 'general rule of law of State responsibility' codified in Article 14(3) of ARSIWA.[39] According to the latter provision, 'the breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation'.[40] Insofar as this text comes close to the old Article 23 of the first reading, devoted to the breach of the obligation to prevent a given event,[41] it probably represents the only remaining echo in ARSIWA of the past, and later abandoned, distinctions concerning obligations of conduct and of result.

In its subsequent judgments in the Argentine/Uruguay pulp mills case and in the Costa Rica/Nicaragua dispute over certain activities in the border area, the ICJ reiterated that the State's obligation to prevent transboundary damage is a duty of conduct qualified by due diligence, and elaborated some sophisticated (even if not always crystal-clear) reasoning intended to clarify the conditions governing the breach of the same obligation.[42] A similar qualification of the obligation to prevent cross-border environmental damage has since been endorsed by subsequent jurisprudence of arbitral or specialized tribunals.[43] Curiously, however, neither

[39] ibid para 431. The latter conclusion of the Court has been rightly criticized by scholars: see eg S Forlati, 'The Legal Obligation to Prevent Genocide: Bosnia v. Serbia and Beyond' (2011) 31 Polish YB Intl L 200-201.

[40] See the full text of art 14 ARSIWA, devoted to the extension in time of the violation of an international obligation, and the commentary thereto, in ILC Report 2001 (n 1) 59-62.

[41] The text art 23 adopted by the ILC on first reading in 1978 (n 35) reads as follow: 'When the result required of a State by an international obligation is prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result'.

[42] See ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment 20 April 2010) [2010] ICJ Rep 14, especially para 187; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment 16 December 2015) [2015] ICJ Rep 665 especially para 104.

[43] Cf eg International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chambers)* (Advisory Opinion 1 February 2011) [2011] ITLOS Rep 10 para 110; Permanent Court of

the most recent judgments of the ICJ nor those of other international tribunals have made express reference to Article 14(3) of the ARSIWA, even though the judges were dealing with issues (the violation of preventive obligations) that were conceptually very close to those already considered in the Genocide case, and in spite of the correspondence (claimed by the ICJ in that same judgment) of the latter provision with a general rule of international responsibility.

To sum up, on the one hand, international case-law continues to use the distinction between obligations of conduct and obligations of result in order to determine the existence of a breach of international law, notwithstanding the lack of clear and express indications on the matter in the ARSIWA. On the other hand, the same jurisprudence reveals a certain unease with the use of the only provision of the ARSIWA that would provide some guidance on this matter, namely Article 14(3). It can be concluded that, on the subject of a breach of an international obligation, the ARSIWA reveals, if not gaps to be filled, certainly some aspects worthy of further clarification.

3.2. *Issues relating to part two of the ARSIWA (the 'consequences' of international responsibility)*

One of the most controversial aspects of part two of the Articles regards the 'special consequences' of the breach of obligations protecting fundamental interests of the international community. The issue is dealt with in Articles 40 and 41 of ARSIWA which, respectively, identify the category of 'serious breaches' of obligations arising under peremptory norms of general international law; and set forth as particular consequences thereof the obligation of all States to cooperate to put an end to any serious breach and the obligation not to recognize as lawful a situation created by a serious breach nor render aid or assistance in maintaining that situation.[44]

Arbitration, *South China Sea Arbitration (Republic of The Philippines v People's Republic of China)* (2020) 33 RIAA 155 para 944; Inter-American Court of Human Rights, *Environment and Human Rights*, Advisory Opinion OC-23/17 (15 November 2017) <www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf> para 143.

[44] See the text of arts 40 and 41 ARSIWA and the commentary thereto in ILC Report 2001 (n 1) 112-116.

This solution has been criticized not only by the most accurate scholars,[45] but also by some States on the ground that it circumscribes the notion of serious breaches to the narrow circle of *jus cogens* obligations, thereby creating a misalignment with the category of *erga omnes* obligations.[46] Even more so, if one considers that the category of *erga omnes* obligations is taken as a reference by Article 48(1)(b) ARSIWA to identify States 'other than the injured State' entitled to invoke international responsibility in the event of breach of obligations owed to the international community as a whole.[47] In light of this, it may be interesting to assess the solution elaborated by the ILC in Articles 40 and 41 ARSIWA against the test of judicial application.

