British Institute of International and Comparative Law

THE OSSIFIED DEBATE ON A UN CONVENTION ON STATE RESPONSIBILITY

ARMAN SARVARIAN*

Abstract This article examines the developments on future action concerning the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) in the Sixth Committee of the UN General Assembly. It reviews the past 20 years, from the presentation of the final draft at the 56th session in 2001, to the most recent debate at the 74th session in 2019. In scrutinising the procedural actions taken over the relevant period, it argues that the ARSIWA have ossified in the Sixth Committee even as they have continued to gain authority through application in practice. This ossification is due not only to divisions amongst delegations on future action but also to disagreements on a select number of provisions. Whilst these substantive issues have narrowed, debate is made fruitless by entrenched positions that do not take account of the application of the ARSIWA in practice.

Keywords: public international law, State responsibility, responsibility of States, United Nations, International Law Commission, Sixth Committee, codification.

I. INTRODUCTION

The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) are now over 20 years old.[1] At its most recent consideration of the text at the 74th session (2019) of the General Assembly, the Sixth Committee (Legal) decided once again to postpone the question of future action, to the 77th session to be convened in

* Reader in Public International Law, University of Surrey, a.sarvarian@surrey.ac.uk. The author is grateful to Mr Arnold Pronto (United Nations Office of Legal Affairs), Dr Filippo Fontanelli (University of Edinburgh) and Professor Kanstantsin Dzehtsiarou (University of Liverpool) for their comments on prior versions of this article, which draws upon the experience of the author in serving as legal adviser and delegate of the Permanent Mission of the Republic of Armenia to the United Nations during the 74th session of the General Assembly of the United Nations. The views expressed herein are his own and do not necessarily reflect those of the Republic of Armenia. The title and structure of this essay are inspired by the article written by Professor James Crawford SC (as he was then) and Mr Simon Olleson, published in the 54th volume of the ICLQ and cited at (n 8) below.

[1] ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session' in *Yearbook of the International Law Commission 2001* (United Nations 2001) vol II(2), 26–143; UNGA Res 56/83 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) UN Doc A/RES/56/83.

[*ICLQ* vol 70, July 2021 pp 769–798] doi:10.1017/S002058932100018X

2022.[2] This continued the holding pattern set by the Sixth Committee in its initial consideration of the text in 2001.[3] At the 74th session a total of 23 statements were delivered on behalf of 61 Member States in an open debate of approximately two hours' duration[4] and an additional three meetings of the Working Group were held in closed session.

On the question of future action, the proposal of the Commission in 2001 was that the General Assembly first take note of the ARSIWA before considering at a later stage the possibility of convening a codification conference: 'The Commission was of the view that the question of the settlement of disputes could be dealt with by the above-mentioned international conference, if it considered that a legal mechanism on the settlement of disputes could be provided in connection with the draft articles.'[5] Accepted by the Sixth Committee, this 'two-step approach' reflected a compromise between those Members who favoured an immediate codification conference and others who considered that postponement of future action would provide time for Member States to become accustomed to the application of the ARSIWA in practice rather than risk through precipitate action the unravelling of the painstaking compromises adopted by the Commission in 32 years of work.[6]

Commenting upon the debate in the 2004 session, Professor James Crawford and Mr Simon Olleson wrote: 'On balance, the better course of action remains that adopted[7] by the General Assembly in 2001 and again in 2004 in putting off any decision on the final form of the ARSIWA until a later date … given the alternatives and the danger of the Sixth Committee's replicating the ILC's 40 years of work on the subject, perhaps to lesser effect, this seems to be the only way forward.'[8]

[2] UNGA Res 74/180 (18 December 2019) UN Doc A/RES/74/180, paras 1, 9. While procedurally it is the General Assembly in plenary that makes the decision, in practice it has accepted each of the proposals of the Sixth Committee on this agenda item; each Member State of the United Nations has the right to participate in the Sixth Committee so that it is virtually a replicate of the Assembly itself—UNGA, 'Rules of Procedure of the General Assembly' (2021) UN Doc A/520/Rev.19, Rule 100.

[3] UNGA Res 59/35 (16 December 2004) UN Doc A/RES/59/35, paras 1, 4; UNGA Res 62/61 (6 December 2007) UN Doc A/RES/62/61, paras 1, 4; UNGA Res 65/19 (6 December 2010) UN Doc A/RES/65/19, paras 1, 4; UNGA Res 68/104 (16 December 2013) UN Doc A/RES/68/104, paras 1, 5; UNGA Res 71/133 (13 December 2016) UN Doc A/RES/71/133, paras 1, 8.

[4] See further details at (n 62).

[5] ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (n 1) 25, paras 72–3.

[6] ILC, 'Summary Record of the 2683rd Meeting' in *Yearbook of the International Law Commission 2001* (United Nations 2001) vol I, 115–21. This time period is traced from the first report submitted in 1969 by Professor Robert Ago, the second Special Rapporteur of the topic, after the project had been relaunched by the Commission in 1963; A Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 76–8, 86–7.

[7] Professor Crawford was the final Special Rapporteur for the State responsibility project and is widely credited with finding the delicate compromises within the Commission to steer the ARSIWA to adoption.

[8] J Crawford and S Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959, 971.

Alongside scholarship commenting upon the application of the ARSIWA in practice,[9] the reports prepared by the Secretariat for each successive triennial debate[10] show that the great majority of the ARSIWA have been widely applied by international courts and tribunals. In light of the period of gestation within the Commission and the normative demand for rules in this critical field, the readiness of international tribunals to use the ARSIWA is arguably unsurprising.[11]

In taking stock of the ARSIWA in light of 20 years of practice since their adoption by the Commission, this article argues that the triennial discussion in the Sixth Committee has ossified even as the ARSIWA have been extensively applied by international tribunals. Whereas the division on the question of future action continues to be between those Member States advocating a diplomatic conference for adoption as a treaty and those wishing to preserve the present state of affairs, consideration of the substance and application in practice of the ARSIWA has wilted. Instead, the debate has entailed the presentation of set-piece statements for the record—in many cases, substantially identical to those presented at previous sessions—focusing predominately upon the central question of a diplomatic conference alongside skirmishing on minor points of procedure. Though the ARSIWA are increasingly used by international tribunals, the pending question of their status in the UN system matters because the resulting uncertainty may inhibit their use not only in adjudication and arbitration but also in diplomatic practice.[12]

Although the divide between the 'pro-conference' and 'anti-conference' Member States remains key, it obscures other significant dynamics. First, the Sixth Committee has taken action on very few major topics over the past 25 years.[13]

[9] eg A Nollkaemper, 'International Wrongful Acts in Domestic Courts' (2007) 101 AJIL 760; Crawford, Pellet and Olleson (n 6); J Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013); S Olleson, 'International Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility' (2013) 26 LJIL 615.

[10] UNGA, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies', UN Docs A/65/76 (2010), A/68/72 (2013), A/71/80 (2016), A/74/83 (2019). See also the technical report (n 72).

[11] One reason why the International Court of Justice might not cite the Articles as frequently as other international tribunals could be that its Members are better informed of the impasse in the Sixth Committee and so are more cautious about invoking them as authority.

[12] The paradox of the provisional status of the Articles leading to greater authority through application in practice (avoiding the risk of a low participation rate in an adopted treaty) was part of the argument of those members of the Commission calling for caution on future action (Pellet (n 6)). While this argument appears to have been borne out by the subsequent treatment of the Articles by international tribunals, the question of final status still constrains the potential of the Articles by leaving their status ambiguous.

[13] These are: the resolution to convene the Rome Diplomatic Conference for the establishment of an international criminal court (UNGA Res 49/53 (9 December 1994) UN Doc A/RES/49/53); the conclusion of the International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256; the International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197; the International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89; and the adoption of the United Nations Convention on Jurisdictional Immunities of States and their Property (adopted 2 December 2004, not yet in force) (2005) 44 ILM 803; H Llewellyn and T

Though this is due to multiple factors, the crucial one is the custom of consensus in a membership of 193,[14] which shows no sign of changing in the foreseeable future. Dividing the Sixth Committee into two camps overlooks significant nuances on future action, differences on substance, as well as the fact that many Member States have yet to express any official view. The lack of substantive debate means that the majority of the Sixth Committee have ignored the topic while the positions of few of the active Member States have evolved in response to practice.

In what follows, the history of the Sixth Committee debates from the 2001 to the 2016 sessions will trace the gradual ossification of Member States' positions on future action and substance. Next, the 2019 debate will be analysed to explain why the deadlock has continued with scant reference to practice or revision of Member States' positions on the ARSIWA. Finally, structural problems in the Sixth Committee with respect to the management of the ARSIWA will be identified together with proposals for changes in the conduct of business in order to galvanise productive debate.

