

The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAAIL Perspective

B. S. Chimni*

Abstract

This article argues, from the perspective of third-world approaches to international law (TWAAIL), that the limitations of the Guiding Principles on Shared Responsibility (hereinafter 'Guiding Principles') stem from the very fact that their drafters did not contest the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Therefore, before advancing a critique of the Guiding Principles, this article questions certain aspects of ARSIWA. It argues that ARSIWA tends to overlook the distinction between primary and secondary rules; does not take into account the thick and structured relations between corporations and the state in formulating the rule on attribution; completely neglects the principle of special and differential treatment (SDT) in framing secondary rules of state responsibility; and gives a negative connotation to the erga omnes principle. As a result, ARSIWA cannot do justice to weak states. Since the Guiding Principles merely seek to supplement ARSIWA, they fail to address key issues, including the shared responsibility of state and non-state actors, such as multinational corporations, for the violation of human rights and environmental norms and the application of SDT principles in determining shared responsibility.

1 Introduction

The law of state responsibility is a difficult area to navigate as it is fraught with philosophical, ethical and legal problems. The team co-chaired by Jean D'Aspremont and André Nollkaemper deserves to be congratulated on drafting the Guiding Principles

* Distinguished Professor of International Law, O. P. Jindal Global University, Sonapat, Haryana, India.
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on Shared Responsibility (hereinafter ‘Guiding Principles’)¹ to fill an important gap in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)² and Articles of Responsibility on International Organization (ARIO).³ The Guiding Principles underline the significance of unofficial initiatives for the codification and progressive development of rules of international law.⁴ This article seeks to offer a synoptic critique of ARSIWA from the perspective of third-world approaches to international law (TWAIL) in order to point to the limitations of the Guiding Principles.

It will be readily recognized that the shape the Guiding Principles assume critically depends on the assumptions that inform, and the objectives pursued, in ARSIWA, the basis on which ARIO is also drafted. In other words, the fact that the Guiding Principles did not contest ARSIWA set its own limitations. The ‘Introduction’ to the Guiding Principles states that ‘the Principles substantiate, supplement, and adjust the existing rules on the law of international responsibility . . .’.⁵ However, what if ARSIWA suffers from serious flaws and is out of sync with contemporary developments such as pandemics and climate change, or if it fails to address the growing role of corporations in global governance? In that instance, GPSR would neither correct the defects of ARSIWA nor help deal with new developments. Therefore, while it may appear completely unrealistic, and even foolhardy, to question both ARSIWA and the Guiding Principles in a short article, a critique of the Guiding Principles from a TWAIL standpoint becomes inevitable. It is also necessitated by the fact that because of the opposition of Western nations, the United Nations General Assembly has not convened a diplomatic conference on ARSIWA, thus failing to give weak states an opportunity to challenge some of its provisions.⁶ The absence of any scholar from the Global South in drafting the Guiding Principles is another reason. This article will merely make at preliminary and general levels some foundational points that will have to await elaboration.

The article proceeds as follows. Section 2 argues that ARSIWA tends to overlook the distinction between primary and secondary rules; does not take into account the thick and structured relations between corporations and the state in formulating the rule on attribution; entirely neglects the principle of special and differential (SDT) treatment in framing secondary rules; and gives a negative orientation to the *erga omnes*

¹ Nollkaemper, d’Aspremont, Ahlborn, Boutin, Nedeski, and Plakokefalos, ‘Guiding Principles on Shared Responsibility in International Law’, 31 *European Journal of International Law (EJIL)* (2020) 15 (hereinafter ‘Guiding Principles’).

² ILC, Articles on the Responsibility of States for Internationally Wrongful Acts (2001) Report of the ILC on the Work of its Fifty-Third Session, UNGAOR 56th Session Suppl no10, A/56/10, pp.26–30 (‘ARSIWA’).

³ ILC, Articles on the Responsibility of International Organizations (2011) Report of the ILC on the Work of its Sixty-Third Session, UNGAOR 66th Session Suppl no10, A/66/10, pp.54–68 (‘ARIO’).

⁴ For an overview of historical initiatives, see R. P. Dholakia, *The Codification of Public International Law* (1970), ch. 2.

