



# A Case Against Crippling Compensation in International Law of State Responsibility

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The obligation of States to provide full reparation for internationally wrongful acts, including by full compensation, is one of the bedrock principles of international law. The article challenges this principle for cases where compensation is crippling for the responsible State or its peoples, which can occur when State responsibility is implemented before international courts and tribunals. The International Law Commission's decision not to qualify full reparation for instances of crippling compensation in its influential Articles on State responsibility was an unpersuasive legal position to adopt in 2001, and its rationale has aged badly. However, the failure by States and other actors to challenge it in the following two decades signified its endorsement by the international legal process. Nevertheless, the case against the permissibility of crippling compensation in modern international law can still be made, both on a case-by-case basis and at the level of customary secondary rules of State responsibility.

## INTRODUCTION

On 8 March 2019, an international arbitral tribunal constituted under a bilateral investment treaty (BIT) rendered an award in the case *ConoccoPhillips Petrozuata BV and Ors v Venezuela (ConoccoPhillips)*, requiring Venezuela to pay compensation of around USD 8.7 billion.<sup>1</sup> On the same day, Venezuela was hit by a major blackout that continued for almost a week.<sup>2</sup> One day before, the International Monetary Fund (IMF) described Venezuela as 'facing one of the most complex situations that we have seen here at the Fund. And that's a combination of food and nutrition crises, hyperinflation, a destabilized exchange rate, very debilitating human capital and physical productive capacity, and a very complicated debt situation'.<sup>3</sup> The IMF had earlier projected a five per cent fall of Gross Domestic

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- 1 *ConoccoPhillips Petrozuata BV and Ors v Venezuela* ICSID Case no ARB/07/30, Award, 8 March 2019 at [1109]-[1110].
- 2 T. Phillips, 'Venezuela: Huge Power Outage Leaves Much of a Country in the Dark' *Guardian* 8 March 2019; J.P. Daniels, 'Venezuela: Power Returns after Blackout but Normal Service May Be a Long Way Off' *Guardian* 14 March 2019.
- 3 'Transcript of IMF Press Briefing' *International Monetary Fund* 7 March 2019 at <https://www.imf.org/en/News/Articles/2019/03/07/tr03072019-transcript-of-imf-press-briefing>.

Product and a 10 million per cent inflation rate for Venezuela in 2019.<sup>4</sup> The *ConoccoPhillips* tribunal had already established its jurisdiction and Venezuela's responsibility;<sup>5</sup> therefore this award's 1110 paragraphs over 331 pages were devoted only to compensation and valuation. The highly sophisticated counsel and the tribunal engaged in considerable detail with legal and valuation issues that related to disputed conduct and effect on the underlying investment – without, however, attributing any legal relevance to the economic and political crisis facing Venezuela. The only point where this reality is acknowledged is in a brief side nod to the discussion of country risk assumptions, noting that the autonomous standing of the particular project meant that there was 'no point in drawing conclusions from the risks implied in Venezuela's sovereign debt, close to collapsing'.<sup>6</sup> Nor is the possible effect of the compensation award on the people of Venezuela treated as relevant, either on its own or taken together with other compensation decisions handed down in recent years.<sup>7</sup>

It may seem odd that an international tribunal treats as legally irrelevant the current conditions of the responsible State and the likely effect that compensation awards may have on it and its people, and that disputing parties (including the State itself) do not raise such arguments. But it is entirely in line with the established mainstream position in public international law of State responsibility, which revolves around the concept of *full reparation*. The traditional position was set out in 1928 by the Permanent Court of International Justice (PCIJ) in its judgment in *Factory at Chorzów (Germany v Poland) (Chorzów)*:

The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution 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.<sup>8</sup>

The 'determin[ation of] the amount of compensation due for an act contrary to international law' through the lenses of 'the consequences of the illegal act' naturally focuses on the illegal act itself, and does not obviously call for consideration of the situation of, or the effect of compensation on the wrongdoing

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4 'Country Data: República Bolivariana de Venezuela' *International Monetary Fund* October 2018 at <https://www.imf.org/en/Countries/VEN#countrydata>.

5 *ConoccoPhillips* n 1 above, Decision on Jurisdiction and the Merits, 3 September 2013; *ibid*, Interim Decision, 17 January 2017.

6 *ConoccoPhillips* n 1 above at [902].

7 See, among others, *OI European Group BV v Venezuela* ICSID Case no ARB/11/25, Award, 10 March 2015 (USD 0.37 billion); *Crystallex International Corporation v Venezuela* ICSID Additional Facility Case no ARB(AF)/11/2, Award, 4 April 2016 (USD 1.2 billion); *Rusoro Mining Limited v Venezuela* ICSID Additional Facility Case no ARB(AF)/12/5, Award, 22 August 2016 (close to USD one billion); *Valores Mundiales, SL and Or v Venezuela* ICSID Case no ARB/13/11, Award, 25 July 2017 (close to USD 0.5 billion); *Koch Minerals Sàrl and Or v Venezuela* ICSID Case no ARB/11/19, Award, 30 October 2017 (USD 0.3 billion).

8 *Factory at Chorzów (Germany v Poland)* (Merits) 1928 PCIJ Series A no 17, 29, 47.

actor. For most of the history of international law this perspective,<sup>9</sup> designated ‘without respect to the cost or consequences for the wrongdoer’, was not particularly concerning.<sup>10</sup> Just a decade ago, the leading contemporary author on State responsibility noted in a co-authored piece that burdens resulting from compensation awards by international tribunals were normally trivial when set against the total resources of the State, and unlikely to have a noticeable impact on the public treasury or on the ordinary taxpayer.<sup>11</sup>

The situation has changed since then. Tribunals in various fields of international law have granted compensation awards for more than USD 1 billion. Many decisions arise out of procedures made available for non-State entities to invoke State responsibility on their own account in relation to injury to economic rights.<sup>12</sup> In investment law, in addition to *ConocoPhillips* noted above, investor-State dispute settlement mechanisms have rendered USD one billion-plus awards in 2014 (against Russia),<sup>13</sup> 2015 (against Ecuador),<sup>14</sup> 2016 (against Venezuela),<sup>15</sup> 2018 (against Egypt),<sup>16</sup> and 2019 against Pakistan<sup>17</sup> and (reportedly) Russia.<sup>18</sup> But the practice is not limited to investment treaty arbitration. In human rights law, the European Court of Human Rights (ECtHR) handed down a EUR 1.86 billion judgment against Russia in 2014,<sup>19</sup> and executions of judgments concluded in recent years regarding deprivation of nationality and functioning of judicial system required allocating respectively EUR 0.25<sup>20</sup> and

9 See on the historical pedigree of reparations, *Ahmadou Sadio Diallo (Guinea v DRC)* (Compensation) [2012] ICJ Rep 324, 347, Separate Opinion of Judge Cañçado Trindade at Sections III-IV.

10 D. Shelton, ‘Righting Wrongs: Reparations in the Articles on State Responsibility’ (2002) 96 AJIL 833, 844.

11 J. Crawford and J. Watkins, ‘International Responsibility’ in S. Besson and J. Tassioulas (eds), *The Philosophy of International Law* (Oxford: OUP, 2010) 283, 294.

12 To use the language of the International Law Commission (ILC), ‘Articles on State Responsibility for Internationally Wrongful Acts’ *Yearbook of the International Law Commission 2001: Volume II Part 2* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 26 (2001 ILC Articles), Art 33(2), Commentary 4.

13 *Yukos Universal Limited (Isle of Man) v Russia* PCA Case no AA 227, Final Award, 18 July 2014 (*Yukos v Russia*) (USD 50 billion in three parallel cases, set aside by the Hague District Court, Judgment of 20 April 2016, reversed by The Hague Court of Appeal, Judgment of 18 February 2020).

14 *Occidental Petroleum Corporation and Ors v Ecuador* ICSID Case no ARB/06/11, Award, 5 October 2012 (USD 1.8 billion, reduced to one billion on annulment, Decision on Annulment of the Award, 2 November 2015 at [586]).

15 See note 7 above.

16 *Unión Fenosa Gas, SA v Egypt* ICSID Case no ARB/14/4, Award, 31 August 2018 (*Unión Fenosa Gas*).

17 *Tethyan Copper Company Pty Limited v Pakistan* ICSID Case no ARB/12/1, Award, 12 July 2019 (*Tethyan*).

18 IAREporter, ‘As Russia is Held Liable in Two New BIT Cases, and Ordered to Pay Upwards of \$100 Million, We Round-up Developments in Crimea-Related Arbitrations’ 16 April 2019 at <https://www.iareporter.com/articles/as-russia-is-held-liable-in-two-new-bit-cases-and-ordered-to-pay-upwards-of-100-million-we-round-up-developments-in-crimea-related-arbitrations/>.

19 App no 14902/04 *OAO Neftyanaya Kompaniya Yukos v Russia* (Just Satisfaction) Judgment of 15 December 2014.

20 Resolution CM/ResDH(2018)111 ‘Execution of the judgment of the European Court of Human Rights: *Ališić against Serbia and Slovenia*’ (adopted by the Committee of Ministers on 15 March 2018 at the 1310<sup>th</sup> meeting of the Ministers’ Deputies).

1.2 billion.<sup>21</sup> Claims of similar magnitude are also possible in inter-State disputes, for example in pending cases against the United States regarding alleged breaches of military sales contracts<sup>22</sup> and against Uganda regarding breaches of rules of use of force and humanitarian law.<sup>23</sup> For some States and taxpayers, the amounts are not trivial: the 2019 award against Pakistan even slightly exceeded its loan from the IMF of the same month.<sup>24</sup> They are also non-trivial in the broader perspective of international cooperation within the framework of public international law: for example budgets of the International Criminal Court and the World Trade Organisation are less than EUR 0.2 billion,<sup>25</sup> and the peacekeeping budget of the United Nations is comparable to *ConocoPhillips*.<sup>26</sup> Possible claims related to COVID-19 would pose the challenge in even starker terms, due to amounts at stake<sup>27</sup> and diminished economic capacity of States.<sup>28</sup>

I will make an argument against the principle of full reparation for cases where compensation is crippling. I use ‘crippling’ as the umbrella term because it is sufficiently vague not to prejudge the content and structure of the hypothetical rule, does not have an established technical meaning in international law, and is sufficiently neutral to have been employed by all sides of the debate.<sup>29</sup>