In its 2004 advisory opinion on the construction of a wall of separation in Palestine, the ICJ held that Israel breached several *erga omnes* obligations, including the obligation to respect the right of self-determination of the Palestinian people as well as certain obligations under international humanitarian law. As to the legal consequences of these violations, the Court affirmed the obligation of all States not to recognize the illegal situation created by the construction of the wall in the occupied territories and the obligation not to provide aid or assistance in maintaining the situation created by this construction.[48] Although in fact this conclusion largely echoed the logic of Article 41 ARSIWA adopted

[45] Cf in particular P Picone, 'Obblighi erga omnes e codificazione della responsabilità internazionale degli Stati' (2005) 88 Rivista di Diritto Internazionale 893 at 926-932.

[46] Cf eg the remarks made at the 2001 session of the Sixth Committee of the GA by the representatives of Finland and Poland, respectively UN Doc A/C.6/56/SR.11 (9 November 2001) 5-6 paras 31-32 and UN Doc A/C.6/56/SR.13 (23 November 2001) 7 para 34.

[47] See the text of art 48 ARSIWA and the commentary thereto in ILC Report 2001 (n 1) 126-128. One must note that the ILC decision to limit the issue of 'special consequences' to cases of serious breaches of obligations arising under peremptory norms of general international law was introduced in the final stages of the adoption of the Articles, during the 2001 session. Interestingly, arts 41 and 42 provisionally adopted at the previous session in 2000 were concerned with 'a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests' (see 'Report of the International Law Commission on the work of its fifty-second session (1 May-9 June and 10 July-18 August 2000)' UN Doc A/55/10 (2000) II/2 YB ILC 69).

[48] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion 9 July 2004) [2004] ICJ Rep 136 paras 157 and 159.

a few years earlier by the ILC, the Court refrained from expressly citing this provision in the context of the advisory opinion. From the Court's silence, one could infer a sense of frustration for the above mentioned choice of the ILC to limit the subject of 'special consequences' of serious breaches to the category of obligations arising under peremptory norms of general international law.[49]

The hiatus from the solution elaborated by the ILC in Articles 40 and 41 ARSIWA becomes even more evident if one considers the most recent advisory opinion given by the ICJ in the case of the Chagos Islands. In its 2019 opinion, the Court held that the separation of the Chagos archipelago from Mauritius and the UK's continued administration over the archipelago were not consistent with the principle of self-determination of peoples.[50] The (re)affirmation by the Court that the right of self-determination of peoples is the object of an *erga omnes* obligation was not, however, followed by an equally clear determination of the consequences arising for third states from the breach of that obligation. In this regard, the Court merely underscored the obligation of all UN Members States to co-operate with the Organization to put into effect the modalities defined by the GA to ensure the full completion of the decolonization of Mauritius.[51] Despite the fact that the point had been raised by some of the participants in the proceedings,[52] the Court failed to elaborate upon the possible obligation of States not to recognize the unlawful situation resulting from the United Kingdom's continued administration over the Chagos

[49] See on this point the separate opinion of Judge Kojimaans appended to the Advisory Opinion of 9 July 2004 [2004] ICJ Rep 231-232 paras 40-45. Among legal scholars see A Bianchi, 'Dismantling the Wall: The ICJ's Advisory Opinion and Its Likely Impact on International Law' (2004) 47 German YB Intl L 379-380.

[50] See ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion 25 February 2019) [2019] ICJ Rep 138 para 177.

[51] ibid 139 para 180.

[52] ibid 138 para 176. Cf in particular, 'Written Statement of the Kingdom of The Netherlands (27 February 2018) para 4.10; 'Written Submission of the Republic of Djibouti' (1 March 2018) paras 50-53; 'Written Statement of the African Union' (1 March 2018) paras 247-255; 'Written Statement of the Argentine Republic' (1 March 2018) para 68 (all available at <https://icj-cij.org/en/case/169/written-proceedings>).

and on the cognate obligation not to assist the United Kingdom in maintaining this situation.[53] The reticence of the Court on this point is further evidenced if compared with GA resolution 73/295, adopted in the aftermath of the advisory opinion. This text seems to overcome the rather prudent conclusions of the ICJ, insofar as it not only reiterates the engagement of all Member States to cooperate with the United Nations to ensure the completion of decolonization of Mauritius as rapidly as possible, but it also calls upon the same States 'to refrain from any action that will impede or delay the completion of the process of decolonisation of Mauritius in accordance with the advisory opinion of the Court and the present resolution'.[54] While the reasons for the Court's reticence on the issue may be a matter for speculation, one cannot refrain from noting that the Chagos case stands as another indicator of the uncertainties surrounding the regime of special consequences of serious breaches of international law as enshrined in the ARSIWA.[55]

