

## COMPENSATION FOR THE DAMAGE CAUSED BY INTERNATIONALLY WRONGFUL ACTS

Martins Paporinskis, 19 September 2024

1. I am grateful for the opportunity to speak about the topic ‘compensation for the damage caused by internationally wrongful acts’, included in the long-term programme of work of the International Law Commission (ILC and Commission) in 2024.<sup>1</sup> The full syllabus of the topic is included in Annex I of the 2024 Annual Report,<sup>2</sup> and in my talk I will address its key elements.
2. I will make four points. I will *first* introduce the topic (Section I); *secondly*, I will address the scope of the proposed topic and issues to be addressed – as well as *not* addressed (Section II); *thirdly*, will consider whether the topic meets the criteria for selection of new topics (Section III); and in conclusion briefly note the possible form of the work of the Commission (Section IV).

### I. Introducing the topic<sup>3</sup>

3. Compensation under the international law of responsibility, particularly State responsibility, is a topic of considerable pedigree in public international law, which goes back to the judgment of the Permanent Court of International Justice in *Factory at Chorzów*<sup>4</sup> and beyond.<sup>5</sup>
4. In the Commission’s work, compensation is addressed in the 2001 articles on responsibility of States for internationally wrongful acts (2001 articles), in

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<sup>1</sup> *Report of the International Law Commission: Seventy-fifth session (29 April–31 May and 1 July–2 August 2024)* UN Doc A/79/10 para 423, available at <<https://legal.un.org/ilc/reports/2024/>>.

<sup>2</sup> Ibid 125 Annex I.

<sup>3</sup> See further Ibid 125 Annex I paras 1-6.

<sup>4</sup> *Factory at Chorzów, Judgment No. 13 (Claim for Indemnity) (Merits)*, P.C.I.J., Series A, No. 17 (1928), p. 47.

<sup>5</sup> *Alabama claims of the United States against Great Britain, Award of 14 September 1872*, UNRIIAA, vol. XXIX, pp. 125–134, at pp. 133–134; and Institute of International Law, “Responsabilité internationale des États à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers”, *Yearbook*, vol. 33-III (1927), pp. 330 et seq., at pp. 333–334, arts. 10–11.

article 36 and related provisions.<sup>6</sup> However, when the Commission discussed compensation in the 1990s, it could draw upon only “relatively few [then-]recent reasoned awards dealing with the assessment of material damage as between State and State”.<sup>7</sup> Consequently, article 36 was expressed in terms of a general principle, rather than detailed criteria. While this drafting was prudent in light of the available materials, and the provisions have to be read alongside very thorough commentaries, some have suggested since then that the Commission did not go far enough in addressing the “many and complex” “real-life issues” (and I quote here from Judge Rosalyn Higgins).<sup>8</sup> The Secretariat of the Commission noted in a somewhat similar vein in its 2016 Working Paper on the long-term programme of work that, “[w]hile States often prefer compensation to other forms of reparation, the 2001 articles provide only limited guidance on the quantification of compensation”.<sup>9</sup>

5. There is now significantly more relevant practice than in 2001. Compensation is addressed in a rich body of reasoned decisions. By way of example, the International Court of Justice (ICJ and the Court) has dealt with compensation in three contentious cases relating to varied fields of international law, including human rights; environmental damage; and concerning the use of force, humanitarian law, human rights, and environmental and macroeconomic damage.<sup>10</sup> In addition, reasoned

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<sup>6</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 98 *et seq.*, art. 36. See also arts. 31, 34, 38, 39.

<sup>7</sup> Third report on State responsibility by Special Rapporteur Mr. James Crawford, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, p. 48, para. 155.

<sup>8</sup> R. Higgins, “Overview of Part Two of the articles on State responsibility”, in J. Crawford, et al. (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 537–544, at p. 539.

<sup>9</sup> Working Paper prepared by the Secretariat on the long-term programme of work: possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments (A/CN.4/679/Add.1), para. 36.