⁵ See Guiding Principles, *supra* note 1, at 15.

⁶ James R. Crawford, *State Responsibility: The General Part* (2013), at 42. But the UN General Assembly has not ruled out the possibility of a convention on responsibility of States for internationally wrongful acts. UNGA Res. 74/180, 27 December, 2019, Responsibility of States for internationally wrongful acts, available at <https://undocs.org/en/A/RES/74/180>.

principle. In short, it adopts secondary rules that do not promote justice for weak actors. Section 3 goes on to contend that the Guiding Principles do not address key issues, including the shared responsibility of state and non-state actors, such as multinational corporations (MNCs), for violations of human rights and environmental norms, or the possible application of SDT principles in determining the meaning and implications of shared responsibility.⁷

2 ARSIWA: Some Issues

How material interests of powerful states and non-state actors translate into primary rules of international law is a complex process that has been subject to much debate. But in the case of secondary rules of international law, such as ARSIWA, the claim is that these are uninflected by interests and power. But the claim of neutrality of secondary rules obscures the organic historical relationship between primary and secondary rules, which were shaped in the colonial era. In fact, the assumption that secondary rules are completely decoupled from the primary rules of state responsibility is a fundamental flaw of ARSIWA. It is no accident that in his book on state responsibility James Crawford, who eventually piloted ARSIWA in the International Law Commission (ILC), merely outlines the views of some key figures of international law on the law of state responsibility from the 17th century to the present, even as he asserts that the modern law of state responsibility emerged in the mid-19th century, the era of high imperialism.⁸ He thus eschews the close relationship between imperialism and the evolution of the rules of state responsibility. That 'secondary' rules are far from being neutral becomes evident when primary rules relating to the protection of the property rights of aliens are listed among secondary rules. For instance, in Chapter II of Part Two of ARSIWA, devoted to the 'Content of International Responsibility of a State', the provision on compensation (Article 36) states:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Noting that the commentary on ARSIWA speaks of '(i) compensation for capital value, (ii) compensation for loss of profits, and (iii) incidental expenses', Dinah Shelton has commented that '[i]n its analysis of property claims, the commentary reflects the global triumph of Western market economies'.⁹ Another commentator observed that the ARSIWA 'places a high value on alienable property rights'.¹⁰ What the ILC did was

⁷ The writings of many of those involved in drafting the Guiding Principles suggest that they were well aware of the Principles' limitations but were compelled to take the path of not challenging ARSIWA out of pragmatic considerations; the alternative would have been drafting new ARSIWA.

⁸ Crawford, *supra* note 6, ch. 1.

⁹ Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility', 96 *American Journal of International Law (AJIL)* (2002) 833, at 852.

¹⁰ Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', 96 *AJIL* (2002) 857, at 859.

to make a double move: first, it distinguished between primary and secondary rules to keep out the controversial issue of compensation for taking of alien property, and then it reintroduced it in the guise of a secondary rule stating the Western position. It may be recalled that between 1956 and 1963 the ILC was attempting to codify and develop rules on state responsibility for injuries to aliens, which had evolved in the colonial era and were actively contested by postcolonial nations. The ILC was therefore unable to move forward. In order to find a way out, it set up a sub-committee headed by Robert Ago, the Special Rapporteur. Following a discussion, ‘the Sub-Committee agreed unanimously to recommend that the Commission should, with a view to the codification of the topic, give priority to the definition of the general rules governing the international responsibility of a State’.¹¹ Thus the distinction between primary and secondary rules was introduced. ILC members from postcolonial nations did not fully appreciate the implications of this so-called practical move.¹² What is worse, they did not oppose the subsequent move to bring back primary rules through the back door. The failure to do so allowed, inter alia, the Western position on compensation for property to be adopted by the ILC, against the views of postcolonial nations adopted in the Programme and Declaration of Action on New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States (CERDS). For example, the notion of “loss of profits” mentioned in Article 36 of ARSIWA did not receive any mention in the CERDS formulation of compensation for the taking of property; CERDS simply spoke of ‘appropriate compensation’ and its determination in the final analysis was subject to domestic law.¹³ What is equally troubling is that while ARSIWA benefitted corporations through rules of *state* responsibility, it also adopted a view on the doctrine of ‘attribution’ that almost ruled out the possibility of making states responsible for their conduct.¹⁴

The concept of “attribution” is central to ARSIWA. It was developed over centuries by Western scholars who kept in view the changing relationship between the individual and the state in Europe.¹⁵ The use of methodological individualism to determine

¹¹ Report by Mr Roberto Ago, Chairman of the Sub-Committee on State Responsibility (Approved by the Sub-Committee), UN Doc. A/CN.4/152, 16 January 1963, at 228, available at <https://bit.ly/36WABRF>.