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- 21 Resolution CM/ResDH(2018)349 ‘Execution of the judgments of the European Court of Human Rights: 16 cases against Albania’ (adopted by the Committee of Ministers on 20 September 2018 at the 1324<sup>th</sup> meeting of the Ministers’ Deputies).
- 22 ‘Iran Claims’ in C.D. Guymon (ed), *Digest of United States Practice in International Law 2016* (Office of the Legal Advisor, United States Department of State, 2017) 333, 334 (discussing a USD 1.7 billion settlement and referring to ‘multi-billion dollar claims against the United States’) at <https://www.state.gov/wp-content/uploads/2019/05/2016-Digest-United-States.pdf>.
- 23 *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Compensation) (*Armed Activities*) is pending, ICJ Press Release no 2019/48 13 November 2019 at <https://www.icj-cij.org/files/case-related/116/116-20191113-PRE-01-00-EN.pdf>. The breaches of obligations identified in merits judgment suggest a likelihood of a multi-billion claim, [2005] ICJ Rep 168 at [259].
- 24 cf *Tethyan* n 17 above; ‘IMF Executive Board Approves US\$6 billion 39-Month EFF Arrangement for Pakistan’ *International Monetary Fund* 3 July 2019 at <https://www.imf.org/en/News/Articles/2019/07/03/pr19264-pakistan-imf-executive-board-approves-39-month-eff-arrangement>.
- 25 WTO, *Annual Report 2019*, 179 at [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep19\\_chap9\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep19_chap9_e.pdf); Assembly of States Parties, ‘Proposed Programme Budget for 2020 for the International Criminal Court’ (25 July 2019) ICC Doc ICC-ASP/18/10 8. See generally H.G. Schermers and N.M. Blokker, *International Institutional Law* (Leiden/Boston: Brill/Nijhoff, 6<sup>th</sup> rev ed, 2018) 636–640.
- 26 R. Higgins and Ors, *Oppenheim’s International Law: United Nations* (Oxford: OUP, 2017) 453 fn 2.
- 27 ‘Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing’ (27 April 2020) at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-31/>.
- 28 World Bank Group, ‘Pandemic, Recession: The Global Economy in Crisis’ in *Global Economic Prospects* (June 2020) at <https://www.worldbank.org/en/publication/global-economic-prospects>.
- 29 J. Crawford, ‘Third Report on State Responsibility’ (15 March, 15 June, 10 and 18 July and 4 August 2000) UN Doc A/CN.4/507 at [162]; 2001 ILC Articles, n 12 above, Art 34, Commentary 5; *Final Award – Eritrea’s Damages Claims* (2009) 26 RIAA 505 at [21]; *Final Award – Ethiopia’s Damages Claims* (2009) 26 RIAA 631 at [21]; J. Crawford, *State Responsibility: The General Part* (Cambridge: CUP, 2013) 482; *The Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe)* PCA Case no 2014-07, Award on Reparations (*Duzgit Integrity*), Dissenting Opinion of Judge Kateka, 18 December 2019 at [26] at <https://pcacases.com/web/sendAttach/6655>.

(The alternative of ‘(dis)proportionality’<sup>30</sup> is less useful: already used widely in international practice<sup>31</sup> with significantly different emphasis,<sup>32</sup> its usual inquiry into appropriateness of means for a legitimate purpose does not fit the analysis of excessive compensation.) It is important not to understate the strength of the position which I challenge. Despite the ubiquitous mispronunciation of the Polish city name in the title of the original PCIJ judgment, few propositions have been endorsed so strongly in State practice and judicial and arbitral decisions as the requirement to provide full reparation for an internationally wrongful act.<sup>33</sup> In the influential 2001 International Law Commission’s (ILC) Articles on the responsibility of States for internationally wrongful acts (2001 ILC Articles), two forms of reparation – restitution and satisfaction – are drafted with explicit safeguards against excessiveness.<sup>34</sup> But, in line with the suggestion of its Special Rapporteur, the ILC provided no comparable qualification for cases of crippling compensation.<sup>35</sup> It does not mean, of course, that compensation comes with no strings attached: various permutations of causality may defeat claims or diminish compensation awarded;<sup>36</sup> choice and application of valuation methods are very important in practice;<sup>37</sup> (dire) economic position can become indirectly relevant for calculating loss,<sup>38</sup> and disputing parties may challenge decisions on compensation through mechanisms for review and set-aside.<sup>39</sup> But all these qualifications are underpinned by the shared focus on the

30 2001 ILC Articles, *ibid*, Art 34, Commentary 5; *Ethiopia’s Damages Claims* *ibid* at [61] (to the extent that both awards are identical, the reference will be further made only to Ethiopia’s claim).

31 For example restrictions in human rights, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 at [136]; self-defence in use of force, *Armed Activities* n 23 above at [147]; countermeasures in State responsibility, *Application of the Interim Accord of 13 September 1995 (FYRM v Greece)* [2011] ICJ Rep 644 at [164]; delimitation in law of the sea, *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3 at [180].

32 *Indus Water Kishenganga (Pakistan v India)* (Partial Award) (2013) 31 RIAA 55 at [222]–[223], [397], [399].

33 See, with further references, 2001 ILC Articles, n 12 above, Art 31(1), Commentaries 1–3; *Arctic Sunrise Arbitration (The Netherlands v Russia)* PCA Case no 2014–02, Award on Compensation, 10 July 2017 at [90] at <https://pcacases.com/web/sendAttach/2214>; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation Owed by Nicaragua to Costa Rica) [2018] ICJ Rep 15 (*Certain Activities*) at [29]–[30]; App no 13255/07 *Georgia v Russia (I)* (Just Satisfaction) [GC] Judgment of 31 January 2019 at [21], [54]; *ConoccoPhillips* n 1 above at [207]–[229]; also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Human Rights Law, UNGA Res 60/147 (16 December 2005) Principle 18.

34 2001 ILC Articles, *ibid*, Arts 35(a), (b), 37(3). I use ‘reparation’ when referring to the concept in law of State responsibility, and ‘reparations’ when referring to multiple instances of its application (as in ‘war reparations’).

35 Crawford, ‘Third Report’, n 29 above at [41]–[42]; 2001 ILC Articles, *ibid*, Art 36; Crawford, *State Responsibility*, n 29 above, 481–483.

36 2001 ILC Articles, *ibid*, Art 31, Commentaries 11–12, Art 39, Commentary 5, fn 627; Crawford, *State Responsibility*, *ibid*, ch 15.4.

37 R. Higgins, ‘Overview of Part Two of the Articles on State Responsibility’ in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: OUP, 2010) 537, and on valuation generally 2001 ILC Articles, *ibid*, Art 36, Commentaries 15–34.

38 *Ethiopia’s Damages Claims* n 29 above at [24]–[27].

39 *Occidental v Ecuador* n 14 above; *Yukos v Russia* n 13 above; *Venezuela Holdings BV and Ors v Venezuela* ICSID Case no ARB/07/27, Award, 9 October 2014 (USD 1.6 billion, reduced by 1.41 billion on annulment, Decision on Annulment, 9 March 2017); *Rusoro v Venezuela* n 7 above (set aside in relation to compensation, Cour d’Appel de Paris, 29 January 2019).

circumstances surrounding the illegal act for the determination of compensation, and therefore reinforce the legal irrelevance of the capacities of the responsible actor. That is the mainstream position that I challenge in this article, by considering an argument for an exception to the principle of full compensation under custom in cases when compensation is crippling.

I frame my argument as an exception to the principle of full compensation. The principle itself as part of full reparation is, in my view, too firmly established in modern law, as reflected in recent endorsements by leading international tribunals, to be open to a credible direct challenge.<sup>40</sup> Conversely, a credible argument, supported by formal authorities and going with the grain of modern law, can be made for an exception to ensure that '[r]emedies serve social as well as individual needs'.<sup>41</sup> I direct my argument at customary State responsibility, where it will have significant and immediate effect. In the (still) sparsely judicialised international law, State responsibility is conceptually autonomous of particular (or indeed any) judicial institutions for implementation. The flipside is that these general rules are applied in all judicial institutions, to the extent that special rules have not been created; in short, the general rules on reparation matter a great deal, for inter-State cases as well as for human rights and investment claims brought by non-State actors.<sup>42</sup> Other rules and practices, for example methods of valuation, may also be relevant, particularly for striking the systemic balance, but the principle of compensation under custom is the pivot around which everything else turns. The target of my paper is the mainstream position's exclusive bilateralist focus on corrective justice in determining compensation. It is not surprising that in 1928 the purpose of reparation was thought to 'wipe out all the consequences of the illegal act and re-establish the situation which would ... have existed if that act had not been committed'.<sup>43</sup> But the conception of inter-War international law as an exclusively inter-State bilateralist order, analogous in underlying assumptions to domestic tort law,<sup>44</sup> is

40 *Arctic Sunrise Arbitration (The Netherlands v Russia)* PCA Case no 2014-02, Award on the Merits, 14 August 2015 at [385], [393]-[395], [397] at <https://pcacases.com/web/sendAttach/1438>; *Certain Activities* n 33 above at [30], [41], [99], [151]; *Georgia v Russia* n 33 above at [20]-[21], [54], [75]; *The M/V "Norstar" case* International Tribunal for the Law of the Sea, Judgment, 10 April 2019 [316]-[323]; and UNSG, 'Report of the Secretary-General, 'Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies' (23 April 2019) UN Doc A/74/83, 35-37 (Compilation of decisions). The few dissents criticise the principle for not going far enough, *Cyprus v Turkey* (Just Satisfaction) [GC] Judgment of 12 May 2014, Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judge Vučinić at [1], [12]-[19]; *Certain Activities ibid*, Separate Opinion of Judge Cançado Trindade 61 at [17], [32], [62]-[65].

41 Shelton, n 10 above, 845.

42 UNSG 'Compilation of decisions' n 40 above, 28-40. But note serious questions about the aptness of transposition of inter-State responsibility rules into procedural mechanisms that involve non-State actors, not addressed in this paper, M. Papparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617, 635-640; R. Goodman and Y. Parkhomenko, 'Does the *Chorzów Factory* Standard Apply in Investment Arbitration? A Contextual Reappraisal' (2017) 32 ICSID Review 304.

43 *Chorzów* n 8 above.

44 A. Ripstein, 'As if It Never Happened' (2007) 48 William & Mary L Rev 1957.

no longer adequate for modern law where State responsibility is conceptualised in genuinely public multilateral terms.<sup>45</sup>

I make the argument in three parts. The 2001 ILC Articles provide the starting point for any argument about State responsibility in modern law and practice, so I first challenge the ILC's choice not to exclude crippling compensation from full reparation. I argue that the 2001 ILC Articles misstate the ambiguity of the legal position of the end-of-century international law. The Eritrea-Ethiopia Claims Commission's (EECC) 2009 argument for capping of crippling compensation is a more persuasive reading of the divided authority against the background of general principles and human rights treaties.<sup>46</sup> The ILC's threefold policy rationale for not excluding crippling compensation – empirical assumption about rarity of major compensation claims, optimistic assessment of other means of addressing them, and overestimation of disapproval with a particular eye to the developed States' perspective – has not aged well, on any of the points. The second part of the argument turns to consider the positive case for a rule limiting crippling compensation, analysing in turn the position in three traditional sources of international law: custom, treaties, and general principles.<sup>47</sup> Subverting the expected punchline (X<sup>1</sup> is unpersuasive, X<sup>2</sup> is the correct rule), the key finding is that the international legal process of the first two decades of the 21<sup>st</sup> century has endorsed the ILC's position: X<sup>1</sup> is unpersuasive *and* reflects what has come to be the correct rule. Examination of authorities shows a widespread and consistent failure by States, particularly those developing States that criticised crippling compensation during the ILC process in the late 1990s, to grasp the nettle of law-making opportunities in the 2000s and generate legally relevant practice when they had an opportunity to do so. Consequently, the window of opportunity somewhat open in the 2000s has now been substantially closed, with the position of the 2001 ILC Articles endorsed by the legal process. The third part sets out three possible futures for the law of crippling compensation, identifying methods and techniques for actors in the international legal process either to further reinforce the permissibility of crippling compensation or to challenge it, either on a case-by-case basis or directly at the level of customary secondary rules of State responsibility.

