

Annexes

Annex I

Compensation for the damage caused by internationally wrongful acts

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Introduction

1. Compensation under the international law of responsibility, particularly State responsibility, is a topic of considerable pedigree in public international law.¹ The traditional position on compensation was set out in *Factory at Chorzów* by the Permanent Court of International Justice, as part of the discussion of the principle of reparation:

“payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”²

At the 1930 League of Nations Conference for the Codification of International Law held in The Hague, States expressed general approval of the idea of reparation but mostly without entering into the detail of compensation,³ which in pre-Second World War practice was rather addressed in decisions of international arbitral tribunals.⁴

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¹ *Alabama claims of the United States against Great Britain, Award of 14 September 1872*, UNRIIA, 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 (and pp. 81–168, and *ibid.*, vol. 33-I, pp. 455–562). See also G. Salvioi, “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.*; W. Buder, *Die Lehre vom völkerrechtlichen Schadensersatz*, Begach, 1932; A. Roth, *Schadensersatz für Verletzungen Privater bei völkerrechtlichen Delikten*, Heymann, 1934; L. Reitzer, *La réparation comme conséquence de l’acte illicite en droit international* (PhD thesis, Université de Genève), Liège, G. Thone, 1938; J. Personnaz, *La réparation du préjudice en droit international public*, Paris, Recueil Sirey, 1939; and M. M. Whiteman, *Damages in International Law*, vols. I–II, Washington D.C., United States Government Printing Office, 1937, and vol. III, 1943.

² *Factory at Chorzów, Judgment No. 13 (Claim for Indemnity) (Merits)*, *P.C.I.J., Series A*, No. 17 (1928), p. 47.

³ See the text of articles adopted on first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930), *Yearbook ... 1956*, vol. II, document [A/CN.4/96](#), Annex 3, p. 225, art. 3 (“The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation”). See also basis of discussion No. 29 of the Bases of Discussion Drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) in *ibid.*, Annex 2, pp. 223–225, at p. 225; League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Ser. L.o.N. P. 129.V.3), document C.75.M.69.1929.V), pp. 75 *et seq.*, at pp. 146–151; and League of Nations, *Acts of the Conference for the Codification of International Law held at The Hague from March 13th to April 12th, 1930*, vol. IV: *Minutes of the Third Committee* (document C.351(c).M.145(c).1930.V.), pp. 129–142.

⁴ See, generally, Whiteman (footnote 1 above).

2. The contribution of decisions of international courts and tribunals to the topic of compensation was more limited in the post-War international legal order in the second half of the last century. By way of example, the 1949 judgment in the first contentious case of the International Court of Justice, the *Corfu Channel case*, remained its sole award of compensation in the twentieth century.⁵ When the issue of compensation was raised in some form in later cases, States variously did not request the Court to determine the quantum of damages due,⁶ failed to provide detailed evidence⁷ or, in the one case where a thorough legal and factual argument was presented,⁸ discontinued the proceedings⁹ (and even the *Corfu Channel case* provides virtually no guidance on the judicial methodology of determination of compensation).¹⁰ When the Commission turned to compensation in the 1990s, it could therefore draw upon only “relatively few recent reasoned awards dealing with the assessment of material damage as between State and State”.¹¹

3. The Commission addressed rules on compensation in its draft articles on the responsibility of States for internationally wrongful acts,¹² recognized to be reflective of customary international law.¹³ In article 36 of the draft articles, compensation is expressed in terms of a general principle, rather than detailed criteria (similarly to the approach taken earlier in the first reading):¹⁴

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.¹⁵

While the drafting of article 36 was prudent in light of the available materials, and the provision has to be read alongside its very thorough commentary,¹⁶ some have suggested since then that the Commission did not go far enough in addressing the “many and complex”

⁵ *Corfu Channel case, Compensation, Judgment of 15 December 1949, I.C.J. Reports 1949*, p. 244.

⁶ See *Gabčíkovo-Nagymaros Project (Hungary/ Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 81, para. 152.

⁷ See *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 204–205, para. 76.

⁸ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Memorial of Nicaragua of 29 March 1988*, available from the website of the International Court of Justice: www.icj-cij.org, Cases.

⁹ *Ibid.*, Order of 26 September 1991, *I.C.J. Reports 1991*, p. 47.

¹⁰ *Corfu Channel case* (see footnote 5 above), p. 248 (“It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions [of the United Kingdom] are well founded”), and p. 249 (“The Court considers that the figures submitted by the United Kingdom Government are reasonable and that its claim is well founded”).

¹¹ 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.

¹² See article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 98 *et seq.* See also articles 31, 34 and 38–39, *ibid.*, pp. 91 *et seq.*

¹³ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 232–233, para. 460; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324, at p. 342, para. 49; *M/V “Norstar” (Panama v. Italy), Judgment, International Tribunal for the Law of the Sea, ITLOS Reports 2018–2019*, p. 10, at p. 116, para. 431; and *The “Enrica Lexie” Incident (Italy v. India), PCA Case No 2015-28, Award of 21 May 2020*, Permanent Court of Arbitration, p. 305, para. 1087, note 1934.

¹⁴ See the 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](#), pp. 50–51, paras 158–160. See also the second report on State responsibility by Special Rapporteur Mr. Gaetano Arangio-Ruiz, *Yearbook ... 1989*, vol. II (Part One), document [A/CN.4/425](#) and [Add.1](#), chap. II, pp. 8 *et seq.*; and article 44 of the draft articles on State responsibility, *Yearbook ... 1996*, vol. II (Part Two), p. 63.

¹⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 98 *et seq.*, art. 36. The title of the topic is based on paragraph 1 of draft article 36.

¹⁶ *Ibid.*, pp. 98–105.

“real-life issues”.¹⁷ The Secretariat 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”.¹⁸ Certain decisions of international tribunals seem to be in line with the concerns about insufficient detail of the Commission’s work on the topic, for example when they turn instead to domestic tort law scholarship to articulate the international rules on compensation.¹⁹

4. There is now significantly more relevant practice than when the Commission adopted the draft articles on the responsibility of States for internationally wrongful acts in 2001. Compensation is addressed in a rich body of reasoned decisions by inter-State courts and tribunals as well as bodies considering claims brought by individuals and other non-State entities.²⁰ The International Court of Justice has dealt with compensation in three cases relating to varied fields of international law: in *Ahmadou Sadio Diallo*, the field of human rights;²¹ in *Certain Activities Carried out by Nicaragua in the Border Area*, regarding environmental damage;²² and in *Armed Activities on the Territory of the Congo*, concerning the use of force, humanitarian law, human rights, and environmental and macroeconomic damage²³ (and yet further decisions may be rendered in subsequent phases of proceedings of currently pending cases).²⁴ In addition, reasoned decisions on compensation have been rendered since 2001 in inter-State cases on law of the sea,²⁵ human rights,²⁶ and by the Iran–

¹⁷ 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. See also D. Shelton, “Righting wrongs: reparations in the articles on State responsibility”, *American Journal of International Law*, vol. 96, No. 4 (October 2002), pp. 833–856; and C. Gray, “Remedies”, in C. P. R. Romano, K. J. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, 2014, pp. 871, 873 and 881.