II. THE CONTEXT OF THE DEBATE IN THE SIXTH COMMITTEE

When the ARSIWA were first debated in the Sixth Committee at the 56th session held in 2001, a total of 52 statements were made on behalf of 68 Member States over an estimated 24 hours in ten sittings.[15] While it was evident that the majority of the text commanded general support, it was equally clear, as depicted in Table One, that there were provisions attracting opposition or doubt, of which the most prominent were countermeasures and serious breaches of peremptory norms.[16] The Sixth Committee accepted the proposal of the Commission not to adopt the ARSIWA but rather to take note of them and to annex them to its resolution while commending them to the Member States for their consideration on the question of future action.[17]

Bektas, 'United Nations, Sixth Committee', *Max Planck Encyclopaedia of Public International Law* (2019) paras 31–40. In 2001, the final Special Rapporteur for the topic of State responsibility observed: 'Caron identifies, quite accurately, a weakness on the part of many governments in dealing with standard lawmaking texts: that can be seen, for example, from the rather unhappy process that has attended the ILC's articles on jurisdictional immunity of states and their property, now belatedly back on the agenda. The lesson of that and other cases has not been lost on the ILC. Its recommendation on the state responsibility articles paralleled an earlier recommendation concerning the articles on succession of states with respect to nationality' (J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 889–90).

[14] Llewellyn and Bektas (n 13) para 7.

[15] Crawford and Olleson (n 8) 960. See also UNGA Sixth Committee (56th Session), Summary Records of the 11th meeting (29 October 2001), 12th meeting (31 October 2001), 13th meeting (31 October 2001), 14th meeting (1 November 2001), 15th meeting (1 November 2001), 16th meeting (2 November 2001) UN Docs A/C.6/56/SR.11–16. In addition, the Republic of Korea submitted written comments but did not make an oral statement, see UNGA, 'State Responsibility: Comments and Observations Received from Governments' (19 March 2001) UN Doc A/CN.4/515.

[16] Crawford and Olleson (n 8) 959–61. The two Tables included in this article are intended to provide the reader with a simple method of identifying the individual positions of Member States.

[17] UNGA Res 56/83 (n 1) paras 1, 3. See further eg Pellet (n 6) 86; Crawford and Olleson (n 8) 971.

TABLE ONE:
Criticisms made of the Articles by United Nations Member States in Sixth Committee debates

Article	2001	2004	2007	2010	2013	2016	2019
2 Elements of an internationally wrongful act					Malaysia		Sudan
5 Conduct of persons exercising elements of governmental authority							Sudan
7 Excess of authority or contravention of instructions	USA			Malaysia	Malaysia; USA	USA	USA
8 Conduct directed or controlled by a State			Pakistan				Russia
10 Conduct of an insurrectional or other movement							Sudan
15 Breach consisting of a composite act	USA					USA	USA

Continued

Table One:
Continued

Article	2001	2004	2007	2010	2013	2016	2019
16 Aid or assistance in the commission of an internationally wrongful act	USA; Guatemala; United Kingdom	Guatemala			USA	United Kingdom; USA	United Kingdom; USA
17 Direction and control exercised over the commission of an internationally wrongful act							
25 Necessity	United Kingdom; Russia		Russia	Russia	United Kingdom; Russia	United Kingdom	United Kingdom
30 Cessation and non-repetition	USA	Italy	Italy			USA	USA
31 Reparation		Italy	Italy				
32 Reliance on internal law							Sudan
38 Interest							Sudan

40, 41 Serious breaches of Obligations under Peremptory Norms of General International Law	France; Israel; Poland; Mexico; Chile; Ireland; Brazil; United Kingdom; Japan; USA; Republic of Korea	Cuba; China; Italy	China; Japan; Russia	Russia	United Kingdom; Russia; Israel; USA		United Kingdom; China
48 Invocation of responsibility by a State other than the injured State	Belarus; Israel	Belarus; Israel; Guatemala	China		Israel	Iran	China; Iran
22, 27, 49–54 Countermeasures	France; Bahrain; Poland; Greece; Cameroon; USA; Jordan; Brazil; Iran; Japan	Cuba; Greece; China; Belarus; Israel; Guatemala; Thailand; France	China; Greece; Cyprus; Japan; Sierra Leone			Singapore	Sudan; China; Russia

https://doi.org/10.1017/S002058932100018X Published online by Cambridge University Press

A significant feature of the 2001 debate was the identity of the speakers, who generally comprised the principal legal advisers to the foreign ministries of the Member States. Their participation was due to the fact that the ARSIWA were presented as part of the annual report of the Commission, which is traditionally debated during 'International Law Week' at the United Nations.[18] The statements were detailed and addressed not only the question of future action but also the content of the ARSIWA. Whereas some thought there to be no prospect of adoption as a treaty, others considered such a treaty to be both desirable and achievable and a few delegations pressed for a working group or diplomatic conference to be convened.[19]

At the 59th session in 2004, 28 statements were made on behalf of 34 Member States over approximately two hours in two sittings.[20] The ARSIWA were debated as a separate agenda item, rather than as part of the annual report of the Commission; in general, the participants were diplomats or legal advisers from the Permanent Missions rather than the principal government legal advisers from the capitals. Far briefer than those delivered in 2001,[21] their statements were largely confined to the issue of future action.

While largely falling into 'pro-conference' and 'anti-conference' camps, certain delegations in the 'pro-conference' group (eg Greece) opposed any change to the text while others (eg Russia, Cuba, Belarus) favoured a diplomatic conference in order to seek such changes.[22] Amongst the 'anti-conference' camp were not only differing degrees of opposition but also divergent views on an eventual outcome (eg the position of Canada, Australia and New Zealand (CANZ) in favour of final adoption as a resolution).[23] In reproducing the resolution of 2001, the Sixth Committee added a request that the Secretariat prepare a 'compilation of decisions of international courts, tribunals and other bodies referring to the [A]rticles and to invite Governments to submit information on their practice in this regard'.[24]

[18] Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (n 13) 875; Llewellyn and Bektas (n 13) para 12.

[19] Crawford and Olleson (n 8) 960.

[20] UNGA Sixth Committee (59th Session), 'Summary Record of the 15th meeting' (28 October 2004) UN Doc A/C.6/59/SR.15; UNGA Sixth Committee (59th Session), 'Summary Record of the 16th meeting' (29 October 2004) UN Doc A/C.6/59/SR.16. See also Crawford and Olleson (n 8) 961 (note 7).

[21] Although a time limit could be imposed on speeches, in practice the Sixth Committee does not do so (UNGA, Rules of Procedure (n 2) Rule 114). Due to time pressure, delegations have been regularly exhorted by the Chair to exercise self-discipline in the oral debate while uploading full statements to the PaperSmart system. Linguistic and other issues remain a problem, see UNGA Sixth Committee (74th Session), 'Summary Record of the 34th meeting' (11 November 2019) UN Doc A/C.6/74/SR.34, paras 79–82.

[22] Whereas Russia did not point to specific provisions, Cuba indicated countermeasures and serious breaches of peremptory norms while Belarus suggested communal standing – Crawford and Olleson (n 8) 961.

[23] ibid 962–4.

[24] UNGA Res 59/35 (n 3) para 3.

https://doi.org/10.1017/S002058932100018X Published online by Cambridge University Press

At the 62nd session held in 2007, for the first time, the Sixth Committee had at its disposal not only the written comments of delegations[25] but also a compendium of decisions of international tribunals referring to the ARSIWA.[26] Five written comments on future action and three returns on State practice were provided to the Secretariat.[27] Twenty-nine statements were delivered on behalf of 35 Member States over approximately two and one-half hours in two sittings.[28] Of these, 13 statements on behalf of 18 Member States referred to the reports of the Secretariat.[29] In replicating the 2004 resolution, the Sixth Committee decided 'to further examine, within the framework of a working group … the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the ARSIWA'.[30] This was not a concession to the 'pro-convention' camp, for the language left open the purpose of the working group, which had in fact been suggested in 2004 by both proponents and opponents of a diplomatic conference as a forum for the regular and informal exchange of views.[31]

At the 65th session held in 2010, 13 written comments were received on behalf of 17 Member States and no information on State practice was submitted.[32] Sixteen statements were delivered on behalf of 54 Member States in a single sitting of one and one-half hours.[33] Of these, seven statements referred to the Secretariat report on international decisions.[34] Since

[25] UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments' (9 March 2007) UN Doc A/62/63. Whilst deadlines are fixed for the receipt of written comments and information on State practice, tardy submissions are generally accepted in practice.

[26] UNGA, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies', UN Docs A/62/62 (1 February 2007); A/62/63/Add.1 (12 June 2007); A/62/62/Corr.1 (21 June 2007).

[27] UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments' (n 25).

[28] UNGA Sixth Committee (62nd Session), 'Summary Record of the 12th meeting' (23 October 2007) UN Doc A/C.6/62/SR.12; UNGA Sixth Committee (62nd Session), 'Summary Record of the 13th Meeting' (23 October 2007) UN Doc A/C.6/62/SR.13.

