Encoding the law of State responsibility with courage and resolve: James Crawford and the 2001 Articles on State Responsibility

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ABSTRACT

1.

The breadth of James Crawford's work as an academic and practitioner of international law is astonishing: from boundary delimitation to foundational sources questions to the complexities of annulment in investment arbitration, little seemed beyond his grasp or interest. From the 1990s onwards, State responsibility became a focus of his work, guiding the International Law Commission (ILC) through a swift second reading of the Articles on Responsibility of States for Internationally Wrongful Acts (Articles). The eventual text, adopted in 2001 and annexed to United Nations General Assembly resolution 56/83, while reflecting a collective ILC effort, bears his imprint. In this contribution, we take three observations by Crawford as prompts for a discussion of both his role in their crafting and of the Articles' place in contemporary international law. First, the Articles have 'encoded the way we think about [State] responsibility'. Second, this encoding exercise marked 'a step in the direction of profitable generalization'. Finally, the fact that this exercise resulted in a formally non-binding text has permitted 'the Articles as part of the fabric of general international law to be consolidated and refined' in the day-to-day interpretation and application of international law. We conclude with brief remarks on their future status.

Keywords: *Draft Articles, State responsibility, International Law Commission, international obligations, James Crawford*

2. INTRODUCTION

The breadth of James Crawford's work as an academic and practitioner of international law is astonishing: from boundary delimitation, to foundational sources questions, to the complexities of International Centre for Settlement of Investment Disputes (ICSID) annulment, little seemed beyond his grasp or his interest. From the 1990s onwards, State responsibility became a focus of his work. As the International Law Commission's (ILC or Commission) fifth Special Rapporteur on the topic, employing (as Bruno Simma recently noted) an admirable combination of 'intellectual courage and resolve',[1] Crawford guided the Commission through a swift second reading of the Articles on Responsibility of States for Internationally Wrongful Acts, typically called the Articles on State Responsibility (Articles or ILC Articles). The eventual text, adopted in 2001 and annexed to United

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[1] Bruno Simma, 'The ILC's Work on State Responsibility: Personal Reflections' in Federica Paddeu and Christian J Tams (eds), *The ILC Articles at 20: A Symposium* (GCILS Working Paper Series 11/2021) <https://gcils.org/wp-content/uploads/2021/12/25352-The-ILC-Articles-at-20.pdf> accessed 4 April 2022, 8.

Nations (UN) General Assembly resolution 56/83,[2] while reflecting a collective ILC effort, bears his imprint.

Our discussion in the following paper steps back and reflects on the role of the ILC Articles in the wider field of international law.[3] Three comments by James Crawford, which in our view capture three essential features of the ILC Articles, structure the discussion. First, the Articles have 'encoded the way we think about [State] responsibility'.[4] Second, this encoding exercise marked 'a step in the direction of profitable generalisation'.[5] Finally, the fact that this exercise has resulted in a formally non-binding text has permitted the Articles as 'part of the fabric of general international law … to be consolidated and refined' in the day-to-day interpretation and application of international law.[6] We use these three observations as prompts for a series of comments on the status of one of international law's canonical documents, 20 years after its adoption, before ending with brief remarks on its future status.

1.

3. ENCODING THE LAW OF STATE RESPONSIBILITY

The ILC Articles are among the discipline's best-known texts, being one of the most consulted and cited. It is difficult to 'do' international law, or credibly pretend to do so, without at least a general knowledge of the ILC Articles. Indeed, as section 4 will show, the ILC Articles are essential in the day-to-day working of many fields of international law. This owes a lot to their subject matter: regulating responsibility for the breach of legal rules is a central function of legal systems and hugely relevant in the practical application of the law; international law is no exception.[7] But there is more to the Articles than subject-matter relevance. Whereas international law's approach to other central, practically relevant matters (such as jurisdiction or statehood) remains diffuse and elusive, the framework of the 'law of State responsibility' can be easily located in a text of 59 provisions, readily available online and in any decent statute book. At no more 14 pages of text in the ILC's Yearbook, this framework is rather easily digestible, at least by international legal standards.

Unsurprisingly, James Crawford was often asked to comment on the ILC Articles. From early on in his work as a Special Rapporteur, he recognised their special status: in a 1999 symposium of the European Journal of International Law devoted to the process of the second reading, notwithstanding significant reservations about certain aspects, he considered the first-reading text of 1996 to 'ha[ve] become part of the mental landscape of international lawyers'.[8] One and a half decades later, in *State Responsibility: The General Part*, this was condensed into the confident, if succinct, claim that '[t]he

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[2] Responsibility of States for Internationally Wrongful Acts UNGA Res 56/83, Annex (12 December 2001) 56th Session (2001) UN Doc A/RES/56/83 [ILC Articles]. See further 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) II(2) Yearbook of the International Law Commission 31 [Commentary].

[3] In part, this text draws on ideas formulated in a series of blog posts in mid-2021, and published as part of an *EJIL:Talk!* symposium on 'The ILC Articles at 20' (which the authors convened). Revised versions of the contributions to the symposium have since been published as Paddeu and Tams (n 1).

[4] 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, Oxford 2013) 71, 81.

[5] James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 American Journal of International Law 874, 878.

[6] James Crawford, *State Responsibility: The General Part* (CUP, Cambridge 2013) [*General Part*] 92.

[7] In Crawford's words, '[a]ny system of law must address the responsibility of its subjects for breaches of their obligations': ibid 3. This makes State responsibility 'a cardinal institution of international law': James Crawford, 'State Responsibility' (September 2006) in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093?prd=EPIL> accessed 4 April 2022, para 1.

[8] James Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 European Journal of International Law 435, 435.

ILC Articles represent the modern framework of state responsibility'.[9] In our view, the status of the ILC Articles is best captured in a third statement, also offered with the benefit of hindsight: 'The Articles have encoded the way in which we think about [State] responsibility'.[10] 'Encoding' is indeed what the ILC Articles have done to a framework of legal rules that (like those pertaining to jurisdiction) for a long time appeared amorphous and elusive. They have done so in the two senses of the word 'code'.