The paper takes the approach of generalist public international law, contributing to the line of scholarship on the tension between bilateralism and community interests in State responsibility.<sup>48</sup> It makes the case against crippling compensation, considering whether reparation rules traditionally underpinned

45 A. van Aaken, 'Shared Responsibility in International Law: A Political Economy Analysis' in A. Nollkaemper and D. Jacobs (eds), *Distribution of Responsibility in International Law* (Cambridge: CUP, 2015) 161 ('Is the private law approach still adequate?'). As to multilateralism, see n 48 below.

46 *Ethiopia's Damages Claims* n 29 above at [18]-[23].

47 Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 Art 38(1)(a)-(c).

48 The topic of compensation has rarely been the focus of analysis in this literature, for example B. Simma, 'From Bilateralism to Community Interest in International Law' (1994) 205 *Hague Recueil* 217, 275, 304; J. Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Hague Recueil* 331, 434, 442, 444; S. Vilalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) 21 *EJIL* 387, 405; G. Gaja, 'The Protection of General Interests in the International Community'

by the bilateralist corrective justice of *Chorzów's* pedigree have evolved in a more communitarian direction or can be changed in line with the broader structural shifts in modern international law.<sup>49</sup> The contribution of the article is three-fold. First, it engages with the reality of international law (of State responsibility), demonstrating the messy, chaotic, and gradual formation of consensus on a key conceptual element of a necessary institution of the international legal order.<sup>50</sup> The second contribution is to the study of formalist international legal process, identifying techniques and methods for successfully shaping fundamental rules, as certain developed States did on this issue in the 1990s – or failing to change them, through a combination of missed opportunities and successful resistance to change, as the case may have been for the critics from the developing world in the 1990s and more recently. The third contribution builds on the last two decades of experience and looks towards the future. States and other participants in the international legal process, particularly those historically disadvantaged in terms of normative influence,<sup>51</sup> are thus provided with a tool-kit on how to articulate their positions in the formalist process to change a rule of fundamental importance.

## THE CASE FOR PERMISSIBILITY OF CRIPPLING COMPENSATION

It is important not to understate the strength of the case for the permissibility of crippling compensation in contemporary international law: it relies on the authority of the 2001 ILC Articles. This document is highly influential in the international legal process, despite not being a formal source of law, and its elaboration in 1997–2001 was a focal point for conceptual debates and State practice, so a discussion about the modern law of State responsibility cannot, in my view, start anywhere else.<sup>52</sup> As a brief background, in 1949, the ILC included the question of state responsibility in its initial list of topics of international law selected for codification. In 1997, the Fifth Special Rapporteur on State responsibility James Crawford was given the mandate of completing a final, generally acceptable draft.<sup>53</sup> The ILC's work on that topic was completed in 2001, when it adopted 2001 ILC Articles on second reading.<sup>54</sup> These Articles sought to formulate, by way of codification and progressive development, the

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(2011) 364 *Hague Recueil* 15, 103, 109, 180, 181; P.-M. Dupuy, 'Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of "Obligations Owed to International Community as a Whole"' (2012) 23 *EJIL* 1059.

49 Shelton, n 10 above, 844.

50 J. Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 *MLR* 1, 2–5.

51 V. Lowe, 'The Marginalization of Africa' (2000) 94 *ASIL Proceedings* 231; S. Pahuja, 'Imperialism, Sovereignty and the Making of International Law' (2006) 69 *MLR* 486, 487–488.

52 'Symposium: State Responsibility' (1999) 10 *EJIL* 339; 'Symposium: Assessing the Work of the International Law Commission on State Responsibility' (2002) 13 *EJIL* 1053; 'Symposium: The ILC's State Responsibility Articles' (2002) 96 *AJIL* 773.

53 A. Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts' in Crawford, n 37 above, 83.

54 J. Crawford, J. Peel and S. Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) 12 *EJIL* 963.



basic rules of State responsibility. The emphasis was on the secondary rules of state responsibility: the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.<sup>55</sup> The 2001 ILC Articles have not (so far) been used as a basis for negotiating an international treaty,<sup>56</sup> but the UN General Assembly (UNGA) has repeatedly acknowledged their importance and usefulness,<sup>57</sup> and State practice and judicial and arbitral decisions widely rely upon them as declaratory of customary international law.<sup>58</sup> The line between rules codified and progressively developed is sometimes hard to draw,<sup>59</sup> but the important point for this discussion is that States and tribunals increasingly accept the 2001 ILC Articles as reflective of custom,<sup>60</sup> even on points that certainly were progressive developments in 2001.<sup>61</sup> In short, the ILC's judgement on State responsibility arrived at in 2001 is likely to stick.<sup>62</sup>

On the topic addressed in this paper, Article 31 provides, in terms reflecting custom, that '[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'.<sup>63</sup> Again under custom, full reparation may take the form of restitution, compensation, and satisfaction.<sup>64</sup> Commentary 5 to Article 34, which sets out forms of reparation, squarely addresses the concern 'that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned' and considers 'whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation'. The response is that concerns are already addressed for each form of reparation; for restitution and satisfaction by an explicit qualification of disproportionality, for compensation by exclusion of indirect and remote damage<sup>65</sup> – but, by necessary

55 2001 ILC Articles, n 12 above, General commentary, Commentary 1. The distinction between primary and secondary rules is 'by now generally accepted and adopted in the literature' *Interim Accord* n 31 above, Separate Opinion of Judge Simma, 695 at [20].

56 Further action may be taken in 2022, GA Res 74/180 (2019) paras 6, 9, although States disagree regarding what it should be, see most recently the discussion at Summary Records of the 13<sup>th</sup> Meeting of the Sixth Committee (15 October 2019) UN Doc A/C.6/74/SR.13 at [6]–[66].

57 GA Res 65/19 (2010) para 1; GA Res 68/104 (2013) para 1; GA Res 71/133 (2016) para 1; GA Res 74/180 (2019) para 1.

58 UNSG, 'Compilation of decisions' n 40 above, with references to earlier reports at [2].

59 *Cargill, Inc v Mexico* (Award), ICSID Case no ARB(AF)/05/2, 18 September 2009 at [381].

60 UNSG 'Compilation of decisions' n 40 above.

61 For example Article 16, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 (*Genocide Convention*) at [420], and Article 41, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 (*Jurisdictional Immunities*) at [93].

62 To borrow the term from J. Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Hague Recueil* 19, 22.

63 *Genocide Convention* n 61 above at [460]; also substantially endorsed in *Certain Activities* n 33 above at [30].

64 2001 ILC Articles, n 12 above, Art 34; *Certain Activities* n 33 above at [27], [31].

65 2001 ILC Articles, *ibid*, Art 34, Commentary 5. Punitive damages are also excluded, *ibid*, Art 36, Commentary 4. On restitution, see Art 35(b) ('an obligation to make restitution ... provided and to the extent that restitution ... does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'), on satisfaction, see Art 37(3) ('Satisfaction shall not be out of proportion to the injury'). But see D. Desierto, 'The Outer Limits of Adequate Reparations for Breaches of Non-Expropriation Investment Treaty Provisions: Choice and Proportionality in *Chorzów*' (2017) 55 *Columbia J Transnational L* 395.

implication, *not* by exclusion of crippling damage. The implication is confirmed by drafting history. The first reading of the 2001 ILC Articles in 1996 (1996 ILC Draft Articles) did have a rule against crippling compensation in Article 42(3), stating that reparation must not ‘result in depriving the population of a State of its own means of subsistence’,<sup>66</sup> but the rule was deleted by the ILC Drafting Committee and does not appear in the 2001 ILC Articles. (The ‘means of subsistence’ language still appears in Commentaries to Article 50 to explain how countermeasures cannot affect obligations for the protection of fundamental human rights, but that only relates to implementation of responsibility and not the conceptually distinct issue of compensation due.)<sup>67</sup> In short, the 2001 ILC Articles consciously and explicitly stand for the permissibility of crippling compensation.

Before critiquing the ILC, it is important to identify its rationale. The best argument, just as on most aspects of reparation, was made by Crawford in his Third Report and the 2000 ILC discussion. For him, it was not obvious how a rule against crippling compensation of the Article 42(3) kind could apply in the context of the secondary obligation of reparation. As a factual matter, Crawford felt that the concern about crippling compensation was exaggerated – amounts in compensation since 1945 had been relatively small, cases of very large compensation exceptional, and States routinely settled greater amounts in sovereign debt than were ever granted in compensation. In legal terms, States could limit liability regimes for particular fields in the first place. Once a distinction was drawn between quantum (how much is owed?) and the mode of payment (how will it be paid?), payment could be addressed either by a delay via necessity as a circumstance precluding wrongfulness or rescheduling in line with the practice of international financial institutions.<sup>68</sup> Crawford’s position was endorsed by leading European members of the ILC,<sup>69</sup> and was in line with the criticism of Article 42(3) by a number of developed States (with the US and the UK particularly vocal about uncertainty and potential for abuse of a rule against crippling compensation).<sup>70</sup> The distinction between quantum and

66 ILC, ‘Draft articles on State responsibility’ *Yearbook of the International Law Commission 1996: Volume II Part 2* UN Doc A/CN.4/SER.A/1996/Add.1 (Part 2) (ILC Yearbook 1996) 58, Art 42(3), and further Commentary 8, *ibid* 66, and drafting history, *Yearbook of the International Law Commission 1995: Volume I* UN Doc A/CN.4/SER.A/1995 (ILC Yearbook 1995) 91 at [31], 92 at [36]–[37]; G. Arangio-Ruiz, ‘Eighth Report on State Responsibility’ UN Doc A/CN.4/476 at [15]; ILC, *Yearbook of the International Law Commission 1996: Volume I* UN Doc A/CN.4/SER.A/1996 239 at [12]–[26].

67 2001 ILC Articles, n 12 above, Art 50, Commentary 7; Crawford, *State Responsibility*, n 29 above, 481–482.

68 Crawford, ‘Third Report’, n 29 above at [41]–[42], [162]–[164]; ILC, *Yearbook of the International Law Commission 2000: Volume I* UN Doc A/CN.4/SER.A/2000 (ILC Yearbook 2000) 5 at [17]–[18], 24 at [49], 174 at [14]; Crawford, *State Responsibility* *ibid*, 481–483.