[29] UNGA Sixth Committee, 12th meeting (n 28) paras 60 (CANZ), 62 (Denmark, Finland, Iceland, Norway, Sweden), 69 (Portugal), 91 (Germany); 13th meeting (n 28) paras 5 (Pakistan), 9 (United States of America), 16 (United Kingdom), 18 (Italy), 19 (Japan), 20 (Russia), 27 (Ethiopia), 30 (Sierra Leone).

[30] UNGA Res 62/61 (n 3) para 4. See also UNGA, 'Responsibility of States for Internationally Wrongful Acts: Report of the Sixth Committee' (21 November 2007) UN Doc A/62/446; UNGA Sixth Committee (62nd Session), 'Summary Record of the 27th meeting' (12 November 2007) UN Doc A/C.6/62/SR.27, para 46.

[31] Crawford and Olleson (n 8) 963–4.

[32] UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments', UN Docs A/65/96 (14 May 2010), A/65/96/Add.1 (30 September 2010).

[33] UNGA Sixth Committee (65th Session), 'Summary Record of the 15th meeting' (19 October 2010) UN Doc A/C.6/65/SR.15.

[34] ibid paras 4 (Nordic Group), 7 (Malaysia), 8 (Germany), 10 (Portugal), 14 (Libya), 17 (Viet Nam), 18 (United States of America).

2001, CANZ and the Nordic Group[35] had delivered joint statements and for the first time a joint statement was also made by the Rio Group comprising 23 Member States.[36] The Sixth Committee made no significant change to the 2007 resolution.[37]

For the 68th session in 2013, the Secretariat received three written comments on future action and no information on State practice.[38] Eighteen statements were made in a single session of two hours on behalf of 56 Member States, including a joint statement by the 32 members of the Community of Latin American and Caribbean States ('CELAC', the successor to the Rio Group).[39] Of these, six statements referred to the Secretariat report on international decisions.[40] In the Working Group,[41] four options were considered: 1) to defer again the question of future action; 2) to conclude consideration of the topic by the General Assembly; 3) to conclude consideration of the topic for the time being while leaving open the possibility of revisiting the matter; or 4) to convene a diplomatic conference.[42] The Chair of the Working Group reported:

> A preliminary exchange of views on the basis of those four options had revealed that divergences of opinion continued to exist. Those who had spoken in favour of negotiating a convention on the basis of the ARSIWA has highlighted, inter alia, the extensive reliance of international tribunals on them, as well as the decisions of international tribunals which noted that certain provisions of the ARSIWA

[35] ibid para 4 (Norway, Sweden, Finland, Iceland and Denmark).

[36] ibid paras 1–3 (Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, Venezuela).

[37] UNGA Sixth Committee (65th Session), 'Summary Record of the 25th meeting' (29 October 2010) UN Doc A/C.6/65/SR.25, paras 1–3; UNGA, 'Responsibility of States for Internationally Wrongful Acts: Report of the Sixth Committee' (11 November 2010) UN Doc A/65/463; UNGA Res 65/19 (n 3).

[38] UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments' (27 March 2013) UN Doc A/68/69.

[39] UNGA Sixth Committee (68th Session), 'Summary Record of the 15th meeting' (21 October 2013) UN Doc A/C.6/68/SR.15 (Argentina, Bolivia, Chile, Colombia, Costa Rica, Cuba, Haiti, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Suriname, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago).

[40] ibid paras 1 (CANZ), 7 (Cuba), 9 (United States of America), 21 (Israel), 22 (Russia), 30 (Nordic Group).

[41] The membership of the Working Group is open to all of the Member States. Though the number of attending delegations fluctuates, it has functioned as a closed session of the Sixth Committee in which informal views can be exchanged, not as a sub-committee. As comments are made without attribution, it is not possible to state definitively the State practice that has been considered; in light of the limited meeting time and the lack of a focused agenda apart from the drafting of the resolution, it seems likely that the reference to practice has been low.

[42] UNGA Sixth Committee (68th Session), 'Summary Record of the 28th meeting' (8 November 2013) UN Doc A/C.6/68/SR.28, para 2.

> reflected rules of customary international law. Several delegations had emphasized that a convention on the basis of the ARSIWA would contribute to legal certainty and the international rule of law, and would lessen the selective and inconsistent application of the ARSIWA in their current form. Other delegations had continued to oppose the negotiation of a convention, indicating that it would threaten the delicate balance established in the ARSIWA by the International Law Commission. Some delegations had also noted that it would be premature to consider the ARSIWA in their entirety as settled customary international law.[43]

The Sixth Committee made no significant change to the 2010 resolution.[44]

In advance of the 71st session held in 2016,[45] the Secretariat received written comments on future action from eight Member States and information on State practice from two.[46] Twenty statements were made on behalf of 111 Member States in a single session over approximately two hours.[47] For the first time, this featured a joint statement by the 54 members of the African Group.[48] Of these, three statements referred to the Secretariat compendium of decisions of international tribunals.[49]

The Working Group held three meetings in which the positions expressed in 2013 by the 'pro-conference' and 'anti-conference' groups were repeated.[50] At the second meeting, the Chair presented a 'non-paper' (an informal discussion paper) entitled 'Informal Working Notes from the Chair' to guide the discussions in which he 'had stressed that any decision on the fate of the ARSIWA, including on the process for reaching such a decision, should be taken by consensus and on the basis of sufficient information'.[51] The Chair

[43] ibid.

[44] UNGA Sixth Committee (68th Session), 'Responsibility of States for Internationally Wrongful Acts: Report of the Sixth Committee' (18 November 2013) UN Doc A/68/460; UNGA Res 68/104 (n 3).

[45] For analysis of this session, see F Paddeu, 'To Convene, or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments' in F Lachenmann and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Brill Nijhoff 2017) vol 21.

[46] UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments' (21 April 2016) UN Doc A/71/79.

[47] UNGA Sixth Committee, 'Summary Record of the 9th meeting' (7 October 2016) UN Doc A/C.6/71/SR.9.

[48] ibid paras 30–3 (Algeria, Angola, Benin, Botwana, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, DRC, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Eswatini, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Togo, Tunisia, Uganda, Tanzania, Zambia and Zimbabwe).

[49] ibid paras 40 (Cuba), 60 (Portugal), 70 (United States of America).

[50] UNGA Sixth Committee, 'Summary Record of the 31st Meeting' (4 November 2016) UN Doc A/C.6/71/SR.31, paras 3–5.

[51] ibid para 6.

https://doi.org/10.1017/S002058932100018X Published online by Cambridge University Press

proposed short-term, mid-term and long-term objectives on which the Working Group could focus to reach a definite decision without prejudice to the positions expressed; while certain delegations pressed for annual meetings on the topic to allow for more thorough discussion, others opposed this as tantamount to embarking upon a negotiating exercise.[52] He further suggested that Member States reflect on current State practice by 'requesting a report of the Secretary-General listing, including in the form of a table, the references made to the ARSIWA in the almost 400 decisions of international tribunals and other bodies already compiled by the Secretary-General since 2001, as well as in the submissions of the parties to the relevant disputes'.[53] Delegations also discussed 'the utility of having information on procedural options for possible action on the basis of the ARSIWA, without prejudice to the question of whether any action was appropriate'.[54]

While the Sixth Committee largely preserved the 2013 resolution, it adopted the proposal of the Chair of the Working Group to request the Secretariat to provide the tabular report of references (thereafter known as the 'technical report'[55]) as an addition to the compilation of decisions of international tribunals and report on the written comments of Member States.[56] The Sixth Committee did not, however, decide to request the Secretariat to provide information on all procedural options regarding possible action on the basis of the ARSIWA, without prejudice to the question of whether such possible action is appropriate; rather, it 'acknowledged the possibility' of making such a request at the 74th session.[57]

The provision by Member States from 2007 to 2016 of written comments and information on their practice was extremely sparse and the level of engagement in terms of oral statements fell from 29 in 2007 to 23 in 2016.[58] In terms of the number of participating Member States, the high-water mark was the year 2016 in which 113 participated in either written or oral form.[59] In total, 111 Member States participated at least once between 2007 and 2016, whether in the form of a written comment or an oral statement delivered singly or jointly of whom 49 had not participated in either the 2001 or the 2004 session.[60]

[52] ibid paras 6–7. [53] ibid para 8. [54] ibid.

[55] UNGA Res 71/133 (n 3) para 4. See also UNGA Sixth Committee, 'Responsibility of States for Internationally Wrongful Acts: Report of the Sixth Committee' (11 November 2016) UN Doc A/71/505. [56] UNGA Res 71/133 (n 3) para 6. [57] ibid para 5.