First, by offering a systematisation of the rules in this field, the ILC has left international lawyers with a *code* in a legal sense. That is, a coherent system of rules regulating a particular area of the law. This was not an easy task. An earlier attempt at an institutional codification of aspects of the law of responsibility, the League of Nations' 1930 Codification Conference at The Hague, had ended in failure. On that occasion, after preparatory work spanning roughly four years,[11] and a conference lasting four weeks, the Third Committee appointed to consider 'Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners', with representatives from 42 States, only managed to adopt 10 articles before 'confessing its inability to arrive at a convention.'[12]

For many, the lesson learned from The Hague Codification Conference's failure was that codification of responsibility by focusing on injury to foreigners was unproductive.[13] The ILC's experience with the six reports of its first Special Rapporteur, Francisco V García-Amador, supports this view; the reports equally focused on the substantive rules governing injuries to aliens and their property but were barely discussed and, to the extent that they were, prompted controversy. Perhaps though, as suggested by Green Hackworth in his post-mortem of the 1930 Conference (where he and Edwin Borchard had been the United States delegates in the Third Committee), it was also that the topic of responsibility was *itself* difficult to codify. This was a topic that included 'principles that underl[ay] the whole fabric of public international law',[14] and there were inherent difficulties 'in any effort to bring about a code on a subject of such vital importance to States and on which the points of view of so many countries are apt to be coloured by their national interests'.[15] For indeed, while the basic proposition that States are responsible for the violation of their international obligations is simple and unanimously accepted, its detailed study opened up a plethora of difficult problems: attribution, fault, reparations, injured parties, and so on.[16] Hackworth's assessment seems to be borne out by the fact that the ILC took over four decades to complete its work, even after the second Special Rapporteur Roberto Ago's change of démarche, with his 'revolutionary'[17] focus on secondary rules in the early 1960s. James Crawford himself noted, as he was working towards the ILC Articles' completion, that this was a 'major task, equal in weight to the work on the law of treaties.'[18] So a project that 'should on the face of it take one

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[9] Crawford, *General Part* (n 6) 45.

[10] Crawford, 'The International Court of Justice and the Law of State Responsibility' (n 4) 81.

[11] The Assembly of the League of Nations selected State responsibility as one of the three topics for codification at The Hague Conference in 1927: see 'Annex 35: Progressive Codification of International Law' (1927) League of Nations Official Journal (Special Supplement) 484.

[12]ok and Simon Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010) 53; Clémentine Bories, 'The Hague Conference of 1930' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010) 61.

[13] See eg Robert Kolb, *The International Law of State Responsibility: An Introduction* (Edward Elgar, Cheltenham 2017) 7. To be sure, The Hague Codification Conference was beneficial in other respects (in general, in setting a format for subsequent codification efforts and, particularly for the law of responsibility, by marking some progress towards the consolidation of certain principles of responsibility). See, among others, Green H Hackworth, 'Responsibility of States for Damage Caused in their Territory to the Person or Property of Aliens' (1930) 24 American Journal of International Law 500, 515; Borchard (n 12) 540. For a more recent re-evaluation, see Antal Berkes, 'The League of Nations and the International Law of State Responsibility' (2020) 22 International Community Law Review 331.

[14] Hackworth (n 13) 500.

[15] Ibid 515.

[16] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon, Oxford 1994) 148.

[17] Alain Pellet, 'Remarques sur une Révolution Inachevée: le Projet de la CDI sur la Responsabilité des États' (1996) 42 Annuaire Français de Droit International 7, 9. For similarly 'revolutionary' terminology, see Michel Virally, 'Panorama du Droit International Contemporain: Cours Général de Droit International Public' (1985) 183 Recueil des Cours de l'Académie de Droit International 13, 229.

[18] Crawford, 'Revising the Draft Articles on State Responsibility' (n 8) 436.

summer's work', given how undisputable its basic proposition was,[19] took 45 years (1956–2001),[20] five Special Rapporteurs,[21] and 34 reports by them[22] to complete. There were false starts (most notably García-Amador's reports),[23] practical difficulties,[24] and changes of direction along the way (most notably draft Article 19 and the provisions on dispute settlement). But the persistence paid off, and the ILC succeeded where The Hague Codification Conference had failed. In the ILC Articles, international lawyers have a legal code of State responsibility.

Second, the ILC has also provided international law with a way of thinking about responsibility, with concepts and a terminology (with a *code* in a lexical sense). This terminology can be forbidding, but it has come to stick. Today's students and practitioners of international law effortlessly use many of the ILC's more burdensome terms, such as 'State other than the injured State'[25] and 'circumstances precluding wrongfulness' (where 'defences' might have done).[26] Conversely, ageing teachers feel the need to explain what they mean by 'reprisals' (a term branded as regressive by the ILC, and replaced by the term 'countermeasure').[27] But beyond the terminology, the ILC's encoding has left us with a mindset for thinking about responsibility which is shaped by three 'basal presumptions':[28] responsibility is today generally understood to be an objective concept not necessarily dependent on fault or damage; it is a general notion applying to custom and treaty breaches alike; and, most significantly, it is a system of secondary rules that formulates 'general conditions ... for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.[29] The Articles' distinction between three substantive parts—addressing, respectively, the origin, content and implementation of responsibility—and its further subdivision between the conditions for responsibility and the circumstances precluding wrongfulness, structures the way we teach the topic, and in its charming simplicity is likely to have made this allegedly intractable topic accessible.

What is more, the language, categories, and way of thinking, are *not just* those of *State* responsibility: they have become the 'lexical code' of international responsibility more generally. The Articles were the blueprint for the subsequent ILC project on responsibility of international organisations, concluded in 2011,[30] which use the same categories as, and share the language of, the Articles on State Responsibility.[31] The basic framework of the Articles also underlies the current ILC

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[19] Higgins (n 16) 148.

[20] The Commission began work on State responsibility in 1956, with the submission of the first report by García-Amador. There were some fallow periods along the way: not all of García-Amador's reports were discussed by the Commission, and Ago only produced his first report in 1969, despite having been appointed in 1963.

[21] Francisco V García-Amador (1955–1961), Roberto Ago (1963–1979), Willem Riphagen (1979–1986), Gaetano Arangio-Ruiz (1987–1996) and James Crawford (1997–2001): see Crawford, *General Part* (n 6) lxxiii–lxxiv.

[22] Six reports by García-Amador; eight reports by Roberto Ago, plus a lengthy addendum to the eighth report presented in 1980, the year after he left the Commission following his appointment to the ICJ; seven reports by Riphagen; eight reports by Arangio-Ruiz; and four reports by Crawford: ibid.

[23] Though his approach had shifted in his later reports: see Shabtai Rosenne, *The Perplexities of Modern International Law* (Martinus Nijhoff, Leiden 2004) 374.

[24] There were other projects, including the law of treaties, occupying the ILC's attention for much of the early period of its work on responsibility: Crawford, 'Revising the Draft Articles on State Responsibility' (n 8) 436.

[25] ILC Articles, arts 42 and 48. See also Christian J Tams, 'All's Well that Ends Well? Comments on the ILC's Articles on State Responsibility' (2002) 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 759, 779 (then hoping 'for a slightly more imaginative use of terminology').

[26] Often to nonsensical effect, see 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, Oxford 2020) 203.

[27] A term which, according to Paul Reuter, literally 'meant nothing': '1771st Meeting' (1983) I Yearbook of the International Law Commission 99 para 23.

[28] Crawford, *General Part* (n 6) 37–8.

[29] Commentary (n 2) para 1.

[30] Responsibility of International Organizations UNGA Res 66/100, Annex (9 December 2011) UN Doc A/RES/66/100.