¹² They did not appreciate that ‘the conceptual foundation on which this fundamental assumption rests are rather weak’, as among other things ‘the content of primary norms will always influence the application of secondary rules’. See Tams, ‘All’s Well That Ends Well: Comments on the ILC’s Articles on State Responsibility’, 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 759, at 764, available at <https://bit.ly/2K0PtFF>; Tams, ‘The World Court and the Development of the Modern Law of State Responsibility’, in C. Chinkin and F. Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (2015) 287, at 292.

¹³ Many commentators have pointed out that the line between primary and secondary has been crossed in other instances. Eric David, as well as André Nollkaemper and Dov Jacobs, has demonstrated that the rules concerning circumstances precluding wrongfulness contained in Chapter V of ARSIWA are essentially primary rules. See David, ‘Primary and Secondary Rules’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010) 27; Nollkaemper and Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, 34 *Michigan Journal of International Law* (2013) 359.

¹⁴ Guiding Principles, *supra* note 1, Art. 33(2) states: ‘This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.’

¹⁵ See Hessbruegge, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’, 36 *New York University Journal of International Law and Politics* (2004) 265.

this relationship led to the privileging of individual autonomy and as a result the separate legal identity of the corporation.¹⁶ This meant leaving out of consideration the intimate historical links between the state and the corporation. In order to illustrate the point, reference may be made to the connections between Great Britain and the East India Company, which was chartered by the Crown and became a Company State from the end of the 17th century until 1857 when Great Britain formally took over the governance of India.¹⁷ According to Stern:

[W]hat the East India Company's history shows us is how state and corporation are mutually constituted, and in fact, derive from similar and shared ideological and historical contexts. Thus, it is the complexities and contradictions in the corporation as both a private and public actor that raises questions that may be useful for upsetting our normative assumptions about precisely what, where, and how corporations operate in a global and transnational context. . . .¹⁸

In different ways, deep structural links between the state and MNCs persist in the contemporary era. This fact, however, is neglected by the ILC. Article 8 of ARSIWA states that '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. The ILC commentary justifies leaving out attributing the conduct of corporations to the state in other instances *inter alia* in the following way:

In theory, the conduct of *all human beings, corporations or collectivities* linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. (Emphasis added)¹⁹

By lumping together 'all human beings' 'collectivities', and 'corporations', the ILC was able to ignore the history of the symbiotic relationship between the corporation and the capitalist state, including their role in the shaping of particular international law obligations.²⁰ The ILC also overlooked that, unlike 'all human beings' and collectives, corporations are few in number.²¹ There was therefore little danger of a suitably

¹⁶ Nollkaemper, 'The Duality of Shared Responsibility', 24 *Contemporary Politics* (2018) 524, at 526. For a brief critique of methodological individualism, see B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd ed. 2017), at 276–279.

¹⁷ See N.B. Dirks, *An Autobiography of an Archive: A Scholar's Passage to India* (2015).

¹⁸ Stern, 'The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations', 39 *Seattle University Law Review* (2016) 423, at 441.

¹⁹ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, UNGA 53rd Session, UN Doc. A/56/10 (2001), at 38 (emphasis added), available at <https://bit.ly/39T3EHB>.

²⁰ For example, it is multinational pharmaceutical corporations that decided on the need to bring the regulation of intellectual property rights in the Uruguay Round of trade negotiations, and effectively shaped the substance of the Agreement on Trade Related Intellectual Property Rights, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 ('TRIPS').