[58] A few submitted written comments without making a statement in the oral debate: two in 2007, seven in 2010, one in 2013 and two in 2016.

[59] Most of this participation is due to the fact that four joint statements were delivered for CANZ, the Nordic Group, the CELAC and the African Group.

[60] Of the remaining 72 Member States that did not, 11 had participated in the 2001 or 2004 session: Croatia, Ireland, Belgium, Thailand, Hungary, Bulgaria, Mongolia, Bahrain, Jordan, Switzerland and the Ukraine.

TABLE TWO:
Positions most recently expressed by United Nations Member States on future action in Sixth Committee debates

Position	2007	2010	2013	2016	2019
Pro-conference	Cyprus	France; Brazil; Lithuania; Viet Nam	Greece; Iran; Indonesia; Saudi Arabia	African Group (54)	CELAC (32); Portugal; Russia
Pro-conference in principle and set up an *ad hoc* committee to examine options	Pakistan				
Pro-conference in principle but only if the integrity of the text be preserved				Austria	
Pro-conference in principle but premature due to current state of State practice	Spain				
Adopt in a resolution without prejudice to a conference			Belarus		
Open to adoption in a resolution as part of a phased approach	China				
Adopt in a resolution, as insufficient consensus for adoption in a treaty				Czech Republic	
			Qatar		

Continued

TABLE TWO:
Continued

Position	2007	2010	2013	2016	2019
Adopt in a resolution and establish an *ad hoc* committee to explore options					
No position	Kuwait				
Open to ideas on adoption					Micronesia
Any decision must be taken by consensus				Singapore	
Anti-conference due to insufficient State practice	Japan; Republic of Korea; Poland; Italy	Germany; Netherlands			
Anti- conference, adopt in a resolution (potentially as annex)					CANZ (3)
Anti-conference, maintain status quo			India		Israel; Malaysia; Nordic Group (5); Slovakia; United Kingdom; United States of America

In terms of the positions of participating States on future action depicted in Table Two,[61] those of 46 of the 'usual suspects' of regular participants may be outlined as follows:

1) CELAC (32 States),[62] Greece, Portugal, Russia and Iran—convene a codification conference;
2) China—open to adoption in a General Assembly resolution as part of a phased approach;
3) CANZ (three States)—no codification conference, instead adopt in a General Assembly resolution (possibly as an annex);
4) Nordic Group (five States), United States of America, India, United Kingdom, Israel and Malaysia—no diplomatic conference, preserve the current status.

The positions of 'sporadic participants' comprising 75 Member States may be sketched as follows:

1) Cyprus (2007), France (2010), Brazil (2010), Lithuania (2010), Viet Nam (2010), Saudi Arabia (2013), Indonesia (2013), African Group (54 States, 2016)—convene a conference for adoption as a treaty;
2) Austria (2016)—support a conference in principle but only if the integrity of the text be preserved;
3) Spain (2007)—support a conference in principle but premature to embark upon it at this stage of evolution of State practice;
4) Pakistan (2007)—support a conference in principle and set up an ad hoc committee to examine the options;
5) Czech Republic (2016)—adopt as a Resolution, as insufficient consensus for adoption as a treaty;
6) Belarus (2013)—adopt in a General Assembly resolution without prejudice to the question of adoption as a treaty;
7) Qatar (2013)—establish a specialised committee to report on options and adopt the ARSIWA in a declaration;
8) Republic of Korea (2007), Japan (2007), Poland (2007), Italy (2007), Germany (2010), the Netherlands (2010)—wait for State practice to evolve through application of the ARSIWA before revisiting the question of a diplomatic conference, preserve the status quo;
9) Singapore (2016)—any decision must be taken by consensus;
10) Kuwait (2007)—no position on future action expressed.

Although the positions of the great majority of Member States did not shift from 2001 to 2016, a few did. Whereas Sierra Leone and Nigeria had opposed a

[61] For an account of the 2001 to 2013 sessions, see LT Pacht, 'The Case for a Convention on State Responsibility' (2014) 83 NordJIntlL 439, 445–7.

[62] Individual statements were also made by Mexico, El Salvador, Cuba, Guatemala, Chile and Venezuela.

https://doi.org/10.1017/S002058932100018X Published online by Cambridge University Press

conference in 2007,[63] they joined the statement of the African Group supporting such a conference in 2016.[64] Austria signalled its support for a treaty in 2007 and 2016 'only if there were a prospect of it really being ratified and accepted' and 'if there are sufficient assurances that the current structure and balance of the draft articles will be maintained and a renewed discussion of their substantial provisions avoided'.[65] France in 2007 called for an ad hoc committee to examine options for the adoption of some of the ARSIWA as a treaty, then adopted a 'pro-conference' position in 2010.[66]

This history of the agenda item can be divided into two phases. The 2001 and 2004 sessions might be described as the reception of the ARSIWA as a newly adopted text that was starting to be used in practice. The ossification of the debate began from the 2007 session when the Sixth Committee had at its disposal regular reports on practice from the Secretariat of which it made scant use. In this second period, positions have largely entrenched with procedural skirmishing revolving around a binary issue of whether to convene a codification conference. To a considerable degree, these procedural questions have effectively become a substitute for action due to the inflexible nature of the impasse on the main issue.

III. THE 2019 DEBATE

In advance of the 79th session held in 2019, the Secretariat received from Member States six written comments but no information on their practice.[67] Twenty-three statements were delivered on behalf of 61 Member States in the oral debate held over two hours in two sittings.[68] The Working Group held three meetings of approximately one hour each.[69] Participation thus remained comparable to previous levels, with Micronesia and the Sudan making their debut while Slovakia intervened for the first time since the 2001 session. As in previous sessions, a few Member States, which have yet to make a formal statement, elected to speak only in the closed meetings of the Working Group in which comments are not individually attributed.

As was the case in 2016, one issue on the draft resolution was the frequency of consideration of the agenda item: certain Member States in the

[63] 13th meeting (23 October 2007) (n 28) paras 28, 30.

[64] 9th meeting (7 October 2016) (n 47) paras 30–1.

[65] 12th meeting (23 October 2007) (n 28) paras 94–5; UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments' (21 April 2016) (n 46) 3.

[66] 13th meeting (23 October 2007) (n 28) paras 10–11; UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments' (14 May 2010) (n 32) 3.

[67] UNGA Sixth Committee, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information received from Governments' (12 July 2019) UN Doc A/74/156.

[68] UNGA Sixth Committee, 'Summary Record of the 13th meeting' (15 October 2019) UN Doc A/C.6/74/SR.13; UNGA Sixth Committee, 'Summary Record of the 15th meeting' (16 October 2019) UN Doc A/C.6/74/SR.15.

[69] 34th meeting (n 21) para 13.

'pro-conference' camp called for annual debate while others in the 'anti-conference' camp pressed for a quinquennial interval.[70] Another recurrent issue was the resistance of some in the 'anti-conference' group to a demand of others in the 'pro-conference' group for a provision to investigate procedural options on future action.[71] Debate also focused on the utility of the Working Group as well as the reports of the Secretariat, particularly the tabular format of the technical report.[72] Ultimately, the Sixth Committee made no change to the 2016 resolution.[73]

Even as scant discussion took place on the application of the ARSIWA in practice, the positions of the usual suspects did not change on future action. Whether a Member State was pro-conference or anti-conference on the question of future action did not necessarily correlate to its position on substance. Some Member States supported a conference and called for changes to the text; conversely, others opposed a conference and wished to preserve the text intact. Certain Member States desired a conference and desired to adopt the text intact while others opposed a conference and sought changes to the text. One change in position on future action was that of Slovakia: it had made no substantive objection in its detailed remarks presented at the 2001 session and had at that time supported a convention in principle[74] but in 2019 it opposed the idea of a convention while voicing no substantive criticism of the text.[75]

As depicted in Table One, 20 Member States have criticised provisions of the ARSIWA between the 2004 and 2019 sessions.[76] Whereas the most contentious issues at the 2001 session were countermeasures, serious breaches of peremptory norms and (to a lesser extent) communal standing, relatively few delegations have consistently voiced concerns about them in subsequent sessions. In 2019, Singapore,[77]

[70] ibid para 18.

[71] ibid para 19.

[72] The technical report covered: 163 cases from 1 January 2001 to 31 January 2016 with 392 references to the Articles; opinions of judges appended to a decision in 50 cases with 202 references; and 157 cases with 792 references in submissions by parties to a dispute; UNGA Sixth Committee, '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, paras 5–6.

[73] UNGA Sixth Committee, 'Responsibility of States for internationally wrongful acts: Report of the Sixth Committee' (21 November 2019) UN Doc A/74/421; UNGA Res 74/180 (n 2).

[74] Slovakia had proposed drafting changes while supporting the key choices made by the Commission; see comments and observations at the 16th meeting (2 November 2001) (n 15) 17, 20, 30, 35, 45, 62, 75–6.