[31] See various essays on this issue in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff, Leiden 2013). See also Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP, Cambridge 2018) 3–4, 41–3.

work on succession to State responsibility.[32] Furthermore, both the language and categories of the Articles are often referred to, and reproduced, in other projects of the ILC, including the Guidelines on Provisional Application of Treaties, concluded in 2021,[33] and the ongoing project on Peremptory Norms of General International Law (*jus cogens*).[34] This is also noticeable in the International Court of Justice's (ICJ) case law. The ICJ does not consistently cite the ILC Articles: since 2001, the Court cited the Articles in 13 decisions[35] out of 38 in which issues of responsibility were raised.[36] However, the structure and language of the Articles permeates the Court's approach to State responsibility questions, even in those cases in which it decides matters of responsibility without referring to the Articles at all.[37]

To conclude on this first point, it seems to us that, while ILC did not invent the law of State responsibility, its approach is now the only meaningful path to understanding it. Synthesising case law,

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[32] Pavel Šturma, 'Third Report on Succession of States in Respect of State Responsibility' (2 May 2019) UN Doc A/CN.4/731 para 18.

[33] Provisional Application of Treaties UNGA Res 76/113, Annex (17 December 2021) UN Doc A/RES/76/113, Guideline 8.

[34] See especially Draft Conclusions 17 (Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)), 18 (Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness) and 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)), adopted on first reading by the ILC in 2019: see 'Report of the International Law Commission: Seventy-First Session (29 April–7 June and 8 July–9 August 2019)' (2019) UN Doc A/74/10, ch V (Peremptory Norms of General International Law (*Jus Cogens*).

[35] The Court has cited the Articles in five merits judgments: *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Merits) [2005] ICJ Rep 168 [160] (arts 4, 5 and 8), [293] (referring to art 45, comment 5 in Commentary (n 2) 122); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 [*Bosnia Genocide case*], referring to art 4 ([385], [388], [414]), art 5 ([414]), art 6 ([414]), art 8 ([398], [401], [407], [414]), art 9 ([414]), art 11 ([414]), art 14 ([431]), art 16 ([420]), art 31 ([460]), art 36 ([460]); *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14, referring to 'Articles 34 to 37' ([273]); *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99, referring to art 13 ([58]), art 30 ([137]), art 35 ([137]) and art 41 ([93]); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3, referring to art 10(2) ([104]–[105]) and art 3 ([128]). See further three compensation judgments: *Case Concerning Ahmadou Sadio Diallo (Guinea v DRC) Compensation, Judgment* (Compensation) [2012] ICJ Rep 324 [49] (citing the Commentary to art 36); *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation) [2018] ICJ Rep 15 [151] (citing art 38, comment 1 in Commentary (n 2) 107); *Armed Activities in the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Reparations) 2022 <www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf> accessed 4 April 2022 [382] (art 31), [388]–[389] (art 37). See further three preliminary objections judgments: *Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India), Jurisdiction and Admissibility* (Jurisdiction and Admissibility) [2016] ICJ Rep 255 [42] (quoting art 44, comment 1 in Commentary (n 2) 120); *Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Jurisdiction and Admissibility) [2016] ICJ Rep 833 [45] (quoting art 44, comment 1 in Commentary (n 2) 120); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v Russian Federation)* (Preliminary Objections) [2019] ICJ Rep 558 [129] (referring to the Articles generally in support of the customary status of the exhaustion of local remedies rule). See further two advisory opinions: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [140] (art 25); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 [177] (art 1).

[36] See Federica Paddeu, 'State Responsibility' in Carlos Espósito and Kate Parlett (eds), *Cambridge Companion to the International Court of Justice* (CUP, Cambridge 2022) (forthcoming).

[37] See eg *Navigational and Related Rights (Costa Rica v Nicaragua)* (Merits) [2009] ICJ Rep 213, 266–9; *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Merits) [2014] ICJ Rep 226, 293–6 (breach), 298 (remedies); *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)* (Merits) [2015] ICJ Rep 665, 716–8 (Nicaragua's responsibility), 738–740 (Costa Rica's responsibility).

State practice, and scholarly commentary, the ILC came up with the blueprint; it moulded the law, and it notably distilled from the mass of material several general categories through which we now approach responsibility (internationally wrongful acts, attribution, aid and assistance, and so on). That the ILC succeeded in 'encoding' this field of law, which to Sir Gerald Fitzmaurice had seemed to be one of the 'most traditional and yet most elusive, unsettled, and intractable problem[s]' of international law,[38] is no mean feat. The fact that we hardly notice it today only reflects the success of the encoding exercise.

4. 'PROFITABLE GENERALISATION': THE ARTICLES AND ALTERNATIVE FRAMEWORKS OF RESPONSIBILILITY

As is clear from the preceding section, the ILC's encoding project has mainly been an exercise in condensing and extracting, most obviously aided by the decision to focus on secondary rules. Commenting shortly after the adoption of the text, James Crawford (perhaps somewhat cautiously) described this 'move to a set of articles dealing solely with secondary obligations' as 'a step in the direction of profitable generalisation'.[39] As he noted later, 'international law has to address a wide range of needs' through 'a few basic tools and techniques'.[40] In generalising the system of responsibility, the ILC ensured that with a few basic tools it would indeed be possible to address all of the different ways in which States (regrettably) violate the wide variety of obligations that they have towards other subjects of international law. This was indeed profitable: it is because of their generality that the ILC Articles rather quickly supplanted other ways of thinking about responsibility in international law.

Generality meant that responsibility, as understood in the Articles, would apply across all the different fields of international law, which in turn meant that the system would have to be *flexible*, capable of performing multiple functions,[41] and *residual*, yielding to *leges speciales*.[42] The generality of the system is premised on two key ideas. First, that the rules about responsibility are *distinct* from the rules of international law that impose substantive obligations on States. In the terminology introduced by the ILC, which is now ubiquitous, the latter are known as 'primary rules', the former as 'secondary rules'.[43] The Articles, on this view, codify a complete system of secondary rules (in Ago's words, they include 'the whole of responsibility and nothing but responsibility').[44] It was the primary-secondary rule distinction that freed the Commission from approaching responsibility piecemeal, through the lens of particular fields of international law (such as injury to aliens), and thereby helped overcome some of the difficulties encountered by prior codification efforts. Insofar as secondary rules do not depend on primary rules,[45] they can in principle cover the whole field. The second key idea is that wrongfulness and responsibility are conceptually distinct: this meant casting responsibility as a legal consequence arising from an internationally wrongful act, and not as a definitional element of the internationally wrongful act.[46] The internationally wrongful act is the subject of Part One of the Articles,

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[38] RY Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law' (1964) 13 International and Comparative Law Quarterly 385, 396.

[39] Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (n 5) 878.

[40] Crawford, *General Part* (n 6) 52.

[41] Pierre-Marie Dupuy, 'Le Fait Générateur de la Responsabilité Internationale des Etats' (1984) 188 Recueil des Cours de l'Académie de Droit International 8, 25–6.

[42] ILC Articles, art 55.