²¹ As Friedmann observed, '[t]he private corporations that are possible subjects of international legal transactions and agreements are relatively few in number. They are collective entities, abstractions, comparable in concept, and often in their economic and political power, to states and public international organizations'. See W. Friedmann, *The Changing Structure of International Law* (1964), at 233.

amended doctrine of attribution assigning extensive responsibility to the home state. The reason the doctrine needs to be amended is that, as Sornarajah points out, ‘it may be possible to argue that a multinational corporation is constituted an agent of the parent state’.²² After all, ‘[i]t is encouraged to invest abroad. Its profits are taxed by the home state. It is given diplomatic and other protection by the home state’.²³ Besides, there are investment insurance schemes, subsidies for exports, technical assistance etc., which add to the weight of state contacts.²⁴ All these connections appear to be negated merely by asserting their distinct legal identity. The ILC would have done well to review the ‘thick and structural links’ with the state to arrive at an appropriate phrase in Article 8. In any case, to borrow the words of Cassese questioning the term ‘control’, ‘[t]o exercise control involves wielding power or authority over a person. But what is the scope of this authority or control? How penetrating should the control be for the controlling state to incur responsibility?’.²⁵ This issue is of particular significance in economies, where the distinction between state and corporation is blurred. Furthermore, as Boon points out:

[I]n the contexts of terrorism, the World Trade Organization (‘WTO’), investor–state arbitration and in a determination of whether an international conflict exists, there have been movements towards lower thresholds because the primary rules in these contexts suggests the requisite level of control should be lesser.²⁶

Therefore, at least the duty of due diligence, varying with the context, exists on the part of the state;²⁷ the extent of responsibility could be greater where the links are more intimate and thicker than usual. Thus, for instance, vis-à-vis human rights obligations, ‘the home State can be held responsible for its own failure to take the domestic measures with extraterritorial effect which could prevent or redress the foreseeable human rights violations by private entities’.²⁸

A TWAIL conception of state responsibility goes beyond making states accountable for MNCs. It also seeks a re-orientation of concepts, principles, rules, measures and remedies of rules of state responsibility to promote the value of justice in so far as it can be pursued through secondary rules. The broad point with regard to the work of the ILC was recognized early on by Phillip Allott when he observed that the aim of

²² M. Sornarajah, *The International Law of Foreign Investment* (4th ed. 2017), at 172.

²³ *Ibid.*

²⁴ See Ryngaert, ‘Jurisdiction: Toward a Reasonableness Test’, in M. Langford et al. (eds), *Global Justice: State Duties* (2013) 92, at 206–207; Seck, ‘Home State Responsibility and Local Communities: The Case of Global Mining’, 11 *Yale Human Rights and Development Journal* (2008) 177.

²⁵ Cassese, ‘The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’, 18 *EJIL* (2007) 649, at 663.

²⁶ Boon, ‘Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines’, 15 *Melbourne Journal of International Law* (2014) 1, at 8.

²⁷ See ILC Study Group on Due Diligence in International Law: Second Report (2016); Bonnitcha and McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights’, 28 *EJIL* (2017) 899.

²⁸ Berkes, ‘Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights’, in Y. Radi (ed.), *Research Handbook on Human Rights and Investment* (2018), at 342.

international lawyers should be ‘the long-term improvement of international society and the increasing realization of justice’.²⁹ However, the instrumental reasoning of the ILC helped avoid thinking about how powerful states have historically behaved vis-à-vis weak nations and peoples. In other words, the critical mistake the ILC made was that, in assessing past state practice on secondary rules of state responsibility, it equated the imperial state with the nation-state.³⁰ If the doctrine and rules of responsibility were to be conceived in terms of ‘connected histories’ of nations, it would be seen that even secondary rules were infected with imperial values.³¹ The ILC’s refusal to do so explains why even when it included rules to promote community interests it was concerned about responding to the breach of peremptory norms – assigned the same scope as state crimes – in a decentralized international system; the concept of ‘serious breaches’ essentially replaced that of ‘international crimes’.³² The ILC did not consider the possibility of the emergence, or progressive development, of positive peremptory obligations, which would have called for framing secondary rules that advanced the values of solidarity and justice. Further, if a justice paradigm had been adopted, the ILC might have considered the need for flexible application of secondary rules in assessing the responsibility of weak nations for the violation of an international obligation. Unfortunately, the SDT principle has not been theorized in the world of secondary rules; it is primary SDT rules that have garnered attention. Justice demands that secondary rules also accommodate the situation of weak states. It is not unusual for secondary rules to respond to demands of justice. Thus, for instance, many of the SDT provisions in the WTO Settlement on Dispute Settlement Understanding (DSU) are essentially secondary rules. The WTO website notes:

²⁹ Philip Allott, ‘State Responsibility and the Unmaking of International Law’, 29 *Harvard International Law Journal* (1988) 1, at 15.

³⁰ Bhambra, ‘Comparative Historical Sociology and the State: Problems of Method’, 10 *Cultural Sociology* (2016) 335, at 346.

³¹ Subrahmanyam, ‘Connected Histories: Notes towards a Reconfiguration of Early Modern Eurasia’, 31 *Modern Asian Studies* (1997) 735.

³² Wyler, ‘From “State Crime” to Serious Breaches of Obligations under Peremptory Norms of General International Law’, 13 *EJIL* (2002) 1147. Chapter III of Part Two which is devoted to the ‘Content of the International Responsibility of a State’ is titled ‘Serious breaches of obligations under peremptory norms of general international law’. Article 41(1) states that ‘States shall cooperate to bring to an end through lawful means any serious breach’. It has to be read with Article 42 of Chapter I of Part Three titled ‘Invocation of responsibility by an injured state’. It states:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: . . . (b) . . . the international community as a whole, and the breach of the obligation: . . . (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Articles 41 and 42 assume that there is no need for framing a distinct set of secondary rules to address the breach of a positive peremptory obligation as would be the case if the right to development was accepted to have that status. This becomes clear from Article 41(2) which states that ‘no State shall recognize as lawful a situation created by a serious breach . . .’. Such an obligation is negative in orientation. The same is the case with Article 48(2)(a) which speaks of ‘cessation of an internationally wrongful act’.

Special and differential treatment *takes a different form in the DSU* than in the other covered agreements, which contain the substantive rules governing international trade. The DSU recognizes the special situation of developing and least-developed country Members by making available to them, for example, *additional or privileged procedures and legal assistance*.

Developing countries may choose a faster procedure, request longer time-limits, or request legal assistance. WTO Members are encouraged to give special consideration to the situation of developing country Members.³³

To take an example of remedies available under WTO rules, Article 15 of the Anti-Dumping Agreement states that developed nations must explore ‘possibilities of constructive remedies’ before applying ‘anti-dumping duties where they would affect the essential interests of developing country Members’.³⁴ By contrast, ILC did not take cognizance of the efforts of postcolonial nations to transform secondary rules of state responsibility. If it had, it might have also made reference to certain tools of interpretation, such as the national deference, margin of appreciation, and subsidiarity principles that could be applied in the instance of weak states on an SDT basis.³⁵ In the context of the European Union, Gerard has observed that ‘all European courts have found that there is good reason to show deference if a case concerns issues of socioeconomic policy which demands complex assessments of fact to be made . . .’.³⁶ In the face of substantial loss of policy space under existing international economic regimes, such a move would help developing nations realize the right to development. Additionally, a positive connotation could have been assigned to obligations *erga omnes* – which intersects and overlaps with the concept of peremptory norms – on the lines of the Advisory Opinion in the *Chagos Archipelago* case (2019).³⁷ It is true that in this case the Court determined that the right of self-determination was a norm of customary international law. But some separate opinions considered it a peremptory norm of international law.³⁸ Be that as it may, the point is that obligations flowing from a peremptory norm require the active cooperation of states on lines ruled by the Court vis-à-vis the right to self-determination.³⁹ Such a provision should have been made in

³³ World Trade Organization (WTO), ‘Developing Countries in WTO Dispute Settlement’, in *Dispute Settlement Module*, ch. 11.2 (emphasis added), available at <https://bit.ly/3goZs3q> (last visited 13 December 2020).

³⁴ Agreement on the Implementation of Article VI of GATT 1994 Anti-Dumping Agreement 1868 U.N.T.S. 201.