[75] Permanent Mission of Slovakia to the United Nations, 'Statement by Mr Matús Košuth, Assistant Legal Adviser, International Law Department, Ministry of Foreign and European Affairs of the Slovak Republic' (14 October 2019) (on file with author); 13th meeting (15 October 2019) (n 68) paras 13–15.

[76] These concerned the substance of the provisions rather than drafting suggestions and include affirmations of positions adopted at prior sessions.

[77] Permanent Mission of Singapore to the United Nations, 'Statement by Mrs Natalie Y Morris-Sharma, Counsellor (Legal)' (14 October 2019) (on file with author and marked 'check against delivery') para 3: 'Singapore continues to have questions over the desirability of providing a

China[78] and the United States of America[79] reaffirmed objections expressed in 2001 without commenting upon the intervening practice. Although the United Kingdom (unlike in the 2013[80] and 2016[81] sessions) did not explicitly reiterate its substantive objections made in the 2001 session to the provisions on necessity, aid or assistance in the commission of an internationally wrongful act and serious breaches of peremptory norms, its statement implicitly maintained this position.[82] Whilst Israel maintained its long-standing

legal regime for countermeasures within the framework of State responsibility because of the potentially negative implications. The matter of countermeasures was a complex one, and therefore more appropriately addressed in a specialist forum. This is a view that my delegation has articulated previously. We had raised this during the time when the ILC was still undertaking its work on preparing the draft articles. However, while the ILC considered the option of deleting the provision on countermeasures from the draft articles, the ILC did not ultimately do so. The ILC did tweak the approach from earlier drafts, but my delegation is of the view that these tweaks were not sufficient to address the concerns that we had raised.' This paragraph was retained in the version of the speech posted on the UN PaperSmart Portal and was omitted from the abridged version of the statement, delivered orally – 13th meeting (15 October 2019) (n 68) paras 16–17.

[78] 13th meeting (15 October 2019) (n 68) para 17: 'At the same time, differences in interpretation and major concerns existed among States with respect to the provisions relating to serious breaches of obligations under peremptory norms of general international law, countermeasures and measures taken by States other than an injured State.' China had previously objected in 2007 – 12th meeting (23 October 2007) (n 28) paras 85–90.

[79] United States Mission to the United Nations, 'Statement by Mr Julian Simcock, Deputy Legal Adviser' (14 October 2019) (on file with author): 'The United States continues [sic] to believe, consistent with our previous statements on the subject, that the draft articles are most valuable in their present form, and that the General Assembly should not take further action on the draft articles at this time. For more details, please see the comments submitted by the United States on March 2, 2001, as reported in document A/CN.4/515.' This paragraph was omitted from the abridged version of the statement, delivered orally – 13th meeting (15 October 2019) (n 68) paras 25–6.

[80] United Kingdom Mission to the United Nations, 'Statement by Ms Ruth Tomlinson, Assistant Legal Adviser, Foreign & Commonwealth Office' (21 October 2013) (on file with author and marked 'check against delivery'): 'There remain elements of uncertainty and disagreement. In our previous statements on this topic we have outlined some of these, and we stand by our previous views without restating them in full here.' The paragraph was omitted from the abridged version, delivered orally – 15th meeting (21 October 2013) (n 39) paras 16–17.

[81] United Kingdom Mission to the United Nations, 'Statement by Ms Ahila Sornarajah, First Secretary (Legal Affairs)' (7 October 2016) (on file with author and marked 'check against delivery'): 'The practice of States in this area continues to evolve. There remain areas of uncertainty and disagreement, as outlined in our previous statements. We do not propose to restate our objections in full here, but we do observe once again that there are dangers in pressing ahead to a Convention during the process of the natural development of customary international law.' This paragraph was omitted from the abridged version, delivered orally – 9th meeting (7 October 2016) (n 47) paras 51–3.

[82] United Kingdom Mission to the United Nations, 'Statement by Ms Susan Dickson, Minister-Counsellor & Legal Adviser' (15 October 2019) (on file with author and marked 'check against delivery'): '[W]hile there is general consensus among States that many of the Articles reflect customary international law, there remain a significant number of Articles on which States' views diverge, or where there is insufficient State practice, or such practice is insufficiently uniform, to make such a determination. In the view of the United Kingdom therefore, it remains premature to assert that all of the Articles carry a sufficiently high degree of consensus among States, or are sufficiently grounded in practice, such that they can be said to reflect customary international law in their entirety.'

position on future action, it did not refer to its substantive criticisms expressed in 2001.[83]

In a number of other cases, however, it is difficult to discern whether objections on substance that were raised in the 2001 or 2004 sessions still hold today. Of the 17 Member States that criticised the provisions on peremptory norms or countermeasures in 2001 or 2004, for example, the positions of eight are obscure. Ireland, Jordan and Bahrain have made no statement at subsequent sessions while Brazil, Poland and the Republic of Korea have participated infrequently with comments confined to the question of future action. While Japan again expressed caution on peremptory norms and countermeasures in its last intervention in 2007,[84] this is sufficiently dated as to potentially no longer reflect its current position. Whereas France shifted to a 'pro-conference' stance on future action in 2010, its comment arguably implies that it would raise its prior concerns at such a conference, notably on serious breaches of peremptory norms and communal standing.[85] Although Mexico and Chile have been regular participants and staunch supporters of a conference, their subsequent statements have focused entirely upon questions of procedure and future action;[86] consequently, it is possible that they maintain the concerns that they voiced about the peremptory norms provisions in 2001.

Changes on substance can be detected, however, in the positions of five Member States. In 2007, Russia had criticised Articles 25(1)(a) on necessity and 41 on consequences of a serious breach of a peremptory norm;[87] however, these points were omitted from its 2019 statement in which it instead criticised Article 8 on conduct directed or controlled by a State for the first time.[88] Whereas Iran had voiced concerns in 2001 about the regime on countermeasures,[89] these were absent from its statements in the 2016 and

[83] Permanent Mission of Israel to the United Nations, 'Statement by Ms Sarah Weiss Ma'udi, Legal Advisor' (15 October 2019) (on file with author and marked 'check against delivery') – 13th meeting (15 October 2019) (n 68) para 56.

[84] 12th meeting (31 October 2001) (n 15) paras 3–5; 13th meeting (23 October 2007) (n 28) para 19.

[85] The prior position was that 'some of the Articles' might be adopted as a treaty (13th meeting (23 October 2007) (n 28) para 11). The written comment in 2010 stated 'that, in the [sic] light of the importance and novelty of some of the rules set forth in the articles, it is essential to invite States to examine the proposed rules at a conference where they could present their views … France believes that the draft articles of the International Law Commission constitute a good basis on which to work' (comments and information (14 May 2010) (n 32) 3).

[86] eg Misión Permanente de México, Intervención de la Delegación de México, 7 de octubre de 2016 (on file with author); Intervención de la Representación Permanente de Chile, 21 de octubre de 2013 (on file with author). See also Crawford and Olleson (n 8) 965.

[87] Russia had supported the inclusion of Part Two, Chapter III in general at the 13th meeting (23 October 2007) (n 28) paras 23–5. These points were cited in the 2010 session at the 15th meeting (19 October 2010) (n 33) para 16.

[88] Consistent with her statement in 2007, she also indicated that changes would be necessary to the provisions on countermeasures which, in her view, reflected progressive development (13th meeting (15 October 2019) (n 68) para 37).

[89] 16th meeting (2 November 2001) (n 15) paras 11–13.

https://doi.org/10.1017/S002058932100018X Published online by Cambridge University Press

2019 sessions in which it expressed doubt on communal standing.[90] In these cases, it appears that the new objections have augmented, not replaced, the earlier ones.

In 2004, Cuba had supported the redrafting of Article 41 on serious breaches of peremptory norms and had expressed doubts about countermeasures,[91] yet these concerns were omitted from its statements in each session from 2007 to 2019 even as it adopted a stance 'in favour of elaborating a convention on the basis of the ARSIWA which did not upset the delicate balance of the current text'.[92] Whilst Greece had objected to the regime on countermeasures from the 2001 to the 2007 sessions,[93] it called for the adoption of the ARSIWA as a convention 'without any changes to its substantive provisions' from the 2010 session onwards.[94] Cyprus criticised the countermeasures provisions from 2001 to 2007,[95] yet omitted this from its 2019 statement in which it called for the ARSIWA to 'be formally codified in a multilateral treaty as quickly as possible, notwithstanding their customary character and universally binding nature'.[96] In these cases, it seems that objections have been tacitly dropped.