69 ILC Yearbook 2000 *ibid*, 13 at [20] (Simma), 19 at [55] (Pellet), possibly also 27 at [9] (Tomka).

70 The US, Summary Records of the 35<sup>th</sup> Meeting of the Sixth Committee (7 November 1996) UN Doc A/C.6/51/SR.35 at [5]–[6] (Crook); *Yearbook of the International Law Commission 1998: Volume II Part One* UN Doc A/CN.4/SER.A/1998/Add.1 (Part 1) (ILC Yearbook 1998) 146; the UK, *ibid* 145 at [3]; France, *ibid* 146; Australia, Summary Records of the 23<sup>rd</sup> Meeting of the Sixth Committee (2 November 1999) UN Doc A/C.6/54/SR.23 at [43] (Blumenthal); Israel *ibid* at [60] (Keinan). Japan’s comment to the ILC is indecipherable due to brevity and apparent errors in numbering of articles and paragraphs referred to, *Yearbook of the International*

practicalities of implementation is reflected in rules on countermeasures, where impermissibility of deprivation of means of subsistence is one example of how countermeasures cannot affect the protection of fundamental human rights.<sup>71</sup> To summarise, the ILC made a conscious call not to exclude crippling compensation because such claims rarely arose in practice and were in any event better addressed by different legal means, in line with the position of leading scholars and influential States from the developed world. The ILC's approach is strongly bilateralist: the interests of the injured actor are central, any general interest not to cripple the responsible actor is given no weight, and the role of the international community is limited to a background assumption of political wisdom that frames legal rules without influencing their content.

### THE CASE AGAINST CRIPPLING COMPENSATION

In this section, I argue that the ILC's position on crippling compensation in the 2001 ILC Articles is problematic in three ways. The first problem is the mismatch between, on the one hand, the clear language of Commentary 5 of Article 34 of the 2001 ILC Articles and deletion of Article 42(3) of the 1996 ILC Draft Articles and, on the other hand, the fairly equal division of opinions within and without the ILC. A number of States did support a rule against crippling compensation, and, while slightly less numerous, vocal, and consistent than its opponents, they were more representative of the geographic and development-status distribution of the international community.<sup>72</sup> ILC members also provided significant support in discussions of the second reading in 2000,<sup>73</sup> reflecting a broad spectrum of professional and academic backgrounds

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*Law Commission 1999: Volume II Part One*, UN Doc A/CN.4/SER.A/1999/Add.1 (Part 1) 108, but Crawford and Yamada (Japan's member of the ILC) categorise Japan as an objector to Article 42(3), respectively Crawford, 'Third Report' n 29 above at [22], fn 43; *ILC Yearbook 2000* n 68 above, 23 at [43].

71 2001 ILC Articles, n 12 above, Art 50(1)(b), Commentary 7.

72 Bahrain, Summary Records of the 34<sup>th</sup> Meeting of the Sixth Committee (7 November 1996) UN Doc A/C.6/51/SR.34 at [49] (Al-Baharna); Italy, Summary Records of the 36<sup>th</sup> Meeting of the Sixth Committee (8 November 1996) UN Doc A/C.6/51/SR.36 at [3] (Leanza); Germany, *ILC Yearbook 1998* n 70 above, 146 at [1]-[3]; Chile, Summary Records of the 22<sup>nd</sup> Meeting of the Sixth Committee (20 December 1999) UN Doc A/C.6/54/SR.22 at [25] (Quezada); Czech Republic, Summary Records of the 15<sup>th</sup> Meeting of the Sixth Committee (24 October 2000) UN Doc A/C.6/55/SR.15 8 at [47] (Janda). The key problem was timing: the right point to intervene was 1998-99, before Crawford's Third Report was debated in 2000, but only Germany made its submission then.

73 In the first reading's discussion, the support for Article 42(3) was even stronger, *ILC Yearbook 1995* n 66 above, 91 at [31] (Lukashuk), 92 at [36]-[37] (Tomuschat); *ILC Yearbook 1996* n 66 above, 239 at [17] (Villagrán Kramer), at [18] (Bennouna), at [20] (Tomuschat), at [21] (Robinson), at [22] (Pambou-Tchivounda), at [25] (Calero-Rodrigues). Arangio Ruiz was ambiguous, *ibid.*, at [13], [21], and the only unqualified objection was made by Rosenstock, *ibid.*, at [12], [19], who appears to be the 'some members' whose disagreement is noted in Commentary 8(b). See also the tentative first discussion, cf concerns about excessive compensation, *Yearbook of the International Law Commission 1990: Volume I* UN Doc A/CN.4/SER.A/1990 165 (*ILC Yearbook 1990*) at [57] (Shi), 168 at [6]-[7], [10] (Bennouna), 177 at [6] (Al-Khasawneh), 189 at [32] (Solari Tudela), 190 at [38] (Al-Baharna), with objections, 181 [44] (Pellet), 196 at [19], and

and legal traditions.<sup>74</sup> Indeed, even Crawford himself did not consider exclusion of catastrophic liabilities to be incompatible with the broader project or systemic considerations, and rather criticised what seemed to him an unnecessary and cumbersome general rule. As he put it in the last intervention, '[i]t was true that there were extreme cases in which the responsible State could be beggared by the requirement of full reparation. Safeguard measures might thus be needed to cope with that situation, without prejudice to full reparation'.<sup>75</sup> When these points are taken together, the ILC's complete rejection of limitations on crippling compensation misstates the essentially divided authority both within and without the Commission. Either a 'without prejudice' clause<sup>76</sup> or language in Commentaries acknowledging flux and uncertainty would have been a more accurate reflection of what was, literally, an ambiguous position. Indeed, if one were pushed to choose one position over the other, the greater representativeness of governmental and ILC members' arguments against crippling compensation would be an attractive reason for preferring it,<sup>77</sup> by contrast with the exclusively developed world's argument for its permissibility.

The second problem with the ILC's position is that the underlying assumptions about the usual nature of compensation claims in international law have been falsified by subsequent developments in international dispute settlement. For Crawford, the 20<sup>th</sup> century practice suggested that compensation claims were mostly modest; the exceptional large claims in cases of egregious and systemic breaches, coloured by recollection of the terrible mistakes of post-World War One reparations, would be either not insisted upon, as after World War Two, or dealt with by *sui generis* mechanisms like the United Nations

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ambiguity, 198 at [35] (Arangio Ruiz). Note that the ILC's five-year term finished in 1996 and started in 1997, and many supporters of Article 42(3) – Tomuschat, Villagrán Kramer, Robinson, and Calero-Rodriguez – were not re-elected and therefore did not take part in the key 2000 debate (Bennouna was re-elected but left the ILC in 1998 to become a Judge at the International Criminal Tribunal for former Yugoslavia, see [https://www.icj-cij.org/files/members-of-the-court-biographies/bennouna\\_en.pdf](https://www.icj-cij.org/files/members-of-the-court-biographies/bennouna_en.pdf)).

74 *ILC Yearbook 2000* n 68 above, 19 at [7] (Hafner), 20 at [16] (Economides), 21 at [23] (Lukashuk), 23 at [43]–[44] (Yamada), 24 at [50] (Galicki), at [55], 25 at [59] (Rao), 188 at [6] (Economides), 191 at [23] (Momtaz).

75 *ILC Yearbook 2000* *ibid*, 29 at [21], also 24 at [49], 174 at [14]; Crawford, 'Third Report' n 29 above at [164]; Crawford and Watkins, n 11 above, 297–298.

76 As for example the effect of circumstances precluding wrongfulness on compensation at 2001 ILC Articles, n 12 above, Art 27(b) and the so-called third-party countermeasures at Art 54, n 10 above. The 'without prejudice' clause takes note of the ambiguity in positive law and leaves scope for subsequent developments, see M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge: CUP, 2017) ch 3; F. Paddeu, *Justification and Excuse in International Law* (Cambridge: CUP, 2018) 77–94.

77 *ILC Yearbook 2000* n 68 above, 21 at [23] (Lukashuk) ('reparation must not result in depriving the population of a State of its own means of subsistence. That could be of critical importance for developing countries'), 23 at [44] (Yamada) ('legal concept was needed in particular for third-world countries'); *Duzgit Integrity* n 29 above at [25], [26] (Kateka) ('[s]ome members [of the ILC] were concerned about the developing countries' ability [to pay reparations]'); also *ILC Yearbook 1990* n 73 above, 165 at [57] (Shi) ('full compensation might prove to be excessively onerous and might deprive the developing country of its right to development. ... a small developing country ... might become bankrupt'). As to representativeness as a criterion of State practice for formation of customary law, see ILC, 'Conclusions on Identification of Customary International Law' in *Report of the International Law Commission on the Seventieth session* UN Doc A/73/10 119 (2018 ILC Conclusions), Conclusion 8(1), Commentaries 3–4.

Compensation Commission (UNCC), attuned to their peculiarities.<sup>78</sup> While a plausible reading of the 20<sup>th</sup> century war reparations' practice,<sup>79</sup> this assumption has been challenged by two unrelated developments. First, a (limited) number of States do press very large claims before general dispute settlement mechanisms,<sup>80</sup> for example a claim with Crawford himself as the lead counsel that was described by the tribunal as 'impos[ing] crippling burdens upon the economies and population'.<sup>81</sup> The second development is the rise, within human rights and investment law, of economic injury claims by non-State actors, who are generally not repeat players and therefore not inclined to indulge in system-preserving generosity<sup>82</sup> (particularly regarding rules that are unlikely to be invoked against them). Crippling compensation claims in that setting are no longer exaggerated, as another participant in the ILC discussion later appreciated in an arbitral capacity, by drawing a comparison between investment claims and war reparations.<sup>83</sup>

Secondly, the alternative legal means discussed in the ILC are not obviously realistic. States may limit liability in particular primary rules but have not done so in cases with large claims. Circumstances precluding wrongfulness that could justify delay in payment, like necessity, may be available in principle.<sup>84</sup> But they are difficult to invoke in practice – currency collapse entirely due to world markets and unrelated to wrongful acts is hypothesised as the rare situation to fall within the rules for crippling compensation<sup>85</sup> – would in any event not affect quantum, and normative desirability of postponement of crippling compensation is coloured by the same disapproval as of other post-World War One mistakes.<sup>86</sup> Finally, necessity does not easily fit within dispute settlement mechanisms that involve non-State actors and enforcement through domestic

78 Crawford, 'Third Report' n 29 above at [41], fn 77, 78; *ILC Yearbook 2000* *ibid* 23 at [49] (Crawford).

79 *ILC Yearbook 2000* *ibid* 23 at [44] (Yamada).

80 Eritrea and Ethiopia before the EECC, n 29 above, Iran before the Iran-US Claims Tribunal, n 22 above, probably Congo before the ICJ, n 23 above. See also H. Smith, 'Greece to ask Germany for billions in war reparations' *Guardian* 21 April 2019.