[43] This was not intended to be a conceptual distinction. It was a pragmatic solution, a heuristic device, to identify the boundaries of the Commission's work; it was, in other words, a legislative technique. As Ago himself explained to the Commission, the distinction must 'be understood rather loosely': '1013th Meeting' (1969) I Yearbook of the International Law Commission 113 para 33. Similarly, see James Crawford, 'First Report on State Responsibility' (1998) II(1) Yearbook of the International Law Commission 1 paras 14–18.

[44] 'Working Paper Prepared by Mr Roberto Ago' (1963) II Yearbook of the International Law Commission 251, 253.

[45] But note that they must be interpreted and applied in light of the primary rules.

[46] Robert Ago, 'Eighth Report on State Responsibility' (1979) II(1) Yearbook of the International Law Commission 3 para 50.

and is defined as a breach of an obligation which is attributable to the State.[47] This is a fixed but flexible concept: it is applicable to all obligations of a State, regardless of their source, their character, or their addressees.[48] By emphasising as much, the Commission was able to bypass old discussions about the place of fault and damage in the law of responsibility: whether these elements are necessary turn on the obligation the breach of which is in issue. This understanding of the internationally wrongful act could be seen as ambitious or rather bland (and it is perhaps both). Its merit is in not prejudging the consequences for the wrongdoing State (as these may vary from obligation to obligation). The legal consequences of the wrongful act are the subject of Part Two (on the content of responsibility) and include obligations for the responsible State involving cessation and non-repetition,[49] as well as reparations (in its three forms of restitution, compensation and satisfaction);[50] and, also (as the Commission clarified during the second reading) for all other States in the case of serious violations of *jus cogens* rules.[51] This set of legal consequences is modular, adaptable to the obligation breached and the character of the breach. Moreover, as a residual system, it can be complemented, or replaced, by special rules that emphasise particular consequences of responsibility; for example, by a broader system of reparations in the field of human rights law,[52] or a decidedly forward-looking system of remedies in world trade law.[53]

It has been said that, in the ILC's work on the topic, 'every aspect of responsibility has been more or less overturned'.[54] And clearly, the Commission's encoding exercise crystallised and forged new concepts and clarified others. However, it had deep intellectual roots. Ago's 'revolution',[55] like many successful revolutions, built on the work of pioneers.[56] Heinrich Triepel and Dionisio Anzilotti are chief among them: the former setting out general notions of attribution,[57] the latter identifying the law of responsibility as a distinct set of general and abstract rules, which did not distinguish between different types of violations.[58] Anzilotti's influence on Ago is clear from the latter's 1939 course at The

[47] ILC Articles, art 2.

[48] Ibid art 12.

[49] Ibid art 30.

[50] Ibid art 31.

[51] Ibid art 41.

[52] For human rights, see eg Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law UNGA Res 60/147, Annex (16 December 2005) UN Doc A/RES/60/147, 6–8. For a comprehensive overview of the Inter-American System, see Claudio Grossman, Augustina del Campo and Mina A Trudeau, *International Law and Reparations: The Inter-American System* (Clarity, Atlanta 2018).

[53] On which, see Geraldo Vidigal, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective' (2013) 16 Journal of International Economic Law 505.

[54] 'Incontestably the law of international responsibility as it results from the work of the International Law Commission has little in common with the applicable law before the beginning of the process [of codification]: every aspect of responsibility has been more or less overturned, whether it be the origin of responsibility, its nature or its content': Brigitte Stern, 'A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, Leiden 2005) 93, 94.

[55] Pellet (n 17).

[56] Compared to other fields of international law, the pioneering work spans a relatively short period; surprisingly short, given the fundamental nature of State responsibility. Crawford considered that it 'was not until the 1850s that a writer would begin to use recognizably modern language of responsibility in a systematic way': Crawford, *General Part* (n 6) 21.

[57] Heinrich Triepel, *Völkerrecht und Landesrecht* (C L Hirschfeld, Leipzig 1899).

[58] Dionisio Anzilotti, *Teoria Generale Della Responsabilità Dello Stato nel Diritto Internazionale* (Lumachi, Florence 1902). See also Dionisio Anzilotti, 'La Responsabilité Internationale des Etats à Raison des Dommages Soufferts par des Étrangers' (1906) 13 Revue Générale de Droit International Public 5; Dionisio Anzilotti 'La Responsabilité Internationale des Etats à Raison des Dommages Soufferts par des Étrangers' (1906) 13 Revue Générale de Droit International Public 285.

Hague Academy of International Law, 'Le Délit International',[59] and was openly acknowledged.[60] As Crawford had noted, this way of thinking about responsibility 'in principle … reflected the situation as it had developed in international law.'[61]

To be sure, this generalisation was not to everyone's taste. Many resisted it and, indeed, for this very reason refused to engage with the ILC's work on responsibility. Writing in 1979, at the end of the 'Ago era', Richard Lillich remarked that Ago's reports to the Commission had 'received almost no scholarly attention, at least in the English language literature', and this for the 'obvious reason' that the topic had been pitched at such high level of generality and abstraction as to be of little or no use in solving practical problems.[62] Speaking on behalf of Australia in the Sixth Committee of the UN General Assembly, Eli Lauterpacht also lamented the 'esoteric' approach taken by the Commission, and urged it to focus on 'elementary' questions: exhaustion of local remedies, the minimum standard of treatment, and so on.[63] English scholarship continued to approach State responsibility through the lens of specific fields of international law. Ian Brownlie's *System of the Law of Nations: State Responsibility*, from 1983, followed closely the common law of torts and showed little to no engagement with the ILC's work on the topic.[64] Like his earlier 'Causes of Action' article in the British Yearbook,[65] the treatment was structured around particular breaches of international law. Perhaps most significantly, leading English-language textbooks like Brownlie's *Principles of Public International Law* continued to eschew the language and structure of the Articles. In fact, they did so until the seventh edition, published seven years after the adoption of the Articles.[66] Unlike many of his British compatriots, Philip Allott did not ignore the ILC's work: in his celebrated 'Unmaking' article from 1988, he did look carefully, but did not like what he saw. In his view, the Commission's work on the topic was doing 'serious long-term damage to international law and international society' and did not believe that responsibility as a general category, situated somewhere 'between illegality and liability', could do much useful work.[67]

Supporters of the so-called 'classical theory' also viewed this generalisation with some restrain and scepticism (in particular, to the extent that it excluded from its ambit the elements of fault and damage). Informed by the laws of obligations and civil codes of many civil law countries, the classical theory considered responsibility to require three basic elements: damage, a faulty conduct, and a causal

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[59] Robert Ago, 'Le Délit International' (1939) 68 Recueil des Cours de l'Académie de Droit International 415.

[60] Robert Ago, 'Rencontres avec Anzilotti' (1992) 3 European Journal of International Law 92, 95. This is not to say that Ago merely applied Anzilotti's understanding. On the divergences between these two, see Georg Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002) 13 European Journal of International Law 1083.