IV. REFLECTIONS ON THE DEBATES

From 2007 to 2019, the agenda item has ossified in the Sixth Committee. Statements in the formal debate (averaging two hours as opposed to the twenty-four hours spent in 2001) varied between 16 and 29 while positions on future action largely became entrenched. Whereas the rationale of the compromise recommendation of the Commission in 2001 was for Member States to become accustomed to the ARSIWA by observing their use in international arbitration and adjudication, the reports of the Secretariat have been infrequently cited and then only in generic terms. Statements focused predominately on the question of future action with scarce comment made upon the application of the ARSIWA—particularly the application of those provisions that were controversial when they were first received as an integral text in the 2001 and 2004 sessions.

Although the number of proponents of a codification conference has increased between 2007 and 2019 while that of the opponents has remained

[90] 9th meeting (7 October 2016) (n 47) paras 64–6; 13th meeting (15 October 2019) (n 68) paras 57–8.
[91] 16th meeting (29 October 2004) (n 20) paras 23–5.
[92] 13th meeting (15 October 2019) (n 68) para 31. See also 12th meeting (23 October 2007) (n 28) paras 71–2; 15th meeting (19 October 2010) (n 33) paras 21–3; 15th meeting (21 October 2013) (n 39) para 8; 9th meeting (7 October 2016) (n 47) paras 39–42.
[93] 14th meeting (1 November 2001) (n 15) para 30; 16th meeting (29 October 2004) (n 20) 79; 13th meeting (23 October 2007) (n 28) para 3.
[94] 15th meeting (19 October 2010) (n 33) para 25; 9th meeting (7 October 2016) (n 47) para 63; 13th meeting (15 October 2019) (n 68) para 40.
[95] 14th meeting (1 November 2001) (n 15) para 56; 16th meeting (29 October 2004) (n 20) para 6; 13th meeting (23 October 2007) (n 28) para 14.
[96] 13th meeting (15 October 2019) (n 68) para 54.

constant, the 'head-count' on future action is complicated by doubt concerning the ongoing validity of positions last expressed in the 2007 and 2010 sessions and based upon the conditions of those times. As depicted in Table Two, 92 Member States have express unqualified support for convening a codification conference between 2013 and 2019 while 14 Member States have signalled unqualified opposition in the same period. In the 2007 and 2010 sessions, six other Member States supported a conference in principle with six indicating opposition due to 'insufficient State practice'; it is consequently difficult to determine whether their positions still hold in light of intervening developments. Between 2007 and 2019, seven Member States supported the intermediate decision of adopting the ARSIWA in a resolution—albeit with varying conditions.

Only five Member States (Russia, Iran, Cuba, Greece and Cyprus) have revised their positions on matters of substance in the intervening 18 years of practice; from their public statements, however, there is no indication whether their positions have changed in response to or independently of that practice. Another five (Singapore, China, United Kingdom, United States of America and possibly Israel) maintained their objections expressed in the 2001 or 2004 sessions without reference to the intervening practice. For the remaining Member States who commented in the 2001 and 2004 debates, it is not possible to glean from the record whether their positions have changed. Although a majority of the membership 'participated' in the 2016 session due to the joint statement of the African Group, the fact that the issue of future action predominates means that the great majority have yet to make substantive comment on the ARSIWA.

This makes it impossible to evaluate whether the majority of the ARSIWA are accepted, while countermeasures, serious breaches of peremptory norms[97] and (possibly) communal standing remain contentious. Although the Permanent Members of the Security Council are formally equal to the other Member States in the Sixth Committee, it is nonetheless politically significant that each of the Permanent Members appears to maintain objections to certain provisions of the ARSIWA.

[97] Coincidentally, the 2019 report of the Commission on its 'peremptory norms of international law' project provoked considerable criticism, particularly on the issue of an indicative list of peremptory norms. See UNGA Sixth Committee (74th Session), Summary Records of the 23rd to 33rd meetings, UN Docs A/C.6/74/SR.23–33 (28 October to 1 November 2020). Though attitudes towards the project were mixed, criticisms centred on the need for an indicative list; the norms included in the draft list; and the methodology employed for identification of norms. The 'non-exhaustive list' of peremptory norms were: the prohibition of aggression; the prohibition of genocide; the prohibition of crimes against humanity; the basic rules of international humanitarian law; the prohibition of racial discrimination and apartheid; the prohibition of slavery; the prohibition of torture; and the right of self-determination ('Text of the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the Commission on First Reading' in UNGA, 'Report of the International law Commission on its Seventy-First Session' (2019) UN Doc A/74/10, 142, draft conclusion 23).

The intention of the Commission in 2001 that practice would inform an evolving debate in the Sixth Committee has not taken place in the main. Rather, the triennial debate has focused almost exclusively upon the question of future action; due to the stalemate between the groups for and against a codification conference, that debate has largely featured procedural skirmishing. As most of the issues are viewed through the lens of movement towards or away from a conference, opponents tend to resist any initiative that might develop the agenda item while proponents tend to propose initiatives leading only towards a conference. Although there have been a few new entrants to the debate (eg Sudan, Micronesia) and the positions of a few Member States (eg Slovakia, Mexico, Chile) on future action have shifted, the agenda item has largely stagnated.

While the role of the Sixth Committee has often centred on procedural action with respect to potential treaty texts, '[a] large number of treaties have passed through the Sixth Committee for adoption either by the UN General Assembly or by an intergovernmental conference … [a] significant number of these were either substantively negotiated and concluded within the Sixth Committee, or were prepared by another UN body – primarily the ILC – but substantively revised and concluded within the Sixth Committee'.[98] Moreover, substantive debate is an important part of its supervisory role with respect to the Commission—even if the effectiveness of its oversight has been questionable.[99] The drift is thus attributable not to the latent inability of the Sixth Committee to engage with matters of substance but rather to the lack of a framework for such debate to take place in a coherent and focused fashion.

It is suggested that the principal cause of this ossification is the format of the debate in the Sixth Committee. The most significant factor is its practice of deciding by consensus: whereas the rules of the General Assembly permit the Sixth Committee to take a vote,[100] in practice there is a powerful inhibition—even a taboo—against 'breaking consensus'.[101] Notwithstanding the fact that attendance in a given debate of 50–60 delegates of the 193 Member States

[98] Llewellyn and Bektas (n 13) para 31.

[99] eg S Rosenne, 'Codification Revisited After Fifty Years' in JA Frowein, R Wolfrum and CE Philipp (eds), *Max Planck Yearbook of United Nations Law* (Brill 1998) vol 2, 1, 10.

[100] UNGA, Rules of Procedure (n 2) Rules 108, 116, 124–33.

[101] An example arose at the first sitting of the Sixth Committee on 7 October 2019 when Iran objected to the programme of work due to ongoing problems with the host country concerning visas and travel restrictions. No delegation called for a vote on adoption of the programme to enable business to commence; after a delay of 25 hours for consultations with the Host Country Committee, the programme was adopted (UNGA Sixth Committee, Summary Records of the 1st to 3rd meetings, UN Docs A/C.6/74/SR.1–3 (7–8 October 2019)). Due to chronic problems concerning visas and other logistics encountered by delegations such as Russia, Iran, Cuba and Syria, it has been suggested in the First Committee (Disarmament and International Security) that it consider removal to Vienna or Geneva. See eg UNGA First Committee, 'Summary Record of the first meeting' (3 October 2019) UN Doc A/C.1/74/PV.1, 6 (Russia), 7 (Syria, Iran, Cuba).

[101]For the 2019 provisional programme, see <https://www.un.org/en/ga/sixth/74/74_session.shtml>.

https://doi.org/10.1017/S002058932100018X Published online by Cambridge University Press

can be considered to be strong, attempting to find consensus even amongst that number often results in inertia. Nonetheless, it is difficult to envisage a realistic prospect of voting being adopted in the Sixth Committee in the foreseeable future.[102]

Since 2001, it has generally not been the principal legal advisers of foreign ministries who have participated in the debate. This is because they prioritise attendance during 'international law week' during which the annual report of the Commission is discussed. Whereas the major delegations commanding greater resources will typically be able to send their legal advisers based in New York City to participate in the other agenda items, the small delegations may well not have a legal adviser on their staff. Even if they do, that individual could well lack research assistance or in-house library resources; confronted with the variety and complexity of the Sixth Committee agenda items—in particular, the annual report of the Commission, comprising several complex topics—prioritisation is inevitable. Whilst the small missions are likely to send one of their regular diplomats to attend sessions in which their national interests are engaged, they are unlikely to expend their limited resources on the 'general' items—particularly those demanding deep subject-matter expertise. Compounding this is the fact that postings to the missions are typically of two to three years' duration so that the degree of turnover of personnel engaging with the topic of State responsibility (considered triennially) is a high one. Collective memory within a mission is likely to be highly relative to the interests and skills of individuals.