³⁵ Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’, 17 *European Law Journal* (2011) 80, at 81.

³⁶ *Ibid.*, at 117.

³⁷ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) 95 [hereinafter ‘*Chagos Archipelago*’].

³⁸ ‘In light of the analysis of the case law of the Court and Article 53 of the VCLT, it is concluded that the right to self-determination is a norm of jus cogens . . .’. See *Chagos Archipelago*, Separate Opinion of Judge Robinson, 25 February 2019, ICJ Reports (2019) 294, at 322, para. 77. See also *Chagos Archipelago*, Separate Opinion of Judge Cançado Trindade, 25 February 2019, ICJ Reports (2019) 156, at 255ff., paras. 319ff.

³⁹ The Court quoted with approval the 1970 Friendly Relations Declaration:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle.

See UNGA Res. 2625 (XXV). See also *Chagos Archipelago*, ICJ Reports (2019) 95, at 139, para. 180.

ARSIWA. The provision might have then been extended to the right to development. It may be recalled that the UNGA Declaration on the Right to Development (1986) calls for 'the full realization of the right of peoples to self-determination' (Article 1) and underlines that 'States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development' (Articles 3(1)).⁴⁰ In other words, the right to development is not only a crucial aspect of the right to self-determination but can also independently be deemed a preemptory norm of international law.⁴¹

3 The Guiding Principles: Added Concerns

Since the Guiding Principles seek to supplement ARSIWA, they have to be aligned with it. Following ARSIWA, Guiding Principle 2 speaks of the shared responsibility only of 'international persons', defined in Guiding Principle 1 as 'states and international organizations'. Consequently, while the Guiding Principles take the idea of shared responsibility seriously, they remain trapped within the traditional doctrine of attribution. They therefore fail to come to grips with critical problems of our times. In April 2020, the UN General Assembly adopted a resolution on 'International cooperation to ensure global access to medicines, vaccines and medical equipment to face COVID-19' which, among other things, called upon States 'to bolster coordination' with the private sector in order to provide affordable access to vaccines, antiviral medicines, etc., especially in developing countries.⁴² The resolution thus mentions the need for shared responsibility of the state and corporations in responding to the Covid-19 pandemic. There are other situations that underline the need for a shared responsibility of the state and corporations. In the age of digital capitalism, individual autonomy is, through the process of mining behavioural data, being colonized by corporations (Google, Facebook, Twitter, Amazon and their local counterparts as in China). Surveillance capitalism is the name of the game.⁴³ Giant digital corporations are also undermining global democracy by collaborating with governments to

⁴⁰ UN General Assembly, *Declaration on the Right to Development*, 4 December 1986, A/RES/41/128 See also Human Rights Council, *Draft Convention on the Right to Development*, UN Doc. A/HRC/WG.2/21/2, 17 January 2020, Art. 13 available at <https://bit.ly/2VPPnmV>.

⁴¹ M. Bedajoui, *International Law: Achievements and Prospects* (1991), at 1193; M. Bedajoui 'Some Unorthodox Reflections on the Right to Development', in F. Snyder and P. Slinn (eds), *International Law of Development: Comparative Perspectives* (1987) 87, at 90; Mauro Ragazzi, *The Concept of International Obligations 'Erga Omnes'* (1997), at 17.

⁴² UNGA, *International Cooperation to Ensure Global Access to Medicines, Vaccines and Medical Equipment to Face COVID-19*, UN Doc. A/74/L.56, 8 April 2020. See also *Shared Responsibility, Global Solidarity: Responding to the Socio-Economic Impacts of COVID-19* (March 2020), at 6–7, available at <https://bit.ly/39SgxBH>.