[61] Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (n 5) 878. This view was shared by ILC members that supported the move to a study of the secondary rules. For example, in his working paper for the ILC's subcommittee, Mustafa Kamil Yasseen suggested that 'the first step must be to define the general theory of responsibility. That theory exists': 'Working Paper Prepared by Mr Mustafa Kamil Yasseen' (1963) II Yearbook of the International Law Commission 250, 251. As one has noted, by 1963, 'the trees were there; it was time to think of the forest': Christian J Tams, 'Law-Making in Complex Processes: The World Court and the Modern Law of State Responsibility' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP, Cambridge 2015) 287, 293.

[62] Richard B Lillich, 'Duties of States Regarding the Civil Rights of Aliens' (1979) 161 Recueil des Cours de l'Académie de Droit International 333, 379.

[63] Ibid 430 fn 307, quoting JG Starke, 'The International Law Commission and State Responsibility' (1976) 50 Australian Law Journal 593, 596.

[64] Ian Brownlie, *System of the Law of Nations: State Responsibility* (OUP, Oxford 1983).

[65] Ian Brownlie, 'Causes of Action in the Law of Nations' (1979) 50 British Yearbook of International Law 13.

[66] The text quotes the Articles only twice: Ian Brownlie, *Principles of Public International Law* (7th edn, OUP, Oxford 2008) 458 (art 47 directly quoted in the text), 449 (art 8, in a quotation from the *Bosnia Genocide case* (n 35) [398]). In the chapter on State responsibility, Brownlie still refers to 'breach of duty' (437, 442), 'agency and joint tortfeasors' (456–8) and 'causes of action' (473–4).

[67] Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 Harvard International Law Journal 1, 1.

link between the two.[68] Some scholars, like Eduardo Jiménez de Aréchaga and Hubert Thierry, eschewed the element of fault but continued to require damage as a necessary element of responsibility (that is, in the ILC's terminology, as a matter of secondary rules).[69] In the German context, Ingo von Münch's influential 1963 study *Das völkerrechtliche Delikt* pointed in the same direction (insisting on damage, but not necessarily on fault), and began a decade-long discussion about results-based and fault-based responsibility (Erfolgshaftung und Schuldhaftung) that did not necessarily track the ILC's discussions.[70] As a variation on these approaches, Brigitte Stern's influential work overcame strictures of the classical approach, but did so 'from within', namely by relying on expansive notions of 'damage/injury'.[71]

Each of these approaches had significant limitations. Field-specific approaches would have required, essentially, a codification of obligations in each area of international law (a general code of international law obligations or, in James Crawford's terms, a '*Code Napoléon* without the Emperor').[72] While desirable, this would have been difficult and impractical (if not impossible). Indeed, the substantive obligations of States vary and change over time, rendering such a code in need of constant 'revision, qualification and development'.[73] By contrast, structural rules of the international legal system,[74] like those concerning rule-making and indeed responsibility, tend to be more stable (though of course subject to continued refinement). In retrospect, it seems to us that it made eminent sense to detach the codification of the substantive obligations from the codification of those structural rules.[75] Using another analogy employed by James Crawford, with a nod to the structure of many domestic criminal law codes, the ILC's project, as begun in 1963, codified the 'general law' of responsibility, while leaving to a side the various 'special features'.[76] Once such a general part became the focus, and once the generality of propositions was tested seriously, it seemed increasingly difficult to insist on fault or damage. While common at some point, these clearly were not always required: to illustrate, where international law requires States to adopt certain provisions as part of its internal law, the adoption of a different set of provisions (or a failure to pass implementing legislation) is itself a violation of that obligation even in the absence of their application to a given case. To require damage as a condition of responsibility would exclude a priori these violations of international law. For these

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[68] See eg Virally (n 17) 227. This basic ground of responsibility was often accompanied by other specific grounds of liability, such as responsibility for risk and vicarious liability. See eg R Quadri, 'Cours Général de Droit International Public' (1964) 113 Recueil des Cours de l'Académie de Droit International 237, 455.

[69] Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 Recueil des Cours de l'Académie de Droit International 1, 268–70; Hubert Thierry, 'L'évolution du Droit International Cours Général de Droit International Public' (1990) 222 Recueil des Cours de l'Académie de Droit International 9, 108–10.

[70] Ingo von Münch, *Das Völkerrechtliche Delikt in der Modernen Entwicklung der Völkerrechtsgemeinschaft* (Keppler Verlag, Frankfurt 1963). For more on the German approach, see the presentations and discussions in Albrecht Randelzhofer and Dietrich Rauschning, *Staatenverantwortlichkeit. Berichte der Deutschen Gesellschaft für Völkerrecht* (C F Müller Verlag, Heidelberg 1984); and the detailed considerations in Bruno Simma, 'Grundfragen der Staatenverantwortlichkeit in der Arbeit der International Law Commission' (1986) 24 Archiv des Völkerrechts 357–407.

[71] Brigitte Bollecker-Stern, *Le Préjudice dans la Théorie de la Responsabilité Internationale* (Pedone, Paris 1973).

[72] James Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, Cambridge 2002) 15.

[73] Ibid.

[74] 'Trans-substantive' rules: Daniel M Bodansky and John R Crook, 'Symposium: The ILC's State Responsibility Articles: Introduction and Overview' (2002) 96 American Journal of International Law 773, 778.

[75] It bears pointing out, too, that the law of treaties does not lay down rules imposing obligations on States (with the possible exception of the principle *pacta sunt servanda*).

[76] Crawford, *General Part* (n 6) xxii. His book *State Responsibility: The General Part* was a reference to the title of Glanville Williams's influential English criminal law textbook *Criminal Law: The General Part* from 1953, in which Williams envisaged dividing English criminal law into a 'general part' (concerned with the principles applicable to all crimes) and a 'special part' (the crimes), a distinction which he explicitly borrowed from continental criminal codes.

and other fields of international law, insistence on damage as a condition of responsibility may simply have reflected an unwillingness to engage with international law in its diversity.[77]

It is difficult now to fully grasp the opposition to the ILC's approach, or indeed the heated nature of debates about fault and damage as general conditions of responsibility. Looked at with the benefit of hindsight, the ILC's system of responsibility did not so much *supplant* as *subsume* these other approaches, thus ensuring its success over them. Profitably generalised, the law of responsibility as encoded by the ILC has shed much of its conceptual baggage. Lightened and truly general, the regime is both flexible (so that it can accommodate requirements of fault and damage where the primary rules require these) and residual (so that it can accommodate special responsibility rules in particular fields of international law). The system's impact on actual outcomes may not always run very deep: staying clear of the primary rules and outsourcing many debates to those primary rules, the ILC's Articles for the most part supply categories and structures. To return to our initial Crawford quote, the Articles 'encoded … the way in which we *think* about responsibility',[78] rather than necessarily mandating a particular outcome in each and every case. But this modesty is part of their success. Despite the growing specialisation of responsibility within certain fields of international law, the Articles have shown, in Katja Creutz's terms, 'tenacity': sometimes in the foreground and sometimes in the background, they have remained at the centre of the law of responsibility.[79]

5. 'ARTICULATING 'A FRAMEWORK TO BE 'FURTHER CONSOLIDATED AND REFINED': THE ARTICLES IN INTERNATIONAL PRACTICE

It is not uncommon for international law to be dominated by major documents that, reflecting the outcome of decades of discussion, redefine a particular field. Diplomatic and consular relations have been shaped by two Vienna Conventions of the early 1960s, the law of treaties by another agreed towards the end of that decade, and the law of the sea by the United Nations Convention on the Law of the Sea. The ILC Articles are not without equals, but their influence is exercised differently.