3.3. *Issues relating to part three of the ARSIWA (the 'implementation' of international responsibility)*

Turning to part three of ARSIWA, concerning the implementation of international responsibility, it is not surprising that the provisions here included have found little application in case-law. This is especially so if one considers that the ILC itself was prominent in underscoring that some of the articles of that part (in particular, Article 48 concerning the invocation of responsibility by a State other than an injured State) involve a measure of progressive development of international law.[56]

The lack of recognition in the case-law of international courts and tribunals is therefore even less surprising if one takes certain provisions

[53] This point is noted, with reference to arts 40 and 41 ARSIWA, in the separate opinions of Judges Sebutinde and Robinson appended to the opinion of 25 February 2019 [2019] ICJ Rep respectively 288-289 para 39 and 326 para 89.

[54] See GA Res 73/295 of 22 May 2019, UN Doc A/RES/73/295 (22 May 2019) para 5.

[55] See F Salerno, 'The obligation not to recognise illegitimate territorial situations after the International Court of Justice's opinion on the Chagos Islands' (2019) 102 Rivista di Diritto Internazionale 729 ff 735-738, 740-742 and 750.

[56] See eg para 12 of the commentary to art 48 ARSIWA, ILC Report 2011 (n 1) 127. However, for a rare judicial application of the latter provision see the Advisory Opinion of 1 February 2011 by the Seabed Disputes Chamber of the ITLOS (n 43) para 180.

of part three that are not meant to express substantive rules but which merely seek to lay down some non-prejudice clauses and which are intended to leave the matter open to the developments of international practice. This is the case with the formula contained in Article 54 of the draft, which considers, without solving it, the question of so-called 'collective countermeasures', ie the entitlement of States other than the directly injured State to resort to countermeasures in the event of a breach of obligations owed to the international community as a whole. As is well known, in the closing stages of its codification effort on State responsibility, the Drafting Committee of the ILC had provisionally adopted a text which, while expressly admitting the right of 'third' States to take countermeasures, made this entitlement subject to certain conditions, such as the prior request of the State directly injured by the breach, and the commitment of 'third' States to cooperate to ensure that the conditions and limits (eg proportionality) for resorting to countermeasures were respected.[57] However, considering the issue too controversial, at the 2001 session the ILC abandoned this hypothesis and came to the current text of Article 54, according to which the Articles do 'not prejudice the right of any State, entitled under Article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State [...]'.[58] As explained by the commentary to this provision, the choice of this formula (that in fact leaves the problem open) mainly lies in the consideration that international practice concerning countermeasures taken to protect a collective interest is 'uncertain (…) sparse and [it] involves a limited number of States'.[59]

Although there is no jurisprudential evidence on this point, it is however true that since 2001 the practice of countermeasures taken by States

[57] The text of draft art 54 ('Countermeasures by States other than the injured State') provisionally adopted by the Drafting Committee at the 2000 session of the ILC read as follows: '1. Any State entitled under article 49, paragraph 1, to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this chapter. (…) 3. Where more than one State takes countermeasures, the States concerned shall cooperate in order to ensure that the conditions laid down by this chapter for the taking of countermeasures are fulfilled': see 'Report of the International Law Commission on the work of its fifty-second session' (n 43) 70-71.

[58] See the text of current art 54 and the commentary thereto in ILC Report 2001 (n 1) 137-139.

[59] See para 6 of the ILC commentary to art 54, ibid 139.

or international organizations other than the direct victim of a breach of obligations protecting fundamental interests of the international community has grown exponentially.[60] Among the well-known examples one may mention the measures taken in freezing economic assets since 2011 by various European and non-European countries against the government of Damascus following the serious violations of human rights and international humanitarian law committed in the context of the conflict in Syria;[61] the unilateral sanctions taken by various States against the Government of Myanmar in reaction to the serious human rights violations committed in that country, most recently reaffirmed after the military coup of February 2021;[62] as well as the waves of economic sanctions taken against Russia by the United States and the European Union in response, first, to the unlawful occupation of Crimea in 2014[63] and, after 24 February 2022, to the ongoing aggression against Ukraine.[64] In short, there is enough material to cast doubt on the conclusion endorsed by the ILC in 2001 and to argue, with one author, that the current practice of collective countermeasures '[neither] lacks the required *opinio iuris*, nor indeed is too selective'.[65]

It is precisely this growth in relevant practice that should make it advisable to reassess the issue of the legal limits applicable to countermeasures taken by 'third' States. As submitted above, after some consideration by the ILC, this issue had been improvidently abandoned in the very final

[60] See in this regard the accurate review of relevant international practice post-2001 in M Dawidowicz, *Third-party Countermeasures in International Law* (CUP 2017) 193-238. For a more recent assessment see also D Alland, 'Les mesures de reaction à l'illicite prises par l'Union Européenne motif pris d'un certain intérêt général' (2022) 105 Rivista di Diritto Internazionale 371 ff.