¹⁸ 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.

¹⁹ See *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (IV) and A24, Final Award No. 602-A15(IV)/A24-FT of 2 July 2014*, Iran–United States Claims Tribunal, pp. 23–25, paras. 51–52, and p. 37–38, para. 93; and *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020*, Iran–United States Claims Tribunal, pp. 459–460, paras. 1793 and 1795.

²⁰ United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts*, 2nd ed. (United Nations publication, Sales No.: E.23V.36), 2023, pp. 396–414.

²¹ *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above).

²² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15.

²³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13.

²⁴ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Judgment of 30 March 2023*, para. 231, available from the website of the International Court of Justice, www.icj-cij.org, Cases. See also the recently instituted proceedings claiming compensation, discussed in footnote 87 below.

²⁵ See *The M/V “Virginia G” Case (Panama/Guinea-Bissau), Case No. 19, Judgment of 14 April 2014*, International Tribunal for the Law of the Sea, *ITLOS Reports 2014*; *Arctic Sunrise, Award on Compensation of 10 July 2017*, UNRIAA, vol. XXXII, pp. 183–353, at p. 317; *M/V “Norstar” (Panama v. Italy), Judgment* (footnote 13 above); *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe), Case No. 2014-07, Award on Reparation of 18 December 2019*, Permanent Court of Arbitration, *Oxford Reports on International Courts of General Jurisdiction*, p. 535. See also the United Nations Convention on the Law of the Sea (signed at Montego Bay on 10 December 1982, entered into force on 16 November 1994), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, at p. 494, art. 235, para. 3; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011*, International Tribunal for the Law of the Sea, *ITLOS Reports 2011*, p. 10, at p. 31, para. 67, and, by analogy, “*Hoshinmaru*” (*Japan v. Russian Federation*), *Prompt Release, Judgment*, International Tribunal for the Law of the Sea, *ITLOS Reports 2005–2007*, p. 18, at p. 45, para. 82 (“the reasonableness of the bond”).

²⁶ *Cyprus v. Turkey, Application no. 25781/94, Judgment of 12 May 2014 on Just Satisfaction*, Grand Chamber, European Court of Human Rights; *Case of Georgia v. Russia (I), Application no. 13255/07, Judgment of 31 January 2019 on Just Satisfaction*, Grand Chamber, European Court of Human

United States Claims Tribunal²⁷ and the Eritrea–Ethiopia Claims Commission,²⁸ as well as in cases brought by individuals and other non-State entities before African, American and European regional human rights courts and investor–State arbitral tribunals.²⁹ Compensation in the field of human rights has also been addressed in the works of international organizations³⁰ and expert bodies established by States and international organizations.³¹ Relevant practice may also be provided by registers of damage, particularly when established by the United Nations.³²

5. The argument for why the topic of compensation fits the programme of work of the Commission is twofold. 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.³³ The argument would follow the Commission’s work on State responsibility in particular³⁴ (addressing compensation in terms of secondary rules regarding one form of reparation for the injury caused by the internationally wrongful acts),³⁵

Rights; and *Case of Georgia v. Russia (II)*, Application no. 38263/08, Judgment of 28 April 2023 on *Just Satisfaction*, Grand Chamber, European Court of Human Rights.

²⁷ *The Islamic Republic of Iran v. the United States of America*, Cases Nos. A15 (IV) and A24, Final Award No. 602-A15(IV)/A24-FT of 2 July 2014 (see footnote 19 above); and *The Islamic Republic of Iran v. the United States of America*, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No.604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020 (see footnote 19 above).

²⁸ *Final Award (Eritrea’s Damages Claims)*, 17 August 2009, Eritrea–Ethiopia Claims Commission, UNRIAA, vol. XXVI, pp. 505–630; and *Final Award (Ethiopia’s Damages Claims)*, 17 August 2009, *ibid.*, pp. 631–770.

²⁹ See, generally, United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above), pp. 396–414.

³⁰ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex, para. 20.

³¹ Human Rights Committee, General comment No. 31 [80]: the nature of the general legal obligation imposed on States parties to the Covenant, adopted on 29 March 2004, Report of the Human Rights Committee, vol. I, *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 40 (A/59/40)*, annex III, p. 178, para. 16; Committee against Torture, General comment No. 3 (2012): implementation of article 14 by States parties, adopted on 13 December 2012, Report of the Committee against Torture, vol. I, *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 44 (A/68/44)*, annex X, p. 255, paras. 9–10; Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), pp. 12–13, para. 41, and p. 15, para. 53; and Committee on the Elimination of Discrimination against Women, General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration (CEDAW/C/GC/38), p. 10, para. 43, and pp. 20–21, paras. 101 and 108.

³² See Establishment of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, General Assembly resolution ES-10/17 of 15 December 2006; and most recently Progress report of the Board of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, enclosed in annex to the Letter dated 26 May 2023 from the Secretary-General addressed to the President of the General Assembly (A/ES-10/949). See also Furtherance of remedy and reparation for aggression against Ukraine, General Assembly resolution ES-11/5 of 14 November 2022, para. 4; and Council of Europe, Committee of Ministers, Resolution establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine, adopted on 12 May 2023, (CM/Res(2023)3). On the practice of bodies established by the United Nations, in particular the United Nations Compensation Commission, see the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 101, paragraph (14) of the commentary to article 36, and p. 108, paragraph (4) of the commentary to article 38.

³³ See the Working paper prepared by the Secretariat (footnote 18 above), paras. 36 and 38.

³⁴ See the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 31, paragraph (1) of the general commentary; and the draft articles on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), p. 27, paragraph (2) of the commentary to article 1.