81 *Ethiopia Damages Claim* n 29 above at [21].

82 V. Lowe, 'The Function of Litigation in International Society' (2012) 61 *ICLQ* 209, 213–214.

83 *CME Czech Republic BV v Czech Republic* UNCITRAL Case, Separate Opinion on the Issues at the Quantum Phase by Arbitrator Brownlie, 14 March 2003 (*CME Brownlie*) at [77]–[80]. cf I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) (Brownlie, *Use of Force*) 147. Crawford was one of the counsel for the investor in an earlier phase of *ConocoPhillips* n 1 above, Decision on Jurisdiction and the Merits, n 5 above.

84 2001 ILC Articles, n 12 above, Art 25; P. d'Argent, *Les réparations de guerre en droit international public* (Bruxelles: Bruylant, Paris: LGDJ, 2002) 724–733.

85 D'Argent, *ibid*, 733. It is hard to satisfy cumulative requirements, particularly that conduct 'is the only way' to safeguard interests and that the State itself has not contributed to the situation, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* n 31 above at [140]; *Unión Fenosa Gas* n 16 above at [8.37]–[8.62]. Yamada (Japan) and Hafner (Austria) suggested the post-War practice regarding their States as examples of necessity, *ILC Yearbook 2000* n 68 above, 23 at [43]–[44], [47]–[48], but it is doubtful that they would satisfy the strict criteria of circumstances precluding wrongfulness, which in any event would only postpone and not annul the payment of compensation, 24 at [49] (Crawford).

86 P. d'Argent, 'The Conversion of Reparations into Sovereign Debts' in M. Erpeldings and Ors (eds), *Peace through Law: The Versailles Peace Treaty and Dispute Settlement after World War I* (Germany: Nomos, 2019) at <https://doi.org/10.5771/9783845299167>.

courts.<sup>87</sup> The broader point is that the ILC under-stated the implications of the structural shift of the international legal order into the ‘age of adjudication’,<sup>88</sup> which properly unfolded for this topic through the practice of the 2000s and particularly the 2010s. It is not a criticism of the ILC or its particular members – the judgement call made was plausible in light of the assumptions of the late 1990s – but their reasoning is no longer reflective of the systemic dynamic of the modern legal order.

The third problem is that permissibility of crippling compensation does not fit within the broader balance struck by the law of State responsibility. One technical aspect of the balance relates to Discount Cash Flow valuation method and compound interest, treated in a lukewarm manner by the ILC<sup>89</sup> but endorsed with significant impact in the recent billion-dollar awards noted in the introduction.<sup>90</sup> This shift of balance to favour the injured actor creates a gap for a corresponding contrary principle to emerge in favour of the responsible actor. The second, systemic point flows from the balance between bilateralism and multilateralism. The voluntarism, bilateralism, and exclusively inter-State focus of classic law<sup>91</sup> provided *Chorzów* with analogous assumptions to tort law:<sup>92</sup> equality of parties, rectification of wrongful violation of private rights, exclusive focus on the relations between the victim and wrongdoer, and irrelevance of considerations external to that relationship.<sup>93</sup> But these assumptions no longer hold true, not in 2001 and certainly not in 2020. The necessary equality of parties is broken down by human rights and investment claims,<sup>94</sup> bilateralist focus on injury as the sole basis for invocation is disaggregated into multilateral interests of the broader community,<sup>95</sup> and *jus cogens* add a further multilateral layer of rules.<sup>96</sup> Indeed, even the law of reparation now incorporates multilateral considerations.<sup>97</sup> The bilateralist fixation of *Chorzów* is out of touch with systemic sensitivities of modern law.

This section has argued that the ILC’s legal position permitting crippling compensation was questionable in 2001, broader assumptions that underpinned it have been shown to be unpersuasive by subsequent developments, and it is out

87 ‘Poverty as such is not a circumstance justifying a stay any more than it would justify non-payment of award’, *Karkey Karadeniz Elektrik Uretim AS v Pakistan* ICSID Case no ARB/13/1, Decision on the Stay of Enforcement of the Award, 22 February 2018 fn 133.

88 C. Greenwood, ‘International Law in the Age of Adjudication’ at [https://legal.un.org/avl/lis/Greenwood\\_CT.html](https://legal.un.org/avl/lis/Greenwood_CT.html).

89 Crawford, ‘Third Report’ n 29 above at [207]–[211], [248]; 2001 ILC Articles, n 12 above, Art 36, Commentary 26; Art 38, Commentaries 8–9.

90 notes 13–17 above.

91 *SS Lotus (France v Turkey)* 1929 PCIJ Series A no 10, 19; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Declaration of President Bedjaoui 268 at [12].

92 H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, 1927) 134.

93 Ripstein, n 44 above; H. Abraham, ‘Tort Liability for Belligerent Wrongs’ (2019) 39 OJLS 808, 811–812.

94 2001 ILC Articles, n 12 above, Art 33(2), Commentary 4.

95 2001 ILC Articles, *ibid*, Art 48(1); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order) [2020] ICJ at [41] at <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

96 2001 ILC Articles, *ibid*, Art 54.

97 *ibid*, Arts 41, 48(2)(b); Crawford, ‘Multilateral Rights’ n 48 above, 434, 442; Gaja, n 48 above, 103, 109.

of line with the general shift of State responsibility away from exclusive bilateralism. That does not mean, on its own, that the opposite rule exists. A positive case still has to be made for such a rule,<sup>98</sup> and its existence and content demonstrated by reference to the usual process of generation of international law by claim and counterclaim, assertion and reaction, by governments as representative of States and by other actors at international law.<sup>99</sup> That is what the next three sections will do, evaluating the argument by reference to the classic sources of international law: customary international law, treaty law, and general principles.

## CUSTOMARY INTERNATIONAL LAW

Rules regarding content of reparation, including compensation, are set out in custom, which is constituted by general practice and *opinio juris*.<sup>100</sup> In the present context, practice of particular significance is to be found in claims to compensation advanced (and resisted) by States before international courts and tribunals, statements made by States in the course of extensive studies of questions of international responsibility before the ILC, and conduct in connection with treaties that address crippling compensation claims.<sup>101</sup> *Opinio juris* in this context is reflected in particular in the assertion by States claiming crippling compensation that international law accords them a right to such reparation; in the acknowledgment, by States accepting or not challenging the claims, that international law imposes upon them an obligation to provide such reparation; and, conversely, in the rejection by States in other cases of crippling compensation claims.<sup>102</sup> This section will consider four strata where States had an opportunity to express their practice, proceeding in a loosely chronological manner: first, the 20<sup>th</sup> century (treaty) practice on war reparations; second, practice relating to the ILC and State responsibility; third, State practice in international dispute settlement; and fourth, areas of law not directly related to crippling compensation in State responsibility but capable of throwing some light by analogy (primary rules on compensation, sovereign debt, and responsibility of international organisations).

### Practice in relation to war reparations

The 20<sup>th</sup> century treaty practice relating to war reparations is vast.<sup>103</sup> I am interested in it for the light thrown on the limits on crippling compensation, so will

98 *EDF International SA and Ors v Argentina* ICSID Case no ARB/03/23, Decision of the Annulment Committee, 5 February 2016 at [319].

99 Crawford, 'Chance, Order, Change' n 62 above, 22.

100 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95 at [142], [149]; 2018 ILC Conclusions, n 77 above, Conclusion 2.

101 *Jurisdictional Immunities* n 61 above at [55]; also 2018 ILC Conclusions, *ibid*, Conclusion 6(2), Commentary 5.

102 *Jurisdictional Immunities ibid* at [55]; also 2018 ILC Conclusions, *ibid*, Conclusion 10(2)–(3), Commentaries 4, 8.

103 See Brownlie, *Use of Force*, n 83 above, 133–149; d'Argent, n 84 above; A. Gattini, *Le riparazioni di guerra di diritto internazionale* (Padova: Cedam, 2003).

be selective, with an eye to reparations practice identified as the most important in the ILC and dispute settlement – post-World War One German reparations, post-World War Two Axis reparations, and post-Gulf War Iraqi reparations. The so-called ‘war guilt clause’ in Article 231 of the Versailles Peace Treaty accepted Germany’s responsibility for causing loss and damage to Allies but was followed by the statement in Article 232(2) that ‘the resources of Germany are not adequate ... to make complete reparation for such loss and damage’.<sup>104</sup> In the post-World War Two practice, the Potsdam Agreement limited payment of reparation by the so-called ‘first charge principle’ to ‘leave enough resources to enable the German people to subsist without external assistance’;<sup>105</sup> the Paris Peace Treaty with Italy was intent to ‘avoid interference with the economic reconstruction of Italy and the imposition of additional liabilities on other Allied or Associated Powers’ but did not apply this rule to compensation;<sup>106</sup> and the San Francisco Treaty ‘recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations’.<sup>107</sup> The final example is the UNCC, set up by the UN Security Council (UNSC) in 1990 to compensate loss from Iraqi aggression against Kuwait, which explicitly referred to the requirements of the people of Iraq, its payment capacity, and the needs of the Iraqi economy<sup>108</sup> (which in practice meant a varied set percentage of yearly proceeds from the sale of Iraqi oil).<sup>109</sup>

For the purpose of evaluating the relevance of reparations’ practice for crippling compensation, the challenge is twofold: first, identifying commonalities in practice; and second, determining their legal relevance. The taking of stock is made difficult by its sheer amount and diversity, varying between conflicts, time periods, regions, and States; by the sharpness of political contestation surrounding conclusion and implementation of treaties; by the variety of legal techniques and arguments at play throughout their life cycle; and particularly by the radical shifts in perception of policy wisdom of particular approaches.<sup>110</sup> Say, the

104 Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) [1919] 225 CTS 188. See d’Argent, n 72 above, 39–104; Gattini, *ibid*, Part V.

105 ‘Protocol of the Proceedings of the Berlin Conference’ in United States Department of State, *Foreign Relations of the United States Diplomatic Papers: The Conference of Berlin 1945* Volume 2 (Washington DC: US Government Printing Office, 1960) 1478, s II Art 19. See also determination to compensate Israel ‘within the limits of their capacity’, Agreement between Israel and Germany (signed 10 September 1952, entered into force 27 March 1953) 162 UNTS 206 Preamble; and understanding that ‘the effects of the limitations on ... its capacity to pay’ will be taken into account in determining manner and extent to which its liability is fulfilled, Agreement on Germany External Debts (signed 27 February 1953, entered into force 16 September 1953) 333 UNTS 4, Appendix A, Exchange of Letters Embodying the Agreement of 6 March, 1951, between France, the UK and the UK (6 March 1951), Art I.

106 Treaty of Peace with Italy (signed 10 February 1947, entered into force 10 February 1947) 49 UNTS 3, Arts 74(A)(3), (B)(3).