[61] Dawidowicz (n 60) 220-231.

[62] ibid 193-203 and, recently, EU Council Decision (CFSP) 2021/639 of 19 April 2021 amending Decision 2013/184/CFSP concerning restrictive measures in view of the situation in Myanmar/Burma [2021] OJ/132-12.

[63] See M Arcari, 'International Reactions to the Crimea Annexation under the Law of State Responsibility: Collective Countermeasures and Beyond?' in W Czaplinski, S Debski, R Tarnogórski, K Wierczynska (eds), *The Case of Crimea's Annexation under International Law* (Scholar Publishing House 2017) 223-235; and Dawidowicz (n 60) 231-238.

[64] See eg the recent 'sixth package' of sanctions against Russia (and Belarus) set forth in the different regulations and decisions adopted by EU Council on 3 June 2022, gathered in [2022] OJ L153/1 ff.

[65] C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 250.

stages of the elaboration of the ARSIWA.[66] It is no coincidence that, in their recent interventions on the topic of State responsibility at the Sixth Committee of the GA, some States have underscored the need for a re-appraisal of collective countermeasures along these lines.[67]

4. *Conclusions*

The previous sections have only touched upon some critical questions regarding the scope and content of the secondary rules on international responsibility codified in the ARSIWA. The purpose, however, was not to enter into the merits of the issues themselves, but rather to focus on some more general risks to which the Articles are currently exposed. The review carried out above has shown that some of the solutions enshrined in the ARSIWA have either been superseded or contradicted by international judicial practice (when available) or that they no longer correspond to the current practice of States. Given this state of affairs, the persistent – and seemingly inconclusive – debate on an appropriate format for the Articles risks obscuring some critical substantive issues, involving the correspondence of certain provisions of ARSIWA with existing customary law on international responsibility as well as, ultimately, the effectiveness of this text as a whole. Correctly then, several States, during the most recent discussion of the issue at the GA Sixth Committee, pointed out that further dragging out the question of the final format of the Articles risks causing a fragmentation in its application and a dispersion of its authority, as well as spreading the impression of a lack of interest in the international community of States about the general rules on international responsibility.[68]

In view of the controversial nature of some of the provisions included in the ARSIWA, and of their dubious conformity with international customary law, there seems little point in insisting on the solution, still stub-

[66] See the text accompanying (n 57-59) above.

[67] See the statements of the representatives of China, Russia and Iran at the meeting of the Sixth Committee of GA held on 15 October 2019, UN Doc A/C.6/74/SR.13 (n 5) respectively 3-4 para 17, 6-7 para 36 and 9-10, para 59.

[68] Cf the statements of the representative of Portugal and Micronesia, ibidem 10, respectively paras 61 and 64.

bornly suggested by certain States, consisting of waiting for a further 'sedimentation' of the Articles in international case-law.[69] All things considered, an operative decision on the part of the GA – for example launching a preparatory committee mandated to discuss the substance of the most controversial solutions of ARSIWA and focusing on selected clusters of provisions worthy of further study – cannot be delayed any longer.[70] This seems an inescapable step to ensure that the debate on the form of the Articles would realign with that on the substance of the rules on international law of State responsibility. This will prove critical in order to prevent a process of progressive 'erosion' of one of the founding pillars of the international legal order, with all the foreseeable consequences in terms of certainty of international law.

[69] Cf eg the positions expressed by Germany and the Netherlands (n 31) above.

[70] See to this effect the suggestions put forward by the representatives of Cameroon, Mexico, Portugal and Micronesia at the meeting of the Sixth AG Committee held on 15 October 2019, UN Doc A/C.6/74/SR.13 (n 5) respectively at 8 para 47; 5 para 28; 10 para 62; and 10, para 65. On the 'technical' options available in this regard, see Bodeau-Livinec (n 5) 609-610.