³⁵ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, art. 31, p. 91, art. 34, p. 95, and art. 36, p. 98.

while moving in the focus and depth beyond what was possible in the earlier, broader engagement with responsibility.³⁶ An analogy in the past work of the Commission for providing legal granularity to accepted rules of State responsibility is the 2006 draft articles on diplomatic protection, which were also intended to “give content to [a] provision” of the draft articles on the responsibility of States for internationally wrongful acts.³⁷ Second, 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 in the previous paragraph, that have provided further material to make the topic sufficiently feasible and concrete for codification and progressive development.³⁸ In both respects, the proposal takes as the starting point the position expressed in the 2016 Working Paper, the strength of which has only been further increased by the developments of the intervening eight years.³⁹

6. The next chapters will consider in turn the scope of the proposed topic and issues to be addressed (chapter I), how the proposed topic fits the criteria for selecting new topics (chapter II), the past work of the Commission on the proposed topic (chapter III) and the possible form of output of the Commission (chapter IV). A select bibliography is also provided.

I. The scope of the proposed topic and issues to be addressed

7. The topic would be firmly situated within the Commission’s work on responsibility and follow its conceptual framework and analytical distinctions, particularly in two respects. First, it will take as a given the distinction between primary and secondary rules in general, and in particular between, on the one hand, compensation for conduct which is internationally wrongful and, on the other hand, where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited under international law (“liability”).⁴⁰ Second, the new legal relations that arise from the commission by a State of an internationally wrongful act, including in terms of reparation for any injury done, will be assumed to have a general character and not vary with the nature of the underlying primary rule in question (in the absence of *lex specialis*).⁴¹

8. This chapter considers in turn the title of the proposed topic, its scope and identification and application of the rules of international law on compensation. The distinction between identification and application replicates the approach of the recent judgments of the International Court of Justice on compensation, which pose the legal question in terms of general principles of, or consistent with, the draft articles on the

³⁶ *Ibid.*, art. 36, p. 98; and article 36 of the draft articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), p. 79.

³⁷ Paragraph (2) of the general commentary to the draft articles on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), p. 26 (referring to article 44 of the 2001 draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 120).

³⁸ See the Working Paper prepared by the Secretariat (footnote 18 above), para. 38.

³⁹ *Ibid.*, paras. 36 and 38.

⁴⁰ See the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 31–32, para. (4) (c) of the general commentary. See also the draft articles on prevention of transboundary harm from hazardous activities, *ibid.*, p. 148, paras. (1)–(2) of the general commentary, and p. 150, para. (6) of the commentary to article 1; paragraph (6) of the commentary to principle 1 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), pp. 62–63; and A. Boyle, “Liability for injurious consequences of acts not prohibited by international law”, in J. Crawford, *et al.* (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, p. 95.

⁴¹ See the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 31, paragraph (3) (f) of the general commentary, and p. 140, paragraph (4) of the commentary to article 55.

responsibility of States for internationally wrongful acts,⁴² and answer it by reference to diverse authorities that constitute the best examples in the particular field of international law.⁴³

A. Title of the proposed topic

9. The title of the proposed topic is “Compensation for the damage caused by internationally wrongful acts”. The formulation takes as the starting point the suggested title in the 2016 Working Paper (“Compensation under international law”),⁴⁴ and adjusts it in line with article 36, paragraph 1, of the draft articles on the responsibility of States for internationally wrongful acts (“The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby”).⁴⁵ The title situates the topic within the conceptual framework of the Commission’s past work on international responsibility, with a clear focus on issues addressed in article 36. The title emphasizes the wrongful act and not the type of entity responsible for it so as to permit engagement with the responsibility of States as well as international organizations.⁴⁶ The focus on the wrongful act also reflects the exclusion from the scope of the topic of compensation required by primary rules in the absence of internationally wrongful acts (“liability”).⁴⁷

B. Scope of the proposed topic

10. The topic focuses primarily on article 36 of the draft articles on the responsibility of States for internationally wrongful acts and also addresses other issues necessarily implicated by identification of rules on compensation and commonly involved with their application in practice. The topic covers compensation for damage caused by the internationally wrongful acts regardless of the origin and character of the applicable primary rules;⁴⁸ in that sense, it differs from the treatment of compensation in relation to breach of specific primary rules.⁴⁹ It also considers only compensation and is without prejudice to the other consequences of an internationally wrongful act such as other forms of reparation (restitution and satisfaction),

⁴² See *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), p. 331, para. 13; *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), pp. 25–28, paras. 29–35 and 41; and *Armed Activities on the Territory of the Congo* (footnote 23 above), p. 50, paras. 99–102.

⁴³ See *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), p. 331, para. 13, p. 334, para. 24, p. 337, para. 33, pp. 339–340, para. 40, and p. 342, para. 49; *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), p. 31, para. 52, and, generally, Part III, pp. 28 *et seq.*; and *Armed Activities on the Territory of the Congo* (footnote 23 above), p. 137, para. 407, and, generally, Part III, pp. 58 *et seq.*

⁴⁴ Working Paper prepared by the Secretariat (see footnote 18 above), sect. II.E.

⁴⁵ See paragraph 1 of article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 98.

⁴⁶ See the discussion in paragraph 13 below.

⁴⁷ See footnote 40 above.

⁴⁸ See article 12 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 54.

⁴⁹ See article 12, paragraph 3, of the draft articles on prevention and punishment of crimes against humanity, and paragraphs (17)–(23) of the commentary to thereto, Report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 10 (A/74/10)*, chap. IV, para. 45; C. Grossman Guiloff, “Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”, *ibid.*, Annex B, para. 23 (a); conclusion 19, paragraph 4, and paragraph (18) of the commentary to draft conclusion 19 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) adopted by the Commission on second reading, 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. IV, sect. E.2, para. 44; and principle 9, paragraph 1, and paragraphs (5)–(8) of the commentary to principle 9 of the draft principles on the protection of the environment in relation to armed conflicts adopted by the Commission on second reading, *ibid.*, chap. V, sect. E.2, para. 59.

cessation, and guarantees of non-repetition.⁵⁰ The focus of the topic is fully in line with and does not undermine the customary and treaty obligations of full reparation,⁵¹ providing for various forms of reparation of which compensation is but one.⁵² The topic does not address issues in Part One of the draft articles on the responsibility of States for internationally wrongful acts (“The internationally wrongful act of a State”), such as international obligations in force for a State or compensation for any material loss caused by the act in relation to which a circumstance precluding wrongfulness has been invoked.⁵³ Nor does it address issues in Part Three of the draft articles (“The implementation of the international responsibility of a State”), such as invocation of responsibility or countermeasures, or enforcement more generally.⁵⁴

11. The scope of the topic is delineated by reference to two elements: entities to which the right to compensation accrues, and entities that are obliged to provide compensation.