107 Treaty of Peace with Japan (signed 8 September 1951, entered into force 28 April 1952) 136 UNTS 46, Art 14(a).

108 UN Doc S/ Res/687 (1991) at [19].

109 Set at 30 per cent in UN Doc/S/RES/705 (1991) at [2], changed to 25 per cent in UN Doc S/RES/1330 (2000) at [12], and to five per cent in UN Doc S/RES/1483 (2003) at [21].

110 For example debates about post-World War One reparations, Z. Steiner, *The Lights that Failed* (Oxford: OUP, 2005) 193–203.



technical language of the Versailles Peace Treaty may seem not unreasonable on its own, but its symbolism, practice of implementation, and historical lessons are generally taken to suggest that it could only ever be an example of how not to do things with law.<sup>111</sup> Or the adjective ‘presently’ that qualifies Japan’s economic woes in the San Francisco Treaty may suggest mere postponement of compensation – but for its proper legal effect broad waiver clauses have to be taken into account.<sup>112</sup> Or, most importantly, there is reasonable ground for disagreement on whether the variety signifies the lack of consistency necessary for practice to count as general,<sup>113</sup> or supports a principle, if formulated at a considerable degree of abstraction, of taking into account the needs of the State and its population *in some way*.<sup>114</sup>

The second challenge relates to legal implications of this practice: does it reflect a rule of customary international law or does it consciously depart from it?<sup>115</sup> International legal process has not generated consensus on the issue but rather three plausible answers, each with credible authority. For some, like Tomuschat, ‘[t]he idea of placing a limit on the notion of full reparation was firmly rooted in current-day positive international law’.<sup>116</sup> For others, like Crawford, full reparation was still the right rule. Versailles may have been legally wrong due to push beyond causality but its real lesson was different: the successful post-World War Two practice of ‘decid[ing] not to insist on reparations at all’ was informed by political wisdom rather than legal limitations.<sup>117</sup> For yet others, like the EECC, the whole century of practice stood for no broader proposition, since it had been entirely shaped by non-legal considerations and peculiar circumstances.<sup>118</sup> In submissions to the ILC and the UNGA Sixth Committee States, including Parties to reparations’ treaties, drew different conclusions about them. For example, Germany noted that ‘[in the context of violations having such disastrous effects as war], settlements, if they have been obtained, refrain from awarding full reparation for every single damage sustained’, while the

111 For example views of ILC members of Russia and Germany, *ILC Yearbook 1995* n 66 above, 91 at [31] (Lukashuk), 92 at [37] (Tomuschat), also Crawford, *ILC Yearbook 2000* n 68 above, 5 at [27], 24 at [49]; 1996 ILC Articles, n 66 above, Art 42, Commentary 8(a).

112 San Francisco Treaty, n 107 above, Art 14(b) (‘the Allied Powers waive all reparations claims of the Allied Powers’). Note the lingering uncertainty about the effects of waiver clauses on individual claims, Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation between Japan and Korea (signed 22 June 1965, entered into force 16 September 1953) 583 UNTS 219 Art II; ‘Why Japan and South Korea bicker’ *The Economist* 3 September 2019. The issue was argued but not decided in *Jurisdictional Immunities* n 61 above, Dissenting Opinion of Judge Caçado Trindade 179 at Sections VIII-IX.

113 2018 ILC Conclusions, n 77 above, Conclusion 8(1), Commentaries 5–8.

114 See the highly qualified support in Brownlie, *Use of Force* n 83 above, 147; d’Argent, n 84 above, 737.

115 2018 ILC Conclusions, n 77 above, Conclusion 11; *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep 582 at [90]; *Jurisdictional Immunities* n 61 above at [66]. *ILC Yearbook 1996* n 66 above, 240 at [20].

116 Crawford, ‘Third Report’ n 29 above at fn 77; *ILC Yearbook 2000* n 68 above, 24 at [49].

117 *Decision Number 7 of 27 July 2007* (2007) 26 RIAA 10 at [27], and generally at [21]–[33]. At the damages stage the EECC seemed more sympathetic to the first position, noting the prevailing post-War practice to give weight to needs of the affected population and citing Tomuschat as an authority, *Ethiopia’s Damages Claim* n 23 above at [21], [22].

Australian representative 'was unaware of any State practice, international rule or legal decision supporting the exception'.<sup>119</sup> The key point for this inquiry is that international legal process has not, in my view, provided the imprimatur of consensus to any reading. The war reparations' practice, despite its richness, does not weigh strongly either way for the rule on crippling compensation.

### Practice in relation to the ILC and State responsibility

The common challenge of determining the broader position that States take on an issue of international law by extrapolating from attitude taken on peculiar issues is alleviated when States engage directly with the work of the ILC, either through comments or by discussing the ILC reports in the UNGA Sixth Committee. On crippling compensation, a limited number of States expressed their views, in 1996, regarding the 1996 ILC Draft Articles, and in 1998–2000, throughout the debates about the second reading of the 2001 ILC Articles. The objections to a rule limiting crippling compensation relied on three points. The first was uncertainty of content of the rule and criteria for its application.<sup>120</sup> The second concern was about potential for abuse.<sup>121</sup> The third and more general point was that there was no support in international practice.<sup>122</sup> States speaking in favour of limiting crippling compensation were less consistent: some seemed to characterise it as an element of the general obligation on reparation and not as a separate rule,<sup>123</sup> others expressed approval in general terms,<sup>124</sup> and Germany argued that it could be derived from post-war settlement practice, with full reparation limited to arbitrations regarding individuals.<sup>125</sup> To sum it up, the US, the UK, France, Australia, Israel, and Japan supported the permissibility of crippling compensation, while Bahrain, Italy, Germany, Chile, and Czech Republic spoke out against it. The consistency of the first group increases the weight of its practice, just as the regional and developmental representativeness of the second group supports their position. Once again, State practice, in addition to its quantitative limitations, is not uniform and consistent enough to weigh strongly either way.<sup>126</sup>

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119 cf against crippling compensation, n 72 above, by Italy, Czech Republic, and Germany, and the argument for its permissibility, n 70 above, by the US, the UK, France, Japan, Israel, Australia.

120 The UK, also the US, n 70 above.

121 Made by Japan, Australia, and the US, *ibid.*

122 The US, France, Australia, Israel, *ibid.*

123 Chile, Czech Republic, Italy, n 72 above.

124 Bahrain, *ibid.*

125 Germany, *ibid.*

126 2018 ILC Conclusions, n 77 above, Conclusion 8(1), Commentaries 3–8. The limited involvement of developing States is in line the Third World Approaches to International Law (TWAAIL) critique of downplaying the interests of the developing world in formulation of State responsibility, from S.N. Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 AJIL 863; to A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005) 268–272.

## Practice in international dispute settlement

International dispute settlement tends to focus States' (counsels') minds, forcing the adoption of a clear position on legal issues, so arbitral and judicial practice should be helpful for identifying the post-2001 perceptions. The legally relevant question for identification of custom is this: did States claim crippling compensation, challenge it due to being crippling, or accept the legal principle by the necessary implication of not challenging it? In my view, disputes that do not raise crippling compensation claims will provide little guidance on the question whether it could be awarded in principle<sup>127</sup> so I will consider in turn the practice where the issue has been raised, in inter-State dispute settlement, human rights courts, and investor-State arbitration.

The key inter-State institution is the EECC, which dealt with claims arising out of the 1998–2000 Eritrea–Ethiopia war.<sup>128</sup> In the Final Awards on (both States') Damages Claims (Awards), the EECC squarely addressed the challenge of crippling compensation by reference to customary law of State responsibility.<sup>129</sup> The EECC was concerned that the huge damages sought by both States, both absolutely and in relation to their respective economic capacities, 'raised potentially serious questions involving the intersection of the law of State responsibility with fundamental human rights norms'.<sup>130</sup> It noted that despite the decision by the ILC to delete the provision limiting crippling compensation from the 1996 Draft ILC Articles, the States were still bound by their human rights obligations. The EECC therefore considered, albeit without ultimately deciding, the possibility of capping compensation awards so as not to excessively compromise States' ability to meet peoples' basic needs (health care, education, and other public services).<sup>131</sup> The Awards provide an authority for limiting crippling compensation, rendered by a tribunal that considered and rejected the position of the ILC<sup>132</sup> (albeit basing its rationale on human rights treaty obligations and not customary law of State responsibility, and not saying much on the practicalities of determining the cap). What is the value of the Awards for determination of customary law on crippling compensation? The usual considerations (nature of the tribunal, unanimity of the decision, and quality of counsel) suggest that they could provide valuable guidance.<sup>133</sup> On the other hand, awards are only subsidiary means for the determination of rules

127 For a different view, see Desierto, n 65 above.

128 At <https://pca-cpa.org/en/cases/71/>, and the volume by Ethiopia's counsel, S. Murphy, W. Kidane, and T. Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (Oxford: OUP, 2013).

129 See references to 2001 ILC Articles, n 12 above and *Chorzów*, n 8 above, *Ethiopia's Damages Claim* n 29 above at [24]–[26].

130 *ibid* at [18]–[19].

131 *ibid* at [19]–[24].

132 Crawford was the counsel and advocate of Ethiopia, and Ethiopia's arguments rejected by the Commission seem similar to the position accepted by the ILC, see n 29 above at [21].

133 2018 ILC Conclusions, n 77 above, Conclusion 13, Commentary 3. Particular weight may be added by the familiarity of arbitrators with the US perspective. Commissioners Aldrich, Crook, and Reed had served at the State Department. Aldrich was the US-nominated Judge at the Iran-US Claims Tribunal, where the standard of compensation was one of the most contested issues, and Crook and Reed had been US Agents before it. President van Houtte had been a Commissioner at the UNCC and Crook and Reed had been involved in its creation. Indeed,

of law, and the ultimate test of their worth lies in their reception by States and subsequent judicial practice.<sup>134</sup> In that setting, Awards have not aged well at all: EECC appears to have never been invoked or accepted as reflective of custom on this point – unlike the favourable treatment of its other pronouncements<sup>135</sup> – with ‘interesting’ the best thing said about them in a formalised setting.<sup>136</sup>

When State responsibility is invoked by non-State actors in the fields of human rights and investment law, their arguments do not contribute to customary law directly but may have an indirect effect, to the extent that States have endorsed or reacted to them.<sup>137</sup> The key question is this: did (respondent) States challenge claims due to their being crippling, or accept the legal principle either expressly or by the necessary implication of not challenging it when a reaction was called for?<sup>138</sup> In regional human rights courts, no challenges to the principle of crippling compensation appear to have been made. For example, Russia has still not complied with the ECtHR judgment in *Yukos v Russia* but did not rely on the crippling nature of compensation to rationalise delay or refusal of compliance.<sup>139</sup> Albania gradually implemented *Manushaqe Puto and Others v Albania* in consultations with the Council of Europe, including by a EUR 1.2 billion allocation.<sup>140</sup> In the Inter-American Court of Human Rights, the comparatively low amounts of compensation usually awarded<sup>141</sup> perhaps do not raise the precise legal point, although the economic impossibility of providing

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Crook had delivered the 1996 intervention before the Sixth Committee highly critical of Article 42(3), n 70 above. For technical purposes of international law-making, officials are taken to speak on behalf of their States and not to express their personal views, adjudicators are independent and do not represent their former employers, and the collective decision-making process in a judicial setting means that not every proposition fully reflects everybody’s views. But since the 2001 ILC Articles on the issue reflect the position of developed States (and the US in particular), the familiarity of Commissioners with that perspective imbues particular weight to a unanimous decision to reject it.