Since their adoption in 2001, the Articles have remained in their current form as a non-binding instrument, with discussions as to their possible 'treatification' ongoing (more on which in section 6). Unlike in the fields of diplomatic or consular relations, the law of the sea, or the law of treaties, States have so far not embarked upon the 'high road' of treaty-making. Rather the Articles have travelled by the 'low road': NGOs and domestic courts cite them, as do scholars, governments, and international courts and tribunals. James Crawford anticipated as much from early on. In his contribution to a 2002 symposium of the American Journal of International Law, published one year after the adoption of the second-reading text and noting that 'the ultimate tests of acceptance have still to be met', he found there already was much 'evidence' of their 'influence' on international practice.[80] Writing a decade later, he underlined the Articles' 'constructive role in articulating the secondary rules of responsibility', while

[77] Crawford's robust defence of the ILC's approach proceeds from a human rights example: 'The reason why a breach of fundamental human rights is of international concern (to take only one example) is not because such breaches are conceived as assaulting the dignity of other states [which could be classified as a form of "moral damage"]; it is because they assault human dignity in ways which are specifically prohibited by international treaties or general international law. For these reasons the decision not to articulate in either Articles 1 or 2 a separate requirement of "damage" in order for there to be an internationally wrongful act was clearly right in principle': Crawford, *General Part* (n 6) 58.

[78] Crawford, 'The International Court of Justice and the Law of State Responsibility' (n 4) 81 (emphasis added).

[79] Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (CUP, Cambridge 2020); Katja Creutz, 'The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An Appraisal' (*EJIL:Talk!*, 5 August 2021) <www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal/> accessed 4 April 2022. See also Paddeu and Tams (n 1) 27.

[80] Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (n 5) 889.

emphasising that their 'position … as part of the fabric of general international law will continue to be consolidated and refined through their application by international courts and tribunals'.[81]

Experience over the course of the last 20 years has borne out the truth of these observations. This is obvious so far as the consolidation of the ILC Articles is concerned. International practice has embraced the Articles, which have become the obvious reference point for any debate about State responsibility. While the level of engagement varies across different fields of international law, the Articles have travelled widely, as the following four examples illustrate, all drawn from recent inquiries.

First, Kubo Mačák has noted that the Articles have had 'significant impact on the application and interpretation' of international humanitarian law.[82] Specifically, in his view, the Articles have become an indispensable resource in assessing State responsibility for violations of international humanitarian Law. The 2020 updated commentaries of the International Committee of the Red Cross on the 1949 Geneva Conventions indicate that the Articles are a key element of the legal framework within which the Conventions must be interpreted and applied.[83]

Second, in investment law, the Articles are, as noted by Gabriel Bottini, 'part of the everyday workings of investment tribunals'.[84] In a review of investment tribunals' engagements with the Articles in the period 2010–2020, Esmé Shirlow and Kabil Duggal concluded that that, since 2010, 'there has been a greater and almost ubiquitous reliance in investment treaty arbitration decisions on the ILC Articles'.[85] By 2020, investment tribunals had referred to at least 42 of the 59 Articles,[86] 10 more than in 2010,[87] in a total of 219 decisions.[88] The handling of the Articles by investment tribunals has sometimes been awkward, and there have been inconsistencies in the application of certain rules.[89] But these inconsistencies have sometimes been revelatory of difficulties about the ILC Articles themselves,[90] and it is undeniable that there has been a 'very conscientious and careful attempt in general to apply the Articles'.[91]

Third, in the field of human rights, according to the UN Secretariat's technical report listing international decisions that cite the Articles, by 2017 the Articles had been referred to in 65 decisions by the regional human rights courts and the Human Rights Committee combined.[92] While this number may appear small, especially if contrasted with investment arbitration, it rebuts Malcolm Evans' prediction that 'the international principles of State responsibility [are] *irrelevant*' to the operation of

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[81] Crawford, *General Part* (n 6) 92.

[82] Kubo Mačák, 'Strengthening the Rule of Law in Time of War: An IHL Perspective on the Present and Future of the Articles on State Responsibility' (*EJIL:Talk!*, 6 August 2021) <www.ejiltalk.org/strengthening-the-rule-of-law-in-time-of-war-an-ihl-perspective-on-the-present-and-future-of-the-articles-on-state-responsibility/> accessed 4 April 2022. See also Paddeu and Tams (n 1) 37.

[83] International Committee of the Red Cross, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (CUP, Cambridge 2021) paras 110–115.

[84] Gabriel Bottini, 'The Articles on Responsibility of States for Internationally Wrongful Acts and the Making of International Investment Law' (*EJIL:Talk!*, 6 August 2021) <www.ejiltalk.org/the-articles-on-responsibility-of-states-for-internationally-wrongful-acts-and-the-making-of-international-investment-law/> accessed 4 April 2022. See also Paddeu and Tams (n 1) 43.

[85] Esmé Shirlow and Kabil Duggal, 'The ILC Articles on State Responsibility in Investment Treaty Arbitration' (2022) 37 ICSID Review (forthcoming).

[86] Ibid.

[87] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review 127, 131.

[88] For a breakdown per year, see Shirlow and Duggal (n 85) Figure 1.

[89] Most notably, in respect of the defence of necessity. See eg Michael Waibel, 'Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*' (2007) 20 Leiden Journal of International Law 637.

[90] For example, on Article 25 on state of necessity and on the impact of countermeasures on third parties, see respectively Federica Paddeu and Michael Waibel, 'Necessity 20 Years On: The Limits of Article 25 ARSIWA' (2022) 37 ICSID Review (forthcoming); Christian J Tams, 'Swords, Shields and Other Beasts: The Role of Countermeasures in Investment Arbitration' (2022) 37 ICSID Review (forthcoming).

[91] Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (n 87) 135.