12. First, the topic addresses compensation owed in the inter-State setting,⁵⁵ as well as situations where the right to compensation accrues directly to any person or entity other than a State.⁵⁶ This is in line with the routine reliance on materials not limited to the inter-State setting in the commentary to article 36 of the draft articles on the responsibility of States for internationally wrongful acts⁵⁷ and *Ahmadou Sadio Diallo*,⁵⁸ as well as the fact that many recent decisions on the topic are rendered in cases brought by individuals and other non-State entities before regional human rights courts and investor–State arbitral tribunals.⁵⁹

13. Second, the topic addresses compensation arising under the law of responsibility of States as well as international organizations.⁶⁰ This is consistent with the identical expression of rules on compensation in the 2011 draft articles on the responsibility of international organizations⁶¹ and the possibility that further relevant materials may be provided by the

⁵⁰ See articles 30, 35 and 37 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 88, 96 and 105, respectively.

⁵¹ See *Armed Activities on the Territory of the Congo* (footnote 23 above), p. 43, para. 70.

⁵² *Ibid.*, p. 50, para. 101. See also rehabilitation, *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), separate opinion of Judge Caçado Trindade, p. 347, at pp. 377–380, paras. 81–85; and Basic Principles and Guidelines ... (footnote 30 above), para. 21.

⁵³ See articles 13 and 27 (b) of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 57 and 85, respectively. See also *CMS Gas Transmission Company v. Argentine Republic, Case No. ARB/01/08, Decision on Annulment of 25 September 2007*, International Centre for the Settlement of Investment Disputes (ICSID), paras. 146–147; and *EDF International SA et al. v. Argentine Republic, Case No. ARB/03/23, Decision on Annulment of 5 February 2016*, ICSID, para. 330.

⁵⁴ Plurality of responsible actors may also be relevant for the determination of content of responsibility, *Armed Activities on the Territory of the Congo* (see footnote 23 above), pp. 49–50, para. 98 (also referring to the commentary to article 47 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 124).

⁵⁵ See article 33, paragraph 1, of the draft articles on the responsibility of States for internationally wrongful acts, *ibid.*, p. 94.

⁵⁶ See *ibid.*, art. 33, para. 2, and p. 95, paragraph (4) of the commentary to article 33.

⁵⁷ *Ibid.*, pp. 99–100, paragraph (6), p. 102, paragraph (19), and pp. 104–105, paragraphs (27) and (32) of the commentary to article 36, as well as pp. 99 *et seq.*, footnotes 515–516, 520–522, 524, 546–547, 549, 550, 553, 555–560, 564–566, 570, 576 and 579. See also the 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](#), pp. 50–51, paras. 156–158.

⁵⁸ *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above), p. 331, para. 13, and declaration of Judge Greenwood, p. 391, at p. 394, para. 8.

⁵⁹ United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above), pp. 396–414. See also Grossman Guiloff (footnote 49 above), para. 20.

⁶⁰ See *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 181; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

⁶¹ Except for replacing the term “State” by “international organization”: see the draft articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), p. 80, paragraph (4) of the commentary to article 36. These articles were also followed with minimal

Commission's work on the settlement of disputes to which international organizations are parties.⁶² The topic would address those aspects of the law of responsibility of international organizations that do not raise issues distinct from State responsibility, and frame the inquiry so as to build upon and supplement, and not overlap with, the Commission's work on other topics. For greater certainty, 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.⁶³

C. Identification of the rules of international law of compensation

14. Taking the 2016 Working Paper as the starting point, one group of issues that could be considered relates to identification and clarification of rules applicable to compensation, expressed in article 36 and other provisions related to reparation more generally. First, the conditions of applicability of compensation would be addressed, confirming that it is neither the primary nor the sole form of reparation.⁶⁴ Second, "damage" would require consideration of article 36 and article 31, paragraph 2, and discussion of material and moral damage as well as confirmation of the impermissibility of punitive damages.⁶⁵ The Commission may also address the question left open by the International Court of Justice in *Armed Activities on the Territory of the Congo*, "whether a claim for macroeconomic damage resulting from a violation of the prohibition of the use of force, or a claim for such damage more generally, is compensable under international law".⁶⁶ Third, "caused", in line with article 36 and article 31, paragraph 1, would call for discussion of the factors that may be relevant for application of causality, and the distinction between factual causation and legal causation, as well as the effect of mitigation of damage and concurrency of several factors or actors.⁶⁷ Fourth, the Commission may want to (re)consider another question left open in *Armed Activities on the Territory of the Congo*, "whether, in determining the amount of compensation, account should be taken of the financial burden imposed on the responsible State, given its economic condition".⁶⁸ Fifth, the topic could address the relevance of equity⁶⁹ and general principles of

changes on other points of content of responsibility relevant for compensation, see *ibid.*, p. 77, paragraph (8) of the commentary to article 31, and p. 81, commentary to article 38 and paragraph (1) of the commentary to article 39.

⁶² See Settlement of disputes to which international organizations are parties, memorandum by the Secretariat (A/CN.4/764).

⁶³ *The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15-2074, Reparations Order of 28 February 2024*, Trial Chamber IX, International Criminal Court, paras. 56–58 and 77–87.

⁶⁴ Draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 91, article 31, paragraph 2, and p. 111, paragraph (5) of the general commentary to Part Two, chapter III. See also, on the choice of the form of reparation, *ibid.*, p. 119, article 43, paragraph 2 (b).

⁶⁵ *Ibid.*, p. 91, article 31, paragraph 2, and p. 99, paragraph (4) of the commentary to article 36.

⁶⁶ *Armed Activities on the Territory of the Congo* (see footnote 23 above), p. 130, para. 381, and separate opinion of Judge Robinson, p. 165, at p. 183–184, paras. 44–46.

⁶⁷ Draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 91, article 31, paragraph 1, and pp. 100–101, paragraphs (9)–(13) of the commentary to article 36; and the Working Paper prepared by the Secretariat (see footnote 18 above), para. 41. On the bearing of the law of occupation on the requisite causal nexus, see *Armed Activities on the Territory of the Congo* (footnote 23 above), pp. 44–45, para. 78, and separate opinion of Judge Yusuf, p. 145, at pp. 146 *et seq.*, section II.

⁶⁸ *Ibid.*, p. 137, para. 407, and separate opinion of Judge Yusuf, p. 154, para. 23. See also *Final Award (Eritrea's Damages Claims)* (footnote 28 above), paras. 19–23; *Final Award (Ethiopia's Damages Claims)* (*ibid.*), paras. 19–23; and *The Duzgit Integrity Arbitration* (footnote 25 above), dissenting opinion of Judge Kateka, paras. 24–26.