134 *ibid.*, Conclusion 13, Commentary 3.

135 *Diallo* (Compensation), n 9 above at [13]; *Jurisdictional Immunities* n 61 above, Dissenting Opinion of Judge Yusuf 291 at [16], [54]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* [2015] ICJ Rep 3, Separate Opinion of Judge Gaja 394 at [4]; Institute of International Law, ‘Present Problems of the Use of Force in International Law’ in *Annuaire de l’Institut de droit international* Volume 72 (Paris: Pedone, 2007) at [27], [54], [57]; ILC, ‘Articles on the expulsion of aliens’ in *Report of the International Law Commission on the Sixty-sixth session* UN Doc A/69/10 11, Art 10, Commentary 5; Art 20, Commentary 6; M.G. Jacobsson, ‘Third report on the protection of the environment in relation to armed conflict’ (3 June 2016) UN Doc A/CN.4/700 at [232]–[235].

136 M. Lehto, ‘Second report on protection of the environment in relation to armed conflicts’ (27 March 2019) UN Doc A/CN.4/728 at [112] (‘interesting’ for not ‘embracing the traditional position’).

137 2018 ILC Conclusions, n 77 above, Conclusion 4(3), Commentary 8.

138 *ibid.*, Conclusion 10(3), Commentary 8.

139 In the *Yukos* case, Russia explained non-compliance by reference to a conflict with its Constitutional Court’s judgment, DH-DD(2019)124 (4 February 2019), the Constitutional Court’s judgment at DH-DD(2-017)207 (22 February 2017).

140 DH-DD(2018)793 (24 August 2018). Also Council of Europe, ‘Support to implementation of the law on the Treatment of Property in Albania’ 6 May 2019 at <https://www.coe.int/en/web/tirana/-/support-to-implementation-of-the-law-on-the-treatment-of-property-in-albania>.

141 F. Novak, ‘The System of Reparations in the Jurisprudence of the Inter-American Court of Human Rights’ (392) 2018 *Hague Recueil* 9, 149.

compensatory remedies has been sometimes considered in substance.<sup>142</sup> Overall, taking the legal relevance of human rights cases for State responsibility at its strongest,<sup>143</sup> it is complicated to draw inferences on the broader principle due to procedural and institutional context. At a basic level, it is unclear whether a challenge of crippling compensation was called for: the amounts awarded, while significant, may not have been crippling for Russia, while for other States the technical point was not brought out due to the wider array of available remedies or the consensual implementation of judgments in a particular institutional setting.<sup>144</sup>

If the leading inter-State case challenges the orthodoxy and human rights cases are evasive, investment law provides a strong, if implied endorsement of the 2001 ILC Articles. Early decisions show challenges by States of compensation by reference to current problems<sup>145</sup> or effects of compensation on the population<sup>146</sup> – but no arguments of this kind were presented in the multi-billion awards made against Russia, Ecuador, Venezuela, Egypt, and Pakistan in recent years.<sup>147</sup> For legal purposes, the consistent failure to challenge crippling compensation in such cases counts as an endorsement of the 2001 ILC Articles on the issue.<sup>148</sup> The strength of the endorsement is increased by taking it together with the general failure to raise the issue either bilaterally<sup>149</sup> or multilaterally.<sup>150</sup> This silence further contrasts with the (often overly) voluminous arguments on valuation, as well as regular presentation of arguments regarding the effect of compensation on health care, education, and other budgets in proceedings on stay of enforcement in annulment proceedings.<sup>151</sup> Indeed, despite personal continuity of arbitrators and counsel, the EECC Awards have apparently never been introduced as authorities in any dispute, suggesting a perceived difference in judicial function between a single retrospective institution

142 IACtHR, *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Judgment of 20 November 2013 at [463]–[473].

143 *Diallo* (Compensation) n 9 above at [18], [24], [33], [40], [49], [56]; *Georgia v Russia* n 33 above at [21], [54]. But see 2001 ILC Articles, n 12 above, Art 33(2).

144 See A. Donald and A.-K. Speck, 'The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments' (2019) 19 HRLR 83; V. Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2019) 29 EJIL 1091.

145 *American Manufacturing & Trading, Inc v Zaïre* ICSID Case no ARB/93/1, Award, 21 February 1997 at [7.17].

146 *CME* Brownlie, n 83 above at [77]–[80].

147 See cases at notes 13–17 above.

148 Tribunals generally treat rules on content of responsibility as legally relevant for investor-State arbitrations, even if differing on the rationale since the 2001 ILC Articles, Art 33(2) puts rules on inter-State content of responsibility on a without-prejudice basis for such claims, *Yukos v Russia* n 13 above at fn 10; *Unión Fenosa Gas* n 16 above at Part X [10.96]–[97]; *ConoccoPhillips* n 1 above at [208], and further n 39 above.

149 Changing treaty formulae is a common way for States to express disapproval of arbitral decisions but there are very few examples of changes that could affect crippling compensation as a secondary rule. But see 2016 Slovakia-Iran BIT, Art 21(2) ('an equitable balance between the public interest and interest of those affected').

150 UNCITRAL Working Group III: Investor-State Dispute Settlement Reform at [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state). But see tentative recent suggestions, n 251 below.

151 States that have made such arguments include Guinea, Ecuador, Venezuela, and Pakistan, *Karkey Karadeniz Elektrik Uretim AS* n 87 above at [111]–[112].

with a fixed docket and decentralised prospective institutions.<sup>152</sup> Reasons for the non-practice could include: the ever-increasing authority of the 2001 ILC Articles;<sup>153</sup> path-dependence in (international) dispute settlement; challenge for (some) States to take a long-term view of the international legal process due to outsourcing of legal services to various counsel of various quality and absence of institutional in-house memory;<sup>154</sup> the collective action problem of likely loss of arguments in individual cases counting against the widespread invocation necessary to change custom; unwillingness to suggest by implication the acceptability of non-crippling damages – or indeed satisfaction with receptiveness of tribunals to the substance of such arguments, even if not their technical characterisation. Be that as it may, for legal purposes the failure by States to invoke the argument against crippling compensation investment claims, particularly in the post-2009 practice where EECC's Awards provided an excellent authority, reinforce the ILC position.

### **Analogies: compensation in primary rules, sovereign debt, responsibility of international organisations**

I have so far discussed State practice directly relevant to crippling compensation in State responsibility through treaties, comments on the ILC work, and dispute settlement. I suggested that the first two categories do not weigh strongly either way, while dispute settlement practice is divided between the argument for capping by the EECC and the general failure of States to challenge crippling compensation in investor-State arbitration. In light of the ambiguity of the directly relevant materials, it is helpful to consider three areas of law that could throw some light on the issue by analogy. I will consider in turn compensation in primary rules, sovereign debt, and the law on the responsibility of international organisations, and will suggest that the first two do not weigh strongly either way, while the third endorses the 2001 ILC Articles.

The first line of analogous practice is compensation as an element of primary customary rules. The connection was explicitly drawn from the very beginning: during the 1996 Sixth Committee session the US criticised limitation of crippling compensation because '[i]t offered an easy escape for potential expropriators or others who had committed wrongful acts and who sought to avoid responsibility for their actions'.<sup>155</sup> In a technical sense, compensation as reparation for an internationally wrongful act ('X cannot do Y, therefore compensation must be paid') is different from a criterion of lawful conduct ('X can do Z as long as compensation is paid'), but they are close in practice, particularly when wrongfulness arises from failure to comply with the criterion of

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152 D. Caron, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 *Berkeley J Int'l L* 401, 404-405.

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

154 J. Sharpe, 'The Agent's Indispensable Role in International Investment Arbitration' (2018) 33 *ICSID Rev* 675. Note also the TWAAIL perspective, n 126 above, n 283 below.

155 Sixth Committee (1996), n 70 above at [5] (Crook).

lawfulness: 'X cannot do Y [Z without paying compensation], therefore compensation must be paid'. The example of expropriation in foreign investment law is not the only rule of that kind<sup>156</sup> but expresses perhaps most clearly the structure of the rule and the criteria for compensation.<sup>157</sup> It is also helpful for this discussion, both because of the historically muddled distinction between primary and secondary rules in investment law<sup>158</sup> and the 'considerable variety' in recent practice on compensation for lawful and unlawful expropriation.<sup>159</sup>

Do primary rules that address compensation always require full compensation or provide for exceptions for crippling compensation? The response is 'it depends'. The Cold War debates about the relevance to compensation of considerations other than value of expropriated investment were contentious,<sup>160</sup> addressing tensions familiar to the crippling compensation debate regarding the financial capacity of States.<sup>161</sup> But they are less helpful than one might expect, due to the difference of framing between the State responsibility regime premised on wrongfulness and the New International Economic Order effort to reform international economic law precisely so as to enable lawful governance of investment.<sup>162</sup> At the end of the day, arguments mostly turned on disagreement about which position reflected general consensus, rather than the legal inevitability of full, qualified, or indeed any compensation.<sup>163</sup> Modern practice in various fields shows that primary rules on compensation can be drafted and applied differently: investment law almost invariably calls for full compensation for expropriation,<sup>164</sup> regional human rights treat compensation as relevant to

156 For example ILC, 'Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities' *Yearbook of the ILC, 2006, Volume II, Part Two* 59, Principles 1, 4, references to treaty practice at Principle 1, Commentary 3; Principle 2, Commentary 5.

157 UNGA Res 1803 (XVII) (14 December 1962) at [4]; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018, in force 30 December 2018) Art 9.8(1)(d), (2)-(4).

158 Crawford, *State Responsibility* n 29 above, 20-36.

159 2001 ILC Articles, n 12 above, Art 36, Commentary 29; *ConocoPhillips* n 1 above at [207]-[229]. In *Venezuela Holdings*, an *ad hoc* annulment committee set aside USD 1.41 billion of the 1.6 billion award due to confusion between applicable primary and secondary rules under treaty and custom, n 39 above.

160 I. Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)' (1979) 162 *Hague Recueil* 253, 255-271; R. Jennings and A. Watts, *Oppenheim's International Law: Peace* (London and New York: Longman, 9<sup>th</sup> ed, 1992) 921-927.

161 A. Anghie, 'Legal Aspects of the New International Economic Order' (2015) 6 *Humanity* 145; contributions by Craven, Brunner, Pahuja and Sanders, and Sornarajah in J. von Bernstorff and P. Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford: OUP, 2019).