[92] UN Secretariat, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies' (20 June 2017) UN Doc A/71/80/Add.1, 10.

human rights treaties.[93] Indeed, Helen Duffy has discerned an increasing engagement of human rights courts and tribunals, as well as other actors involved in human rights monitoring, with the Articles, and noted that this increased engagement is both quantitative and qualitative.[94]

Finally, the Articles have also been relevant in the World Trade Organization (WTO), long considered (albeit misleadingly) to be a candidate for inclusion in the mythical category of 'self-contained regimes'. A panel of the WTO's Dispute Settlement Body in *Korea—Procurement* confirmed the residual application of international law, including the law of State responsibility: these rules, according to the panel, apply 'to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently'.[95] On this basis, various reports of panels and the Appellate Body have referred to the Articles. In an assessment of the WTO practice, Jan Yves Remy has noted that the WTO adjudicatory bodies have seemed comfortable in directly referencing the Articles on matters of attribution and countermeasures, though they have been more hesitant in relation to the defences (circumstances precluding wrongfulness).[96]

These are but illustrations, and condensed ones at that. But they bring out the general point: from global trade to the conduct of hostilities, few fields of international law are shielded from the Articles' categories. The ILC's 'constructive role in articulating the secondary rules of responsibility'[97] has brought, as noted by Mačák, 'a welcome degree of legal clarity that permeates all specific areas of international law',[98] and it has allowed the rules to be consolidated. The Articles have also, to return to the second aspect of James Crawford's above-quoted statement, allowed the secondary rules to be 'refined', at least occasionally. To be sure, the process of refinement is ongoing, not the least because the Articles are often very flexible. But two decades of practice have highlighted aspects that may be in need of refinement. The public-private divide informing the ILC's provisions on attribution is perhaps the clearest candidate. As Alex Mills has observed, the increased privatisation of public functions does not sit well within the provisions on attribution in the Articles, leaving considerable areas which historically fell within the sphere of governmental action beyond the law of responsibility.[99] It might perhaps lead to the identification of functions that are, after all, inherently sovereign and for which States should always be responsible.[100] Debates about conduct in cyberspace have also put pressure on attribution rules,[101] and serious engagement by investment tribunals may over time result in the emergence of 'refined' provisions governing the treatment of investors.[102] Outside Part One of the Articles, debates since 2001 suggest that the ILC's provisions concerning multiple wrongdoing and

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[93] 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: The Clifford Chance Lectures* (Bloomsbury, London 2004) 159 (emphasis added).

[94] Helen Duffy, 'Articles on Responsibility of States for Internationally Wrongful Acts and Human Rights Practice' (*EJIL:Talk!*, 5 August 2021) <https://www.ejiltalk.org/articles-on-responsibility-of-states-for-internationally-wrongful-acts-and-human-rights-practice/> accessed 4 April 2022. See also Paddeu and Tams (n 1) 32. For a recent assessment of engagement by the European Court of Human Rights with the Articles, also noting the increased relevance of its rules, see Pavel Šturma, 'State Responsibility and the European Convention on Human Rights' (2020) 11 Czech Yearbook of Public & Private International Law 3.

[95] WTO, *Korea: Measures Affecting Government Procurement—Report of the Panel* (1 May 2000) WT/DS163/R [7.96].

[96] Jan Yves Remy, 'The Application of the Articles on Responsibility of States for Internationally Wrongful Acts in the WTO Regime' (*EJIL:Talk!*, 7 August 2021) <www.ejiltalk.org/the-application-of-the-articles-on-responsibility-of-states-for-internationally-wrongful-acts-in-the-wto-regime> accessed 4 April 2022. See also Paddeu and Tams (n 1) 48.

[97] Crawford, *General Part* (n 6) 92.

[98] Mačák (n 82). See also Paddeu and Tams (n 1) 42.

[99] Alex Mills, 'State Responsibility and Privatisation: Accommodating Private Conduct in a Public Framework' (*EJIL:Talk!*, 4 August 2021) <www.ejiltalk.org/state-responsibility-and-privatisation-accommodating-private-conduct-in-a-public-framework> accessed 4 April 2022. See also Paddeu and Tams (n 1) 24–6.

[100] On this question (though not addressing State responsibility), see Frédéric Mégret, 'Are There "Inherently Soverign Functions" in International Law?' (2021) 115 American Journal of International Law 452.

[101] Mačák (n 82). See also Paddeu and Tams (n 1) 40–41.

[102] For much more on this, see Carlo de Stefano, *Attribution in International Law and Arbitration* (OUP, Oxford 2020).

injured States are unlikely to be last word: recent environmental litigation highlights the desirability of refining the relatively sketchy Articles 46 and 47,[103] including by developing more detailed principles of shared responsibility.[104]

Consolidation and refinement are part of the ongoing engagement with the ILC Articles, which for two decades have been tested in practice. Overall, it seems clear that the Articles have stood the test of time. In a formally non-binding text, the Commission has distilled a framework that is widely taken to reflect customary international law[105] (a successful exercise in what has been referred to as 'codification light').[106] In this sense, as suggested by James Crawford, the *legal form* of the Articles seems not to have mattered all that much.

6. PRESERVING THE DELICATE EQUILIBRIUM? CONCLUDING THOUGHTS ON THE FUTURE OF THE ARTICLES

Despite the success of the ILC Articles as a non-binding text, momentum is building towards a treaty on responsibility. The high road remains attractive to many governments who would wish to convene a diplomatic conference to adopt a text in treaty form. The number of States expressly supporting the treaty option has increased over the years (now at over 90). It includes, among others, the 33 members of the Community of Latin American and Caribbean States (CELAC),[107] the African Group (composed of 54 States),[108] France,[109] Greece,[110] Iran,[111] Pakistan,[112] Portugal,[113] Saudi Arabia,[114] and Russia.[115] There is further divergence within this group, with some States favouring adoption of the text as it stands and others wishing to renegotiate the text.[116] Against the treaty option is a more eclectic group

[103] Ginevra Le Moli, 'State Responsibility and the Global Environmental Crisis' (*EJIL:Talk!*, 8 August 2021) <www.ejiltalk.org/state-responsibility-and-the-global-environmental-crisis> accessed 4 April 2022. See also Paddeu and Tams (n 1) 51–2.

[104] For the most advanced attempt, see André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 European Journal of International Law 15.

[105] As Fernando Bordin has argued, this perception in turn rests on the legitimacy of the codification process, and of the ILC in particular: Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 International and Comparative Law Quarterly 535, 538.

[106] Santiago Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) 8 Anuário Brasileiro de Direito Internacional 117.

[107] Dominican Republic, on behalf of CELAC: UN General Assembly (UNGA), 'Sixth Committee: Summary Record of the 9th Meeting' (7 November 2016) UN Doc A/C.6/71/SR.9 para 27. For membership of CELAC, see 'Comunidad de Estados Latinoamericanos y Caribeños' <https://celacinternational.org> accessed 4 April 2022.

[108] South Africa, on behalf of the African Group: UNGA, 'Sixth Committee: Summary Record of the 9th Meeting' (n 107) paras 32–33. For membership of the African Group, see United Nations, 'Regional Groups of Members States' <www.un.org/dgacm/en/content/regional-groups> accessed 4 April 2022.