<sup>10</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13.

decisions on compensation have been rendered in inter-State cases on law of the sea and human rights, as well as in cases brought by individuals and other non-State entities before regional human rights courts and investor–State arbitral tribunals. Relevant practice may also be provided by registers of damage established by international organizations, particularly the United Nations.

6. The argument for why the topic of compensation fits the programme of work of the Commission is twofold.
7. First, it would enable the Commission to address compensation in terms that are general in scope and also sufficiently detailed in substance to reflect its importance in the law of responsibility. An analogy in the past work of the Commission for providing legal granularity to accepted rules of State responsibility is the 2006 articles on diplomatic protection.
8. Secondly, the topic would be approached with a practical orientation, building on the increase and diversification of decisions of international courts and tribunals concerning compensation since the adoption of the draft articles on the responsibility of States for internationally wrongful acts, noted before, that have provided further material to make the topic sufficiently feasible and concrete for codification and progressive development. In short, the topic would be framed so as to respond to the practical needs of States.

## **II. The scope of the proposed topic and issues to be addressed<sup>11</sup>**

9. I now turn to the scope of the proposed topic and issues to be addressed. As a general matter, the topic is firmly situated within the Commission’s work on responsibility and follow its conceptual framework and analytical distinctions.
10. I will first address scope of the topic (what the topic addresses, what it does *not* address, then say a few words about the scope, and actors covered) and then explain the substance of issues addressed.

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<sup>11</sup> See 2024 ILC Report (n 1) 125 Annex I paras 7-15.

11. The topic focuses primarily on article 36 of the 2001 articles (Compensation) and also addresses other issues necessarily implicated by identification of rules on compensation and commonly involved with their application in practice, such as causality, contribution, and interest. The topic covers compensation for damage caused by the internationally wrongful acts regardless of the origin and character of the applicable primary rules. In other words, it applies to compensation for breaches of international law of whatever content, unless *lex specialis* does not provide otherwise.
12. The topic does *not* address other consequences of an internationally wrongful act such as other forms of reparation (restitution and satisfaction), cessation, and guarantees of non-repetition. Nor does it address issues in Part One of the 2001 articles, such as international obligations in force for a State, or Part Three, such as invocation of responsibility or countermeasures, or enforcement more generally.
13. In terms of scope, the topic addresses compensation owed in the inter-State setting, as well as situations where the right to compensation accrues directly to any person or entity other than a State in human rights and investment law. The topic addresses compensation arising under the law of responsibility of States as well as international organizations. The topic would not address reparations to, or in respect of, victims, by a person convicted by an international court or tribunal such as the International Criminal Court.
14. I turn now in somewhat greater detail to issues that would be addressed.
  - 14.1 One group of issues that could be considered relates to identification and clarification of rules applicable to compensation. These issues would include the nature of “damage”, causality, equity, the question left open by the ICJ on whether “account should be taken of the financial burden imposed on the responsible State, given its economic condition”,<sup>12</sup> and the evaluation of compensation in the comparative setting of dispute settlement.

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<sup>12</sup> *Armed Activities* (n 10) para 407.

14.2 Another group of issues relate to application of the rules and the determination of quantum of compensation. These issues would include the determination of applicable standards of compensation and the different methods to assess fair market value, determination of lost profits, calculation of interest, and identification of the best practices and methods of determination of compensation in particular specialist fields.

### **III. The proposed topic and the criteria for selecting new topics<sup>13</sup>**

15. Let me now turn to my second larger point: the topic and the criteria for selecting new topics, and particularly the first criterion: the needs of States reflected in the proposed topic.

16. All States may face claims regarding compensation *and* may invoke responsibility of other States themselves or have nationals that directly invoke it. I have spoken already of the richness of developments since 2001, including the decisions of the ICJ, tribunals adjudicating claims under the United Nations Convention on the Law of the Sea, specialised inter-State tribunals, regional courts and universal expert bodies dealing with human rights, investor–State arbitration tribunals, and registers of damage.