⁶⁹ See *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), pp. 334–335, para. 24, and declaration of Judge Greenwood, p. 391, at pp. 393–394, paras. 5, 7 and 9; *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), pp. 26–27, para. 35; and *Armed Activities on the Territory of the Congo* (footnote 23 above), pp. 51–52, para. 106, pp. 70–71, paras. 164 and 166, p. 76, para. 181, p. 79, para. 193, p. 83, para. 206, pp. 88–89, para. 225, p. 98, para. 258, and p. 127, para. 365.

law.⁷⁰ Sixth, the related questions of interest and contribution to injury, expressed in respectively articles 38 and 39, could also be considered, since they play an important role in the practice of determination of compensation.⁷¹ The final question relates to the broader perspective of compensation before different courts and tribunals, and has two aspects. One aspect relates to the extent, if any, that the applicable secondary rules may be affected by the character of the entity invoking responsibility, particularly (certain) non-State entities. Another aspect considers the uniformity of approaches in different settings, and whether “those principles [are] capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just ... by comparison with other cases”.⁷²

D. Application of the rules of international law of compensation

15. Again taking the 2016 Working Paper as the starting point, another group of issues relate to application of the rules and the determination of quantum of compensation, with an eye to article 36, paragraph 2, and also article 38 (“Interest”). Relevant legal questions would include, first, the determination of applicable standards of compensation and the different methods to assess fair market value, including their interrelationships.⁷³ The second question is the determination of lost profits.⁷⁴ The topic could explore how decisions since 2001 have addressed the negative aspects of the rule (the general caution against claims with inherently speculative elements,⁷⁵ specifically against awarding loss of profits and interest over the same period of time to avoid double recovery),⁷⁶ as well as the categories of lost profits identified as “covered”.⁷⁷ An additional question, not prominently considered by the Commission, is whether double recovery takes place by award of loss of profits if valuation of income-producing assets has already taken into account their effectiveness in producing future profits.⁷⁸ Third, the choice of interest rate and the application of simple interest and compound interest could be addressed,⁷⁹ reflecting on the sceptical attitude to compound interest in the commentary to article 38 in light of post-2001 practice.⁸⁰ Finally, in line with the approach of the International Court of Justice outlined in paragraph 8 above, the

⁷⁰ See the second report on State responsibility by Special Rapporteur Mr. Gaetano Arangio-Ruiz, *Yearbook ... 1989*, vol. II (Part One), document [A/CN.4/425](#) and [Add.1](#), pp. 10–11, paras. 27 and 29; and *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020* (footnote 19 above), p. 459, paras. 1793–1794, pp. 461–462, para. 1797, p. 505, para. 1946, and pp. 542–543, para. 2087.

⁷¹ P. Nevill, “Award of interest by international courts and tribunals”, *British Year Book of International Law*, vol. 78, No. 1 (2007), pp. 255–341; and D. Dreyssé, *Le comportement de la victime dans le droit de la responsabilité internationale*, Paris, Dalloz, 2021.

⁷² *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above), declaration of Judge Greenwood, p. 391, at pp. 393–394, para. 7, also paras. 8–9. See also *Arctic Sunrise, Award on Compensation* (footnote 25 above), p. 338, para. 73.

⁷³ Working Paper prepared by the Secretariat (see footnote 18 above), para. 41.

⁷⁴ *Ibid.*

⁷⁵ See paragraphs (27) and (32) of the commentary to article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 104–105 (endorsed in *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above), p. 342, para. 49).

⁷⁶ See paragraph (33) of the commentary to article 36 and paragraph (11) of the commentary to article 38 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 105 and 109, respectively.

⁷⁷ See paragraphs (27)–(31) of the commentary to article 36, *ibid.*, pp. 104–105.

⁷⁸ See A. C. Smutny, “Some observations on the principles relating to compensation in the investment treaty context”, *ICSID Review – Foreign Investment Law Journal*, vol. 22 (2007), p. 1, at pp. 11–14.

⁷⁹ Working Paper prepared by the Secretariat (see footnote 18 above), para. 41.

⁸⁰ See paragraphs (8)–(9) of the commentary to article 38 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 108–109. In post-2001 inter-State cases, compound interest has been awarded in law of the sea disputes, rejected by the Iran–United States Claims Tribunal, and not requested before the International Court of Justice; in investor–State arbitration, compound interest is increasingly, although not invariably, awarded when requested, see M. Pappas, “Article 38”, in P. Bodeau-Livinec and P. Galvão Teles (eds.), *Articles on State Responsibility for Internationally Wrongful Acts: a Commentary*, Oxford University Press, forthcoming.

Commission would identify the best practices and methods of determination of compensation in particular specialist fields, just as the commentary to article 36 did.⁸¹ By way of one example of what that exercise would entail, the award of a global sum in *Armed Activities on the Territory of the Congo* gave rise to a rich variety of judicial views, which could inform the discussion regarding its legal rationale as well as conditions and practicalities of implementation.⁸²

II. The proposed topic and the criteria for selecting new topics

16. The proposed topic meets the criteria for selection of new topics set by the Commission.⁸³

17. First, the proposed topic reflects the needs of States.⁸⁴ Secondary rules of responsibility regarding compensation continue to be of increasing practical importance for States in different fields of international law and before different international courts and tribunals, reflected in the frequency of explicit invocation of article 36 of the draft articles on the responsibility of States for internationally wrongful acts and related provisions before and in the decisions of international courts and tribunals.⁸⁵ All States may face claims regarding compensation *and* may invoke responsibility of other States themselves or have nationals that directly invoke it. The introduction has outlined the richness of developments since 2001, including the decisions of the International Court of Justice, tribunals adjudicating claims under the United Nations Convention on the Law of the Sea, the Iran–United States Claims Tribunal, the Eritrea–Ethiopia Claims Commission, regional courts and universal expert bodies dealing with human rights, investor–State arbitration tribunals, and registers of damages.⁸⁶ Recently instituted contentious proceedings before the International Court of Justice specifically seeking compensation suggest that the general importance of compensation is likely to continue in future.⁸⁷ In these circumstances, States would seem to

⁸¹ See paragraphs (7)–(34) of the commentary to article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 100–105; and paragraphs (5)–(8) of the commentary to principle 9 of the draft principles on the protection of the environment in relation to armed conflicts, 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.

⁸² *Armed Activities on the Territory of the Congo* (see footnote 23 above), pp. 51 *et seq.*, paras. 106–107, 166, 181, 193, 206, 221, 225–226, 253, 258, 298, 310, 322, 332, 344, 363, 365–366, 392 and 405; declaration of Judge Tomka, p. 140, at pp. 142–143, para. 9; separate opinion of Judge Yusuf, p. 145, at pp. 153–164, sections III–IV; separate opinion of Judge Robinson, p. 165; declaration of Judge Salam, p. 185, at p. 189, para. 17, and p. 191, para. 23; separate opinion of Judge Iwasawa, p. 192, at p. 193, paras. 4–5, and p. 195, para. 10; and dissenting opinion of Judge *ad hoc* Daudet, p. 200, at pp. 207–208, paras. 27 and 29.