In general, one might presume that statements of delegations on the ARSIWA are scrutinised in advance by the legal directorates of the foreign ministries based at their capitals. Though the autonomy of the missions is likely to vary, there is no guarantee of securing the attention of the principal legal adviser or his proxy on a draft statement: competing demands, time differences and centralisation of authority at high levels of a long chain of command can considerably complicate the internal process of 'clearing' a draft. Although foreign ministries are not monolithic bureaucracies, even if a legal directorate signals approval for a statement, authority to deliver it may lie at higher levels, particularly if the substance might carry actual or perceived implications for national interests.

[102] According to one commentator, the General Assembly abandoned the two-thirds-majority rule used in codification conferences up to the UN Conference on Succession of States in respect of State Property, Archives and Debts of 1983 in favour of consensus due to the refusal of a majority of States to negotiate with a minority on contentious issues, particularly the omission of debts owed to private creditors and special treatment for 'newly independent States' on which the Commission had been closely divided (GE do Nascimento e Silva, 'Succession of State Debts' in M Rama-Montaldo (ed), *International Law in an Evolving World: Liber Amicorum Eduardo Jiménez de Arechaga* (Montevideo : Fundación de Cultura Universitaria 1994) vol II, 947, 961–2). The final vote on the draft convention was 54–11–11 (Official Records of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts (Vienna, 1 March–8 April 1983) vol I, 10th plenary meeting, UN Doc A/CONF.117/SR.10, para 62).

In these circumstances, there is scant pressure for incisive statements on the ARSIWA, which would require the dedication of limited resources to careful and time-intensive scrutiny of the evolving practice underpinning any proposed change of direction on either substance or future action. The ARSIWA thus stagnate in the Sixth Committee through inertia, for the agenda item is perceived to lack urgency due to the inertia that is expected to perpetuate. Due to the passage of time, it is thus questionable whether Member States' positions that were last articulated in the 2007, 2010 or 2013 sessions remain current.

The establishment of the Working Group in 2010 has arguably had some utility in clarifying positions concerning the prospective resolution (the 'zero-draft') as well as providing a few delegations with a closed-door forum in which to speak.[103] Due to the size of the Trusteeship Council chamber in which the Sixth Committee sits in order to be able to house (theoretically) 193 Member States plus observers in attendance, it is difficult to form relationships with more than a few delegates in a short space of time. Though delegates in this smaller gathering tend not to sit behind their usual, assigned place but to position themselves nearer to the Chair for improved intimacy, this can also make it difficult to identify speakers. As delegates might not know one another well, the proceedings are semi-formal and somewhat stilted. In this context, it is questionable how much value the Working Group has added to the formal debate in the limited time available.[104]

To break this dynamic, an idea is to adjust the scheduling of the agenda item[105] to coincide with the attendance of legal advisers during International Law Week. To mitigate time pressure on the annual reports of the Commission and the International Court of Justice, one day (eg Tuesday) could be allocated to the State responsibility item. This could feature one morning session of three hours dedicated to formal statements and one afternoon session of the Working Group, which would replace one of the two sessions normally allocated for informal discussion amongst the legal advisers. Whilst this would necessitate three hours of time for debate on the Commission report to be scheduled for the preceding Friday or the following Monday, this can be accommodated by so scheduling the less urgent topics (eg those on the long-term programme of work).

Notwithstanding the fact that participants in the debate refer to the Secretariat reports infrequently and generically, their scope is a significant factor. As several delegations have challenged the evidentiary authority of decisions of

[103] As statements made in the Working Group by delegations are off the record, this can enable a delegation to speak without having to clear a statement with the capital.

[104] Informal consultations are possible when the Sixth Committee is not in session, yet the logistical and organisational challenge is considerable to ensure inclusivity. A few delegations have also insisted on the need for a mandate to call inter-sessional informal meetings.

[105] For the 2019 provisional programme, see <https://www.un.org/en/ga/sixth/74/74_session.shtml>.

https://doi.org/10.1017/S002058932100018X Published online by Cambridge University Press

international tribunals referring to the ARSIWA during the debates, a weakness in the reporting mandate of the Secretariat is that it pertains to the decisions alone. In this respect, the United Kingdom made a new and interesting comment in the 2019 debate:

> Although [the United Kingdom] held the Commission's outputs in the highest regard, it had noticed, in some academic writings and judgments, a certain lack of clarity as to the legal force and status of some of those outputs. On occasion, they had been relied upon as an articulation of international law and without a full consideration of whether they were sufficiently underpinned by State practice and *opinio juris*. It was therefore important to ensure that international law continued to be properly formulated and developed in accordance with well-established principles.[106]

Though this remark is persuasive insofar as it points to a need for proper substantiation of a provision invoked as reflective of customary international law, the notion that the entirety of the text should reflect customary law as a precondition for adoption in a treaty[107] would not only be an extremely high threshold but also contrary to codification practice, which necessarily includes an element of progressive development. For the purposes of identifying customary international law,[108] the diplomatic practice and pleadings of States appearing as parties are important examples of practice.[109] However, a practical constraint on the ability of the Secretariat to undertake a broad study of State practice might be budgetary due to the chronic financial problems of the organisation. Save for the Czech Republic, Germany and especially the United Kingdom, however, the record of Member States in responding to requests to provide information on their practice with respect to the ARSIWA has been lamentable.

Although they are included in the mandate of the Secretariat for the technical report added in 2016, the utility of that report is constrained both in terms of the

[106] 13th meeting (15 October 2019) (n 68) para 20.

[107] Note 82, above ('it remains premature to assert that all of the Articles carry a sufficiently high degree of consensus among States, or are sufficiently grounded in practice, such that they can be said to reflect customary international law *in their entirety*' (emphasis added)).

[108] See eg ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' in UNGA, 'Report of the International Law Commission on its Seventieth Session' (2018) UN Doc A/73/10, 141 (Conclusion 10, Commentary, para 4).

[109] For example, in the *Whaling in the Antarctic Case*, Australia did not cite art 48(1)(a) and 48(2)(a) of the Articles in its Application, yet the remedies that Australia sought in its prayer for relief applied the provisions: 'For [the] reasons [set forth in its Application], and reserving the right to supplement, amplify or amend the present Application, Australia requests the Court to adjudge and declare that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean. In addition, Australia requests the Court to order that Japan: (a) Cease implementation of JARPA II; (b) Revoke any authorizations, permits or licences allowing the activities which are the subject of this application to be undertaken; and provide assurances and guarantees that it will not take any further action under the JARPA II or any similar program until such program has been brought into conformity with its obligations under international law.' *Whaling in the Antarctic Case (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 226, 238, para 23.

mandate provided for it and the difficult formatting of the report itself. To improve the precision of the data, the reporting mandate could be amended to dispense with the technical report in tabular format. Instead, the regular report on international tribunal decisions could be adjusted to authorise the Secretariat to report on the 'application of the ARSIWA' rather than 'references to the ARSIWA'. Whilst it seems to be unlikely that the resources of the Secretariat would allow it to undertake a broader study of State practice—namely, diplomatic practice concerning disputes that are not addressed in arbitration or adjudication—and the Member States have not provided this information, one way to include this important practice might be to authorise the Secretariat to collate such information as its resources might allow.

Even such relatively minor changes as these might require considerable effort to realise. The history of the agenda item has shown a tendency to become ensnared by procedural points as part of a 'zero-sum game' towards or away from a diplomatic conference. For example, on the aforementioned issue of frequency of discussion, the fruitlessness of the debates hitherto arguably militates in favour of a longer interval for the efficient use of resources in terms of personnel time (ie salaries) of Member States and the Secretariat,[110] to say nothing of overhead costs of Headquarters.[111] In this respect, the limbo in which the ARSIWA sit has arguably created a 'bottleneck' for other agenda items (ie articles on transboundary harm, diplomatic protection and responsibility of international organisations) to which they are linked both in terms of substance and codification history.[112]

The participation of small delegations might also be improved through joint statements, at least on the topic of future action. To date, CANZ, the Nordic Group and the CELAC have consistently made such statements while the African Group made a single intervention in 2016. Although joint statements by the European Union or the Commonwealth of Nations are improbable, some of their Member States might be able to find common ground, while the Association of South East Asian Nations, the Eurasian Union and the Alliance of Small Island States might also explore the possibility of joint statements. Such coordination seems likelier to take place if large delegations deploy their resources and energy to good effect, as such diplomatic groundwork requires sustained effort.

On the core question of future action, a majority exists in favour of convening a codification conference. However, it is also evident that some of those

[110] In recent years, improving the efficiency of the organisation has been a priority of the United States of America as its single largest funder. See eg UNGA Fifth Committee, 'Summary Record of the 29th Meeting' (15 March 2019) UN Doc A/C.5/73/SR.29, paras 19–20.

[111] Perhaps the only tangible achievement of the 74th session in which the author might claim involvement was the decision to discontinue the Working Group on diplomatic protection, the meetings for which had been poorly attended—34th meeting (n 21) para 28; UNGA Sixth Committee, 'Diplomatic Protection: Report of the Sixth Committee' (21 November 2019) UN Doc A/74/426; UNGA Res 74/188 (18 December 2019) UN Doc A/RES/74/188, para 2; UNGA Res 71/142 (13 December 2016) UN Doc A/RES/71/142, para 2.