17. In these circumstances, States would seem to have a shared interest in greater clarity regarding the content of applicable rules and the better instances of their application, to further peaceful settlement of international disputes before international courts and tribunals, as well as by other means in less formalized settings where compensation claims – or defences against such claims – are considered, prepared and settled. The Commission’s work on international responsibility is at the core of these developments, and it is the Commission, taking into account the important contributions by courts and tribunals as well as by specialised organizations, that would be best placed to address the topic at the general and universal level.

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<sup>13</sup> See 2024 ILC Report (n 1) 125 Annex I paras 16-21.

18. The other criteria for selection of new topics may be viewed as satisfied as well.

17.1 The topic is at a sufficiently advanced stage in terms of State practice and decisions of courts and tribunals to permit progressive development and codification, for which the Commission could also rely on its earlier work, particularly in and in relation to the 2001 articles.

17.2 The topic is concrete and feasible for progressive development and codification. The topic falls within the law of international responsibility, one of the areas in which the Commission has considerable and long-standing expertise due to its universalist and generalist character.

17.3 Finally, while compensation is a traditional topic, this proposal is driven by new developments in international law, particularly in the number and quality of decisions of international courts and tribunals on the topic since the adoption of the draft articles on the responsibility of States for internationally wrongful acts as well as their increased significance in international relations.

#### **IV. The possible form of the work of the Commission<sup>14</sup>**

19. Let me now turn to my last point: the possible form of work of the Commission. In my view, the work of the Commission on the topic may take the form of draft principles, in line with how reparation and compensation were addressed most recently by the Commission.<sup>15</sup> This form would be suitable for the practical orientation of the topic and reflect the recognized customary international law character of the relevant provisions of the 2001 articles. Alternatively, the form of draft articles, well known from the Commission's earlier work within the field, could be adopted.

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<sup>14</sup> See 2024 ILC Report (n 1) 125 Annex I para 26.

<sup>15</sup> See paragraphs (5) to (8) of the commentary to principle 9 of the draft principles on protection of the environment in relation to armed conflict, Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 10 (A/77/10)*, chap. V, sect. E.2, para. 59.

20. Je conclurai en français, dans l'esprit de reconnaissance de deux langues de travail du CAHDI. Le français est également l'une des langues de travail de la Commission du droit international, et le multilinguisme des sources et de l'argumentation constitue sa force particulière. La doctrine francophone a exercé une influence particulièrement marquante sur le développement de ce sujet, d'abord dans les années entre les deux guerres (avec le cours de Salvioli à l'Académie de La Haye en 1929 sur *La responsabilité des États et la fixation des dommages et intérêts par les tribunaux internationaux* et la monographie de Personnaz en 1939 sur *La réparation du préjudice en droit international public*), en passant par l'œuvre magistrale *Le préjudice dans la théorie de la responsabilité internationale* par Brigitte Stern en 1973 et enfin, plus récemment, *Le comportement de la victime dans le droit de la responsabilité internationale* par Daphné Dreysse, l'ouvrage publié en 2021.<sup>16</sup> J'espère que le programme et la bibliographie choisis témoignent de mon engagement à poursuivre l'examen d'un large éventail d'écrits dans les différentes langues, ainsi que de pratiques étatiques et de décisions judiciaires.

21. Je vous remercie de votre attention.

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<sup>16</sup> G. Salvioli, "La responsabilité des États et la fixation des dommages et intérêts par les tribunaux internationaux", *Collected Courses of The Hague Academy of International Law*, vol. 28 (1929-III), pp. 231 et seq.; J. Personnaz, *La réparation du préjudice en droit international public*, Paris, Recueil Sirey, 1939; B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1973 ; D. Dreysse, *Le comportement de la victime dans le droit de la responsabilité internationale*, Paris, Dalloz, 2021.