⁸³ *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238; and 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. X, sect. C, para. 252.

⁸⁴ Working Paper prepared by the Secretariat (see footnote 18 above), para. 38 (“Such developments illustrate both the need and the potential for a more general approach to the determination of quantum in the law of international responsibility”).

⁸⁵ See United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above), pp. 383–414 (art. 36). See also *ibid.*, pp. 320–354 (art. 31), 362–369 (art. 34), 422–437 (art. 38) and 438–445 (art. 39).

⁸⁶ See the discussion in footnotes 20–32 above.

⁸⁷ *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Joint Application Instituting Proceedings filed with the Registry on 8 June 2023, International Court of Justice, available from the Court’s website: www.icij-cij.org, Cases), para. 60 *f*; *Alleged Violations of State Immunities (Islamic Republic of Iran v. Canada)*, Application Instituting Proceedings filed in the Registry of the Court on 27 June 2023, *ibid.*, para. 26 (*f*); and *Aerial Incident of 8 January 2020 (Canada, the Kingdom of Sweden, Ukraine and the United Kingdom of Great Britain and Northern Ireland v. the Islamic Republic of Iran)*, Application Instituting Proceedings concerning a Dispute under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation filed with the Registry on 4 July 2023, *ibid.*, para. 41 (*c*)(ii).

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.⁸⁸ 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.⁸⁹

18. Second, 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. The Commission could rely on its earlier work on State responsibility, the responsibility of international organizations and protection of the environment in relation to armed conflicts, as well as the decisions of international courts and tribunals in different fields of international law.⁹⁰ The richness and representativeness of the body of decisions, particularly since the adoption of the draft articles on the responsibility of States for internationally wrongful acts,⁹¹ may permit, after careful assessment, identification of genuinely universal rules on compensation that reflect the perspectives from the various legal systems and regions of the world.⁹² The key recent decisions have been rendered in intra-African and intra-Latin American disputes⁹³ (and in other cases Western European and other States have often been respondents),⁹⁴ and recent rules have been strongly shaped by the contributions of African and American regional institutions.⁹⁵ The leading teachings on compensation and reparation also reflect a high degree of gender diversity.⁹⁶

⁸⁸ Brattle Group, *The Report on Reparation for Transatlantic Chattel Slavery in the Americas and the Caribbean*, 8 June 2023, available from: <https://uwitv.global/news/reparations-symposium-brattle-paper>.

⁸⁹ UNCITRAL, Summary of the intersessional meeting on investor–State dispute settlement (ISDS) reform submitted by the Government of Belgium (A/CN.9/WG.III/WP.242), para. 46 (“ensuring that the draft provision [on assessment of damages and compensation] would align with the customary international law principles of full reparation for internationally wrongful acts was mentioned”). See also UNCITRAL, Possible reform of investor–State dispute settlement (ISDS): assessment of damages and compensation, Note by the Secretariat (A/CN.9/WG.III/WP.220), paras. 8, 15–17, 31, 35, 38, 43, 49, 57 and 61; Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022), (A/CN.9/1124), chap. VI; and Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its forty-sixth session (Vienna, 9–13 October 2023) (A/CN.9/1160), chap. IV.C.

⁹⁰ Working Paper prepared by the Secretariat (see footnote 18 above), para. 39.

⁹¹ See United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above), pp. 396–414.

⁹² See conclusion 3 of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, Report of the International Law Commission on the work of its seventy-fourth session, *Official Records of the General Assembly, Seventy-eighth session, Supplement No. 10 (A/78/10)*, chap. VII, sect. C.2, para. 127.

⁹³ *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above); *Certain Activities Carried Out by Nicaragua in the Border Area* (see footnote 22 above); and *Armed Activities on the Territory of the Congo* (see footnote 23 above). See also *Final Award (Eritrea’s Damages Claims)* (footnote 28 above); *Final Award (Ethiopia’s Damages Claims)* (*ibid.*); and *The M/V “Virginia G” Case* (footnote 25 above) between Panama and Guinea-Bissau.

⁹⁴ For example, *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (IV) and A24, Final Award No. 602-A15(IV)/A24-FT of 2 July 2014* (see footnote 19 above); *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020* (see footnote 19 above); and *M/V “Norstar” (Panama v. Italy), Judgment* (see footnote 13 above). See also *Certain Iranian Assets* (footnote 24 above).

⁹⁵ *Ahmadou Sadio Diallo, Compensation* (see footnote 13 above), p. 331, para. 13, pp. 333–334, paras. 18–24, p. 337, para. 33, and pp. 339–340, para. 40; separate opinion of Judge Cançado Trindade, pp. 370–378, paras. 60–80; declaration of Judge Yusuf, p. 385, at p. 386, para. 5, and p. 389, para. 15; and declaration of Judge Greenwood, p. 394, para. 9.

⁹⁶ See Whiteman (footnote 1 above); B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1973; C. Gray, *Judicial Remedies in International Law*, Oxford, Clarendon Press, 1987; P. N. Okowa, *State Responsibility for Transboundary Air Pollution in*

19. Third, the topic is concrete and feasible for progressive development and codification.⁹⁷ The topic falls within the law of international responsibility, which is one of the areas in which the Commission has considerable and long-standing expertise due to its universalist and generalist character.⁹⁸ The draft articles on diplomatic protection, somewhat analogous to this topic in terms of framing, have been recognized by international courts and tribunals to be reflective of customary international law on several points.⁹⁹

20. Fourth, while compensation is a traditional topic within the field of State responsibility, 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.¹⁰⁰

21. Finally, recent practice of the Commission supports the conclusion that the topic of compensation satisfies the criteria. In 2019, the Commission included in the long-term programme of work the topic proposed by Mr. Claudio Grossman Guiloff, “Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”, which addressed compensation as part of full reparation for the breach of these primary obligations.¹⁰¹ Other concluded topics have addressed compensation as part of full reparation for the breach of the relevant primary obligations.¹⁰² These examples, while importantly different from the proposed topic which focuses on compensation under general secondary rules and without limitation to responsibility for breach of specific primary obligations, show that the Commission has recently accepted related issues as falling within its mandate.