[109] UNGA 'Sixth Committee: Summary Record of the 13th Meeting' (12 November 2007) UN Doc A/C.6/62/SR.13 para 10.

[110] UNGA, 'Sixth Committee: Summary Record of the 9th Meeting' (n 107) para 63.

[111] Ibid para 66.

[112] UNGA 'Sixth Committee: Summary Record of the 13th Meeting' (n 109) para 7.

[113] Ibid paras 59–60.

[114] UNGA 'Sixth Committee: Summary Record of the 15th Meeting' (15 January 2014) UN Doc A/C.6/68/SR.15 para 13.

[115] UNGA 'Sixth Committee: Summary Record of the 9th Meeting' (n 107) para 48.

[116] Contrast UNGA 'Sixth Committee: Summary Record of the 9th Meeting' (7 November 2016) UN Doc A/C.6/71/SR.9 para 63 (Greece supporting adoption of the text as is) and UNGA 'Sixth Committee: Summary Record of the 15th Meeting' (3 December 2010) UN Doc A/C.6/65/SR.15 para 20 (Venezuela supporting a renegotiation of the text).

of States: smaller in number, but firm in its resistance; it includes the majority of European States,[117] Australia, Canada and New Zealand,[118] Israel,[119] Malaysia,[120] and the United States.[121] Here, too, there are some further divisions between States who would favour maintaining the status quo, and those who would prefer to adopt the Articles as a declaration of the General Assembly.

So far, the resistance camp has been successful in blocking any move towards the treaty option, much aided by the decision of the Sixth Committee to proceed by consensus (which simply has not emerged).[122] In its most recent session, in 2019,[123] 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 General Assembly discusses the topic) (but none were followed). Like on Groundhog Day, the General Assembly 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 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).

James Crawford's position on the Articles' eventual form was not neutral. In 2001, he was a strong advocate of the 'wait and see' approach, suggesting to the General Assembly to note the Articles for the time being.[124] This view made sense, substantially and strategically. Many of the Articles were grounded in the practice of States and the case law of international courts and tribunals, including the mixed claims commissions of the early twentieth century. But their articulation, as all codification inevitably does, included some elements of creation and development. Furthermore, if any lesson could be drawn from previous codification experiences, as we mentioned earlier, it is that State responsibility is difficult to codify. As James Crawford noted in *Chance, Order, Change*, there was, and remains, a real risk that reopening negotiations on State responsibility would bring with it 'all the dramas, delays and divisions of the 40-year first reading re-enacted as diplomatic farce.'[125] This farce, he wrote in the latest edition of *Brownlie's Principles*, would 'likely … be interminable (or terminal).'[126]

It would be wrong (and out of character) to read this as the view of an architect worried that 'his project' might be dismantled or disfigured. Rather, these statements reflect a quality that characterised James Crawford as a scholar and practitioner of international law: a certain wariness for

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[117] See UNGA 'Sixth Committee: Summary Record of the 9th Meeting' (n 107) para 34 (Nordic Countries); UNGA, 'Sixth Committee: Summary Record of the 13th Meeting' (28 February 2020) UN Doc A/C.6/74/SR.13 paras 14 (Slovakia) and 19–20 (United Kingdom). See also, in writing, Austria and Czech Republic: UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments: Report of the Secretary-General' (21 April 2016) UN Doc A/71/79, 3.

[118] New Zealand, speaking on behalf of the three countries: UNGA 'Sixth Committee: Summary Record of the 9th Meeting' (n 107) para 37.

[119] Ibid para 54.

[120] UNGA 'Sixth Committee: Summary Record of the 13th Meeting' (n 109) para 41.

[121] UNGA 'Sixth Committee: Summary Record of the 9th Meeting' (n 107) para 70.

[122] For overviews of the discussions over the years, see James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 International and Comparative Law Quarterly 959; Laurence T Pacht, 'The Case for a Convention on State Responsibility' (2014) 83 Nordic Journal of International Law 439; Federica Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments' (2017) 21 Max Planck Yearbook of United Nations Law 83; Arman Sarvarian, 'The Ossified Debate on a UN Convention on State Responsibility' (2021) 70 International and Comparative Law Quarterly 769.

[123] United Nations, 'Sixth Committee (Legal) — 74th Session: Responsibility of States for Internationally Wrongful Acts (Agenda Item 75)' <www.un.org/en/ga/sixth/74/resp_of_states.shtml> accessed 4 April 2022.

[124] See James Crawford, 'Fourth Report on State Responsibility' (2001) II(1) ILC Yearbook 1 para 26. On the impact of this choice in the ILC's subsequent work, see Patricia Galvão Teles, 'The Impact and Influence of the Articles on State Responsibility on the Work of the International Law Commission and Beyond' (*EJIL:Talk!*, 3 August 2021) <www.ejiltalk.org/the-impact-and-influence-of-the-articles-on-state-responsibility-on-the-work-of-the-international-law-commission-and-beyond> accessed 4 April 2022. See also Paddeu and Tams (n 1) 10.

[125] James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 Recueil des Cours de l'Académie de Droit International 9 para 166.

[126] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP, Oxford 2019) 524.

overly principled arguments (such as, that a topic as weighty as responsibility would simply have to be 'treatified' because treaties were the natural or inherently superior outcome of ILC processes or were a natural and inherently superior source as compared with customary law).

There is much to be said for this approach to the Articles. As section 4 showed, the Articles have been well received in many fields of international law. Refinements and clarifications are necessary, to be sure, but this is a normal part of the adaptation of legal rules to the changing character of State interactions, and to the emergence of new challenges and threats. The Articles, grounded as they are in customary law, are amenable to such refinement and adaptation through State practice. Most importantly, however, the system of responsibility codified in the Articles *works*. A codification conference could alter the 'delicate balance' of this system and create instability and uncertainty were the treaty adopted not to be ratified by States.

Whatever the case, however, it is crucial that States in the General Assembly make a decision on their final status. David Caron had warned that the form of the Articles would overshadow disagreements over substance: that, entranced by their neat form, practitioners of international law would overlook some of the deep uncertainties that lingered in some parts of the Articles. This was the 'paradox' of the relationship between form and authority.[127] The paradox was perhaps overstated: the authority of the Articles rests not just in the body that produced the text, but in the role of States both during their drafting as well as in their engagement with the Articles ever since. The hope is that the General Assembly's current stalemate in respect of the final status of the Articles will not invert this paradox: that disagreements over form may begin to overshadow the substance of the Articles.

[127] David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 American Journal of International Law 857. On this paradox, see Fernando Lusa Bordin, 'Still Going Strong: Twenty Years of the Articles on State Responsibility's 'Paradoxical' Relationship between Form and Authority' (*EJIL:Talk!*, 3 August 2021) <www.ejiltalk.org/still-going-strong-twenty-years-of-the-articles-on-state-responsibilitys-paradoxical-relationship-between-form-and-authority> accessed 4 April 2022. See also Paddeu and Tams (n 1) 15.