[112] Paddeu (n 45) 26–7.

Member States advocate changes to the text; indeed, a few of them desire a conference precisely to seek changes. The positions of the anti-conference delegations are likewise mixed, with some maintaining substantive objections and others wishing to preserve the text intact. Due to the practice of consensus, it is evident that there is no prospect in the foreseeable future of a codification conference being convened in the face of the consistent opposition of the minority.

Even if the impasse on adoption as a treaty cannot be negotiated in present circumstances, progress can still be made by narrowing the issues and focusing future debate on them. The positions of the 'intermediate' camp (Belarus, China, Czech Republic, Qatar, CANZ) calling for the ARSIWA to be adopted in the form of a resolution offer a potential path towards progress. In light of the entrenched positions on a codification conference, such adoption would need to be done without prejudice to the question of a subsequent treaty (the Belarus and Czech Republic positions). By leaving open the subsequent steps and final outcome, the resolution would either be part of a phased approach (the China position) or the final outcome in itself (the CANZ position).

As this move would 'upgrade' the text—though remaining exhortatory unless affirmed by underpinning State practice and *opinio iuris*—another important condition would need to be the identification of those provisions of the ARSIWA that remain contentious. While criticism of the provisions on countermeasures and serious breaches of peremptory norms has dwindled over time, it is likely that at least some of them would remain questionable. As Table One depicts, objections have been registered to other provisions by one or two States. If senior legal advisers with authority to act were to debate the ARSIWA in light of the 20 years of practice, it is to be expected that fresh consideration of long-standing positions on substance would enable the truly debatable provisions to be identified.

The inclusion of conditional language on these issues in the adoptive resolution would assure those Member States that in fact retain objections that they might continue to seek changes to the text. Conversely, those Member States wishing to preserve the text intact would receive the guarantee that the remainder of the text would be closed to further debate. The ongoing discussion would thus focus not on the ARSIWA as a whole but rather the actual points of contention.

Whilst the question of adoption as a treaty would remain open, those in favour of that outcome could recall that there is precedent for the adoption of a narrow mandate for a codification conference on the understanding that core provisions are agreed as a package;[113] negotiation would thus focus on

[113] This was the approach adopted by the Sixth Committee with respect to the Articles on the Law of Treaties with respect to International Organizations adopted by the Commission in preparation for the diplomatic conference, whereby the settled provisions of the Vienna Convention on the Law of

the remainder in addition to the outstanding and tricky question of a dispute settlement mechanism. Notwithstanding that this question is an important one, it is suggested that the debate has been somewhat mesmerised by the issue of a codification conference; while this would offer the allure of a voting procedure (eg supermajorities) in contrast to the practice of consensus in the Sixth Committee, there is nothing to prevent negotiations from being conducted 'in-house' (eg in a subcommittee)[114] pursuant to a timetable and mandate with a view to adoption as a treaty by the General Assembly.[115] Against the decisiveness offered by a codification conference must be weighed the risk of abstention from the eventual treaty by those States remaining dissatisfied with the text—whether due to changes accepted or rejected.[116] Regardless of the forum, a key priority should be the clarity of the text in terms of avoiding vagueness that necessarily creates scope for conflicting State practice resulting from divergent interpretations.

V. CONCLUSIONS

This article has argued that the hope of the Commission in 2001 that Member States would gradually become accustomed to their application in practice has largely not taken place in the Sixth Committee. Rather, the triennial debates have consisted of procedural skirmishing on future action that has revolved around the divisive question of a codification conference. Not only have the Secretariat reports on the application of the ARSIWA in practice featured only peripherally in the debates but matters of substance have largely been absent. Although there have been a few new entrants into the debates, the participants remain relatively few in comparison with the total membership as measured by the number of statements made.

Whereas shifts in the positions of a few regular participants, either on substance or future action, can be detected between the 2001 and the 2019 sessions; other participants have repeatedly reaffirmed their positions, without

Treaties 1969 were not to be touched. See UNGA Res 40/76 (11 December 1985) UN Doc A/RES/40/76, para 5; Annex II.

[114] UNGA, Rules of Procedure (n 2) Rule 102.

[115] Whereas the principal costs of a diplomatic conference are as a rule borne by the host country, these and the expenses of attendees could be mitigated by putting the Sixth Committee to more productive use. Logistics ought also to take into account practical considerations such as the ongoing COVID-19 pandemic at the time of writing as well as the greenhouse gas emissions to emanate from the conference. Moreover, there is nothing preventing the Sixth Committee from exercising its voting procedure.

[116] Whilst the voting procedure in the Rome Diplomatic Conference enabled the decisive adoption of the Statute of the International Criminal Court in 1998—a text that differed significantly from the draft produced by the Commission to the Sixth Committee—a significant minority of States have since chosen not to ratify it, notably the United States of America after being voted down on key issues at the Conference. The unhappy experience of the UN Conference on Succession of States in respect of State Property, Archives and Debts of 1983 also militates in favour of a voting procedure that encourages a majority to compromise on specified issues in the interest of participation by the minority in the eventual treaty (see n 102).

commenting upon the intervening practice. For certain sporadic participants, it is not possible to glean from the debates whether positions expressed a decade ago or more continue to be held. Although a majority of Member States have adopted a position on the question of future action, many have yet to express any view on the ARSIWA. In spite of the majority that has emerged from 2007 to 2019 in favour of the convening of a conference, the opacity of most Member States' positions on substantive matters makes it impossible to state with confidence whether views are converging on those provisions that were known to be controversial when the ARSIWA were adopted by the Commission in 2001. This, in turn, makes an open conference in which the entirety of the text would be subject to negotiation difficult to predict.

It is suggested that a number of measures could be considered in order to revitalise this ossified debate. A practical change would be to schedule the agenda item to coincide with the presence of foreign ministry legal advisers. The intended effect of this change would be to prompt Member States to refresh their positions on substance, thereby refocusing discussion on concrete reference to the reception of the ARSIWA in practice. A viable objective to break the deadlock might be the adoption of the ARSIWA in a resolution, with a saving clause for those provisions remaining in contention, and without prejudice to the open question of a codification conference. While upgrading the status of the majority of the ARSIWA to reflect their wide application in practice, the item would remain on the agenda with subsequent debate focused upon the outstanding issues. Whether a resolution or a treaty be the final outcome, the quality of the debate in the Sixth Committee on the issue could improve significantly with 'in-house options' for future action also considered.

Scholars of international law have tracked and commented upon the application of the ARSIWA by international tribunals. As international lawyers commemorate the 20th anniversary of their adoption by the Commission, their reception in practice gives rise to a diversity of views.[117]

[117] For examples of scholars treating the text as generally authoritative, see eg J Barboza, 'State Responsibility for Wrongful Acts: Comments on Some ILC Articles' (2014) 44(1–2) EnvPoly&Law 95; Paddeu (n 45) 24 (considering the authority of the Articles to be increasing with every passing year, as evinced by references to them by international courts and tribunals); AS Meardi, 'State Attribution: Whether State Ownership of a Private Entity Is Important in Determining if the Actions of that Entity Are Attributable to the State' (2021) 7 Arbitration Brief <https://digitalcommons.wcl.american.edu/ab/vol7/iss1/1/>. For examples of scholars questioning the status of particular provisions as reflective of customary international law, see eg M Ajevski, 'Serious Breaches, the Draft Articles on State Responsibility and Universal Jurisdiction' (2008) 2(1) European Journal of Legal Studies 12, 15 (arts 40–1, 48); RD Sloane, 'On the Use and Abuse of Necessity in the Law of International Responsibility' (2012) 106 AJIL 447, 450, 502–3 (art 25); A Nissel, 'The Duality of State Responsibility' (2013) 44(3) ColumHumRtsLRev 793, 845–50, 854–5 (considering there to be a gap between the ILC codification and the *opinio juris* in practice, which is based on incremental development in case law); B Farhang, 'The Notion of Consent in Part One of the Draft Articles on State Responsibility' (2014) 27 LJIL 55, 66, 72–3 (art 20).

https://doi.org/10.1017/S002058932100018X Published online by Cambridge University Press

There is, however, a risk in focusing upon international tribunals as the sole point of validation, which have played only a peripheral role in the Sixth Committee debates, even as international tribunals in applying the ARSIWA appear to take scant notice of their ambiguous status in the United Nations system.[118]

[118] Scholars of the law of international responsibility might consider investigating not only the use of the Articles before international tribunals but by States in their diplomatic practice, particularly their use in correspondence in Asia and Africa. They might not only transmit their findings on State practice to the Secretariat but also offer their services to advise Member States with limited capacity to present their views at the Sixth Committee.