International Law, Oxford University Press, 2000, chap. 6, pp. 171–202; Shelton, “Righting wrongs ...” (footnote 17 above); Xue H., *Transboundary Damage in International Law*, Cambridge University Press, 2003; Nevill (footnote 71 above); Smutny (footnote 78 above); I. Marboe, *Die Berechnung von Entschädigung und Schadenersatz in der internationalen Rechtsprechung*, Frankfurt am Main, Peter Lang, 2009; Higgins (footnote 17 above); C. L. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, Leiden, Brill Nijhoff, 2018; V. Fikfak, “Changing state behaviour: damages before the European Court of Human Rights”, *European Journal of International Law*, vol. 29, No. 4 (November 2018), pp. 1091–1125; and Dreyssé (footnote 71 above).

⁹⁷ Working Paper prepared by the Secretariat (see footnote 18 above), para. 38 (“Since the adoption of the 2001 articles, the case law of international courts and tribunals concerning the quantification of compensation has increased and diversified, making the topic sufficiently feasible and concrete for codification and progressive development”).

⁹⁸ See United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (footnote 20 above).

⁹⁹ See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, *I.C.J. Reports 2007*, p. 582, at p. 599, para. 39; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, *I.C.J. Reports 2019*, p. 558, at p. 605, para. 129; and *Certain Iranian Assets* (footnote 24 above), paras. 61, 66 and 68. See also *The M/V “Virginia G” Case* (footnote 25 above), p. 53, para. 153; *Cyprus v. Turkey* (footnote 26 above), paras. 45–46; *Arctic Sunrise, Award on Merits of 14 August 2015* (see footnote 25 above), p. 210, at p. 256, note 168; *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment, *ITLOS Reports 2016*, p. 44, at p. 102, para. 266; and *Case of H. F. and Others v. France, Applications nos. 24384/19 and 44234/20, Judgment of 14 September 2022*, Grand Chamber, European Court of Human Rights, paras. 87–92, 211 and 257.

¹⁰⁰ In 2023, the Institute of International Law established the Twelfth Commission: The Determination of Quantum in International Adjudication, see www.idi-iil.org/en/commissions/page/2.

¹⁰¹ Grossman Guiloff (see footnote 49 above), para. 23 (a).

¹⁰² See paragraphs (17) to (23) of the commentary to article 12 of the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading, Report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 10 (A/74/10)*, chap. IV, sect. E.2, para. 45; and paragraphs (5) to (8) of the commentary to principle 9 of the draft principles on protection of the environment in related to armed conflicts, 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. VI, sect. C.2, para. 71.

III. The past work of the Commission on the proposed topic

22. The approach to compensation under the international law of State responsibility adopted by the Commission in the draft articles on the responsibility of States for internationally wrongful acts may be traced back to the fourth Special Rapporteur on State responsibility, Mr. Gaetano Arangio-Ruiz.¹⁰³ In 1993, the Commission adopted draft article 8 (“Compensation”) with commentary on first reading¹⁰⁴ (renumbered as article 44 in the 1996 draft articles on State responsibility):

“1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

“2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.”¹⁰⁵

23. The fifth Special Rapporteur on State responsibility, Mr. James Crawford, addressed compensation in 2000 in his third report on State responsibility.¹⁰⁶ He suggested that the Commission “was faced with a choice between two solutions: it could either draft article 44 succinctly, stating a very general principle in flexible terms, or it could go into some detail and try to be exhaustive”.¹⁰⁷ Crawford emphasized that it was essential to take account of the different legal relations involved, including legal relations with non-State entities.¹⁰⁸ In light of the discussion, in 2000 the Drafting Committee provisionally adopted on second reading draft article 37 (“Compensation”), with language identical to that of article 36 of the draft articles on the responsibility of States for internationally wrongful acts.¹⁰⁹ States were generally welcoming,¹¹⁰ and in 2001 the Drafting Committee decided to retain the previous year’s text without any changes.¹¹¹

24. To fully appreciate the law of compensation for damage caused by an internationally wrongful act, article 36 of the draft articles on the responsibility of States for internationally wrongful acts is to be read alongside other provisions of Part Two (“Content of the international responsibility of a State”). The terms “damage” and “caused” are elaborated upon in article 31 (“Reparation”). On second reading, the Commission chose to draft these issues as aspects of the general principle of full reparation, rather than relating specifically to compensation (as in the first reading).¹¹² Article 31 elaborates on the use of the term “caused”

¹⁰³ Second report on State responsibility by Special Rapporteur Mr. Gaetano Arangio-Ruiz, *Yearbook ... 1989*, vol. II (Part One), document [A/CN.4/425](#) and [Add.1](#), chap. II, pp. 8 *et seq.*

¹⁰⁴ See *Yearbook ... 1993*, vol. II (Part Two), pp. 67–76; and *ibid.*, vol. I, 2321st meeting, 19 July 1993, pp. 165–167, paras. 42–73, 2322nd meeting, 19 July 1993, pp. 172–174, paras. 33–77, 2323rd meeting, 20 July 1993, pp. 174–176, paras. 1–33, and 2324th meeting, 21 July 1993, pp. 177–178, paras. 1–10.

¹⁰⁵ Article 44 of the draft articles on State responsibility, *Yearbook ... 1996*, vol. II (Part Two), p. 63.

¹⁰⁶ 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, pp. 47–52, paras. 147–166.

¹⁰⁷ *Yearbook ... 2000*, vol. II (Part Two), p. 39, para. 192.

¹⁰⁸ *Ibid.*, p. 43, para. 230.

¹⁰⁹ *Ibid.*, p. 68, art. 37.

¹¹⁰ Fourth report on State responsibility by Special Rapporteur Mr. James Crawford, *Yearbook ... 2001*, vol. II (Part One), document [A/CN.4/517](#) and [Add.1](#), pp. 9–10, paras. 33–34 (see limited questions regarding moral damage and “financial assessability”), and Annex, pp. 19 and 24.

¹¹¹ See the first statement by the Chairperson of the Drafting Committee, Mr. Peter Tomka, on “Responsibility of States for internationally wrongful acts [State responsibility]”, available from the Commission’s website, documents of the fifty-third session.