⁴³ Zuboff defines 'surveillance capitalism', inter alia, as '[a] new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction, and sales' and as '[a]n expropriation of critical human rights that is best understood as a coup from above; an overthrow of the people's sovereignty'. See S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontiers of Power* (2019), at 1.

institutionalize surveillance States. Therefore, to leave out the shared responsibility of the State for the acts of omission and commission of corporations is to be extremely short sighted, especially as ARSIWA seeks to defend corporate concerns.⁴⁴ Progressive Guiding Principles must take cognizance of the *thick and structural links* between state and corporations raising *legitimate expectations* that the home state influence the corporations' conduct in the face of violations of human rights or destruction of the global environment.⁴⁵ The reasons for hesitation to go beyond the 'overall control' test were explained by the International Court of Justice (ICJ) in the *Genocide* case:

[T]he 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf . . . [T]he 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.⁴⁶

As noted earlier, given the limited number of MNCs, the fear of overly broadening the scope of state responsibility might be exaggerated.⁴⁷ On the other hand, to give the doctrine of attribution a narrow technical understanding is to do grave injustice to weak states and peoples exploited by MNCs with the overt, and covert, support of home states. In fact, 'the U.N. Guiding Principles on Business and Human Rights . . . envisage a distribution of responsibilities among states and businesses that operate in delicate human rights situations or in conflict areas'.⁴⁸ Karavias goes further to emphasize that:

[T]he subsidiary is not a freestanding actor . . . its operation is under the managerial control of the parent company. In other words, the parent company, and by extension the home state, may be implicated in the commission of an international law violation, which arises from the conduct of a subsidiary abroad.⁴⁹

An international treaty body has at least in one instance pierced the corporate veil, albeit, as Karavias points out, 'using very subtle language'.⁵⁰ In its concluding observations on Canada in 2012, the Committee on the Elimination of Racial Discrimination noted that it 'is concerned that the State Party has not yet adopted measures with

⁴⁴ See generally D. Fuchs, *Business Power in Global Governance* (2007).

⁴⁵ It is interesting that Nollkaemper (and Jacob) has himself noted in the context of shared responsibility the growing role of private actors in international relations, especially 'in relation to the world economy, where corporations wield influence equal to – and sometimes greater than – some states': see Nollkaemper and Jacobs, *supra* note 13, at 375.

⁴⁶ *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, at 210, para 406 (hereinafter '*Genocide*').

⁴⁷ It is useful to clarify here that not all structural links, but only those that reflect *close and sustained connections* to a state or states, signal a qualitative relationship and bring it into the fold of the law of shared responsibility.

⁴⁸ Nollkaemper and Jacobs, *supra* note 13, at 375 (emphasis added).

⁴⁹ Karavias, 'Shared Responsibility and Multinational Enterprises', 62 *Netherlands International Law Review* (2015) 91, at 97.

⁵⁰ *Ibid.*, at 98.

regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples outside Canada, in particular in mining activities'.⁵¹ The Committee recommended that Canada 'take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable'.⁵² What the Guiding Principles essentially do is to set aside the four century-long history of global capitalism. They also do not take cognizance of the many efforts to make the state accountable for human rights violations.

The idea of shared responsibility was also suited to bringing in SDT in some contexts as an aspect of applicable secondary rules to determine whether there has been a violation of an international legal obligation. But the Guiding Principles have gone along with the assumption of non-discriminatory application of secondary principles of state responsibility. Thus, for instance, in the example given of indivisible shared obligation of multiple states to reduce combined CO2 emissions by 25%, the primary rule of common, but differentiated, responsibility should also be reflected in secondary rules of interpretation and remedies.⁵³ These could, inter alia, assume the form of national deference and margins of appreciation principles.

4 Conclusion

To conclude, what is needed is not that the Guiding Principles complement ARSIWA, but rather a new ARSIWA with suitable guiding principles. While there is much that is valuable in ARSIWA, there are also many flaws. What is more, ARSIWA does not adequately respond to contemporary challenges posed by pandemics, climate change, surveillance capitalism or the continuing developmental problems faced by weak states.

⁵¹ Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations of the Committee on the Elimination of Racial Discrimination – Canada, UN Doc. CERD/C/CAN/CO/19–20, 4 April 2012, at 4. See also decision of the Supreme Court of Canada in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/18169/1/document.do>; Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights (2013), https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (accessed 22 December 2020); Amao 'Multinational Corporations', in A. Nollkaemper and I. Plakokkefalos (eds), *The Practice of Shared Responsibility in International Law* (2017) 799.

⁵² *Ibid.*

⁵³ Guiding Principles, *supra* note 1.