¹¹² See *Yearbook ... 2001*, vol. I, 2682nd meeting of 30 May 2001, p. 103, para. 6. See also article 42 of the draft articles on State responsibility, *Yearbook ... 1996*, vol. II (Part Two), p. 63; *Yearbook ... 1993*, vol. II (Part Two), pp. 68–70, paras. (6)–(13) of the commentary to draft article 44 [originally numbered article 8] (discussing causality), and pp. 71–72, paras. (16)–(19) of the same commentary (on material and moral damage); and articles 31 and 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 91 and 98, respectively. See also the third report on State responsibility by Special Rapporteur Mr. James

in its paragraph 1 in the commentary, emphasising the variety of factors that may be relevant for applying causality for different breaches of international obligations,¹¹³ accepting mitigation of damage¹¹⁴ but rejecting (in a departure from the first reading)¹¹⁵ concurrency as an element affecting the scope of reparation.¹¹⁶ The notion of “damage” refers back to article 31, paragraph 2; that is any damage, whether material or moral,¹¹⁷ which is explained in the commentary as, respectively, damage to property or other interests of the State or its nationals assessable in financial terms and such items as individual pain and suffering, loss of loved ones or personal affront.¹¹⁸ Two further provisions expressed as applicable to all forms of reparation, but particularly important in practice for compensation, are article 38 (“Interest”)¹¹⁹ and article 39 (“Contribution to the injury”).¹²⁰

25. The Commission also addressed compensation after the adoption of the draft articles on the responsibility of States for internationally wrongful acts. The draft articles on diplomatic protection, despite Crawford’s expectations,¹²¹ did not deal with the question of quantification of compensation arising in the context of injury to aliens.¹²² The draft articles on the responsibility of international organizations essentially replicated the text of article 36 of the draft articles on the responsibility of States for internationally wrongful acts in drafting the provision on compensation.¹²³ Compensation was discussed as part of the topic of succession of States in respect of State responsibility.¹²⁴ The identification of compensation

Crawford, *Yearbook ... 2000*, vol. II (Part One), document [A/CN.4/507](#) and [Add.1-4](#), pp. 18–20, paras 27–29 and 31–37.

¹¹³ Paragraphs (9)–(10) of the commentary to article 31 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 92–93 (see, similarly, *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), p. 26, para. 34).

¹¹⁴ Paragraph (11) of the commentary to article 31 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 93 (explicitly endorsed in *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020* (see footnote 19 above), para. 1796). See also *Gabčíkovo-Nagymaros Project (Hungary/ Slovakia)* (footnote 6 above), p. 55, para 80.

¹¹⁵ *Yearbook ... 1993*, vol. II (Part Two), p. 70, paras. (12)–(13) of the commentary to draft article 44 [originally numbered article 8].

¹¹⁶ Paragraphs (12)–(13) of the commentary to article 31 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 93–94 (explicitly endorsed in *Armed Activities on the Territory of the Congo* (see footnote 23 above), p. 49, para. 98).

¹¹⁷ See the first statement by the Chairperson of the Drafting Committee, Mr. Peter Tomka, on “Responsibility of States for internationally wrongful acts [State responsibility]”, available from the Commission’s website, documents of the fifty-third session.

¹¹⁸ Paragraph 2 of article 31 of the draft articles on the responsibility of States for internationally wrongful acts and paragraph (5) of the commentary thereto, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 91–92.

¹¹⁹ *Ibid.*, art. 38, p. 107. See also the first statement by the Chairperson of the Drafting Committee, Mr. Peter Tomka, on “Responsibility of States for internationally wrongful acts [State responsibility]”, available from the Commission’s website, documents of the fifty-third session (“a mere reference in the context of compensation ... in the draft articles adopted on first reading”).

¹²⁰ Article 39 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 109.

¹²¹ See the 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. 51, para. 158 (b).

¹²² Paragraph (1) of the general commentary to the draft articles on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), p. 26, note 21 (referring back to article 36 of the draft articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 68).

¹²³ See the discussion in footnote 61 above.

¹²⁴ Fourth report on succession of States in respect of State responsibility, by Special Rapporteur Mr. Pavel Šturma ([A/CN.4/743](#)), paras. 49–66, and Annex, draft article 17; and the Report of the International Law Commission on the work of its seventy-second session, *Official Records of the General Assembly, Seventy-sixth session, Supplement No. 10 (A/76/10)*, chap. VII, paras. 129–130, 146 and 159.

as a possible future topic by the Secretariat¹²⁵ and its treatment in the syllabus for the topic “Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”¹²⁶ and within the concluded topics have already been noted above at paragraphs 3 and 21 respectively.¹²⁷

IV. The possible form of the work of the Commission

26. The work of the Commission may take the form of principles, in line with how reparation and compensation were addressed most recently by the Commission.¹²⁸ This form would be suitable for the practical orientation of the topic and reflect the recognized customary international law character of article 36¹²⁹ and other related provisions of the draft articles on the responsibility of States for internationally wrongful acts.¹³⁰ Alternatively, the form of articles would be in line with the treatment of secondary rules of international responsibility in the draft articles on the responsibility of States for internationally wrongful acts, the draft articles on diplomatic protection, and the draft articles on the responsibility of international organizations. Commentaries to article 36 and other related provisions of the draft articles on the responsibility of States for internationally wrongful acts show that practical issues can be addressed in this way in a satisfactory and well-received manner.¹³¹ On balance, principles are the preferable form for addressing the topic in relation to rules of international responsibility reflecting customary international law and the best practices of their application.

¹²⁵ Working Paper prepared by the Secretariat (see footnote 18 above), sect. II.E.

¹²⁶ Grossman Guiloff (see footnote 49 above), para. 23 (a).

¹²⁷ See paragraphs (17) to (23) of the commentary to article 12 of the draft articles on prevention and punishment of crimes against humanity, Report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 10 (A/74/10)*, chap. IV, para. 45; and 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.

¹²⁸ 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.

¹²⁹ See footnote 13 above.

¹³⁰ *Case of Georgia v. Russia (I)* (see footnote 26 above), para. 54; *The Islamic Republic of Iran v. the United States of America, Cases Nos. A15 (II:A), A26 (IV) and B43, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT of 10 March 2020* (see footnote 19 above), paras. 1787–1788; *The “Enrica Lexie” Incident* (see footnote 13 above), para. 1082; and *Armed Activities on the Territory of the Congo* (see footnote 23 above), p. 43, para. 70, and p. 50, para. 101.

¹³¹ See reliance on the relevant commentaries in *Ahmadou Sadio Diallo, Compensation* (footnote 13 above), p. 342, para. 49; *Certain Activities Carried Out by Nicaragua in the Border Area* (footnote 22 above), p. 58, para. 151; *Armed Activities on the Territory of the Congo* (footnote 23 above), pp. 49–50, para. 98, pp. 63–64, para. 148, and p. 130, para. 382; *Arctic Sunrise, Award on Compensation* (footnote 25 above), p. 344, paras. 91, and p. 350, para. 118; *M/V “Norstar” (Panama v. Italy), Judgment* (footnote 13 above), p. 122, para. 458; and *The Duzgit Integrity Arbitration* (footnote 25 above), para. 212.

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