162 See M. Bedjaoui, 'Second Report on Succession of States in respect of matters other than treaties' *Yearbook of the International Law Commission 1969: Volume II UN Doc A/CN.4/SER.A/1996/Add.1*, 69 at [80]-[86]; M. Bedjaoui, *Towards a New International Economic Order* (Paris: UNESCO, 1979).

163 See *Ebrahimi v Iran* IUSCT Case no 560-44/46/47-3, Final Award, 12 October 1994 at [88], [95]; Separate Opinion of Judge Allison. Even leading authorities from developed States suggested a relaxation of either the standard or promptness of compensation, H. Lauterpacht, *Oppenheim's International Law: Peace* (London and New York: Longman, 8<sup>th</sup> ed, 1955) 352; L.B. Sohn and R.R. Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 *AJIL* 545, 560.

164 *Venezuela Holdings* n 39 above. But see 2012 South African Development Community Model Bilateral Investment Treaty Template Art 6.2 (Option 1) at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2875/download>.

protection of property but do not require it in all circumstances,<sup>165</sup> and rules on transboundary harm often introduce explicit limitations for liability.<sup>166</sup> There is no consistency in the practice regarding primary rules, which would nudge secondary rules in a particular direction.

The second source of analogy is provided by sovereign debt. For Crawford, debt was relevant in three ways: it put in perspective the relatively small amount of compensation, demonstrated methods for rescheduling that tempered concerns about harsh implementation, and underscored the absence of an international analogue of insolvency law.<sup>167</sup> The practice of sovereign debt disputes is vast.<sup>168</sup> For the purpose of this paper, the key point is consensus by relevant actors that, at some level, sovereign debt burden is unsustainable – even if accompanied by disagreement about what that level is and what the best procedures to address the unsustainability are. There is still no international insolvency law, suggestions to the contrary notwithstanding,<sup>169</sup> and disputes about debt are addressed through engagement by debtors and creditors, both sovereign and commercial.<sup>170</sup> The concept in sovereign debt least dissimilar to crippling compensation in law of State responsibility is odious debt; a topic more discussed in literature than in State practice and directed at non-enforceability of debts incurred by earlier governments for particularly dubious ends.<sup>171</sup> Even taken at its highest, the sovereign debt analogy is not helpful. A bird's-eye view of odious debt practice raises the same uncertainties as war reparations, with lines between the wise generosity of foregoing dubious claims and the legal principles requiring that result blurred, often consciously so. The broader dynamic is reminiscent of State responsibility. Some concerns may be articulated so as to fit the applicable law and institutions<sup>172</sup> but many will not. Wise repeat players will not beggar the creditors but preferably without prejudice to a legal principle that would call for generosity as a matter of right<sup>173</sup> – and occasionally

165 In the ECtHR, full compensation is not required for a taking to be lawful, App no 71243/01 *Vistiņš and Perepjolkins v Latvia* [GC] Judgment of 25 October 2012 at [108]–[131], and even no compensation at all may be lawful under exceptional circumstances, App Nos 46720/99 and Ors *Jahn and Ors v Germany* [GC] Reports 2005–VI at [94], [109]–[117].

166 See practice discussed in 2006 ILC Principles, n 156 above, Principle 4, Commentaries 19–27, and Crawford 'Third Report' n 29 above at [163].

167 Crawford, *ibid* at [41], [161]; *ILC Yearbook 2000* n 68 above 5 at [17].

168 M. Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge: CUP, 2011); R. Lastra and L. Buckheit (eds), *Sovereign Debt Management* (Oxford: OUP, 2014); L. Buckheit, G. Chabert, C. DeLong and J. Zettelmeyer, 'How to Restructure Sovereign Debt: Lessons from Four Decades' *Peterson Institute for International Economics Working Paper 19-8* at <https://piie.com/system/files/documents/wp19-8.pdf>.

169 See A.O. Krueger, *A New Approach to Sovereign Debt Restructuring* (Washington, DC: IMF, 2002); UNGA, 'Basic Principles on Sovereign Debt Restructuring Processes' (29 July 2015) UN Doc A/69/L.84, addressed in Lastra and Buckheit *ibid* Part V.

170 See Buckheit and Ors, n 168 above.

171 See R. Howse, 'The Concept of Odious Debt in Public International Law' UNCTAD Discussion Paper no 185, July 2007 at [https://unctad.org/en/Docs/osgdp20074\\_en.pdf](https://unctad.org/en/Docs/osgdp20074_en.pdf); Waibel, n 168 above, 136–143; J. King, *The Doctrine of Odious Debt in International Law: A Restatement* (Cambridge: CUP, 2016).

172 For example *Ukraine v The Law Debenture Trust Corporation PLC* [2017] EWHC 655 (Comm).

173 C. Lumina, 'An assessment of the human rights impact of international debt relief initiatives' (11 June 2013) UN Doc A/HRC/23/37; World Bank, 'Debt Relief' at <https://www.worldbank.org/en/topic/debt-relief>.



claimants less mindful of systemic interests will successfully push their right to the full.<sup>174</sup> No obvious systemic nudge comes from sovereign debt.

The final analogous field is responsibility of international organisations – a project that the ILC commenced after the 2001 ILC Articles and concluded in 2011 with the adoption of Draft Articles on Responsibility of International Organisations, which on many issues,<sup>175</sup> including on reparation and compensation, proceeds by analogy with the 2001 ILC Articles discussed so far.<sup>176</sup> A quip by José Alvarez about international organisations ‘purposefully kept by their members at the edge of bankruptcy’ was picked up by Alain Pellet to make the point in the 2007 ILC discussion that ‘[i]n most major cases, international organizations were unable to discharge their obligation to make reparation because they lacked resources to do so’.<sup>177</sup> The response by ILC members, States, and international organisations to this challenge is instructive for identifying perceptions on crippling compensation in the second half of the 2000s. Rules on compensation were applied to States and international organisations in substantively identical terms, so the discussion put in even sharper relief the question whether compensation could be limited by reference to responsible entities’ limited resources or the effects on the capacity to perform its essential functions. The key point for this inquiry is that nobody relied on a rule against crippling compensation in State responsibility. The discussion focused instead on whether members of organisations had subsidiary obligations towards the injured party when the responsible organisation was not in a position to make reparation (eventually answered negatively).<sup>178</sup> Even the organisations concerned by the principle of full reparation emphasised differences from States, particularly their inability to generate financial resources by tax systems.<sup>179</sup> The implicit assumption about the backdrop rule of responsibility of States, occasionally articulated in explicit terms, was that lack of resources did not affect States’ obligation to provide full compensation.<sup>180</sup> This supports the position taken by the 2001 ILC Articles, both directly and also by underscoring the lack

174 For example *Argentina v NML Capital, Ltd* 573 US (2014).

175 C. Ahlborn, ‘The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the ‘Copy-Paste Approach’’ (2012) 9 Int’l Organizations L Rev 53; F. Lusa Bordin, *The Analogy between States and International Organizations* (Cambridge: CUP, 2018) 41–43, 230–237.

176 2001 ILC Articles, n 12 above, Arts 31, 34, 36 are reproduced in ILC, ‘Articles on Responsibility of International Organizations’ *Yearbook of the International Law Commission 2011: Volume II Part 2* UN Doc A/CN.4/SER.A/2011/Add.1 (Part 2) 87 (2011 ILC Articles), with ‘State’ appropriately replaced by ‘international organization’, Art 31, Commentary 8; Art 34, Commentary 1; Art 36, Commentary 4.

177 *Yearbook of the International Law Commission 2007: Volume I* UN Doc A/CN.4/SER.A/2007 119 at [22]–[23], 132 at [86].

178 *ILC Yearbook 2007*, *ibid*, 119, 131, 135–140, 143–146; *Yearbook of the International Law Commission 2007: Volume II Part 2* UN Doc A/CN.4/SER.A/2007/Add.1 (Part 2), 91 Art 43, Commentary 2; G. Gaja, ‘Seventh report on responsibility of international organizations’ (27 March 2009) UN Doc A/CN.4/610 at [95]–[98]; 2011 ILC Articles n 176 above, Art 31, Commentaries 3–5, Art 40, Commentaries 2–3.

179 *Yearbook of the International Law Commission 2011: Volume II (Part 1)* UN Doc A/CN.4/SER.A/2011/Add.1 (Part 1) 161 (CTBTO and Ors) at [3] (ILO).

180 *ILC Yearbook 2007* n 177 above, 132 at [88] (Pellet), 141 at [42] (Xue); *Yearbook of the International Law Commission 2011: Volume I* UN Doc A/CN.4/SER.A/2011 29 at [25] (Pellet), 30 at [33] (Melescanu).

of interventions by those States that had been critical of crippling compensation a decade earlier.

### TREATY LAW

Treaties, particularly human rights treaties, have been treated as relevant to limiting crippling compensation. The two strongest authorities – the 1996 ILC Draft Articles and the 2009 EECC's Awards – rely on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (Covenants), and the 'means of subsistence' language in the 1996 ILC Draft Articles is taken from their common Article 1(2)<sup>181</sup> (albeit suggested to reflect a general principle, and therefore discussed in the next section).<sup>182</sup> For the EECC, the size of claims involved 'the intersection of the law of State responsibility with fundamental human rights norms', since claims 'would impose crippling burdens upon the economies and populations of each other, notwithstanding the obligations both have accepted under the Covenants'.<sup>183</sup> It therefore considered, although ultimately did not decide, 'whether it was necessary to limit its compensation awards in some manner' (elsewhere it was necessary to limit its compensation awards in some manner' (elsewhere in the Awards expressed as 'possible capping of the award in light of the Parties' obligations under human rights law').<sup>184</sup> This is the sole modern judicial authority to consider the issue of crippling compensation directly so its reasoning is worth taking seriously, which I will do in three steps: first, introducing the relationship between human rights and State responsibility; secondly, explaining the Awards' rationale; and thirdly, identifying their limitations.

The starting point is that State responsibility is less unsettled by human rights law than was once thought.<sup>185</sup> Responsibility for the breach of human rights obligations operates just as responsibility for any other primary rule of international law, and apparent peculiarities are either taken into account by the law of State responsibility itself or involve issues properly directed at primary and not secondary rules, reasonable disagreement about facts and application, institution-specific vocabulary that is substantively equivalent to general rules, or special rules.<sup>186</sup> Responsibility under human rights law arises for breach of

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181 International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 3 January 1976) 999 UNTS 172, Art 1(2); International Covenant on Economic, Social and Cultural Rights (signed 16 December 1966, entered into force 3 January 1976) 999 UNTS 3, Art 1(2).

182 1996 ILC Articles, n 66 above, Art 42(3), Commentary 8(a).

183 *Ethiopia's Damages Claims* n 29 above at [19], [21].

184 *ibid* at [22], [23], and further [61], [312]-[315].

185 M. Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing, 2004).

186 R. McCorquodale and P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 MLR 598, 601-602; J. Crawford and A. Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in A. van Aaken and I. Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford: OUP, 2018).

an applicable obligation by conduct attributable to the State.<sup>187</sup> Content of international responsibility for breaches of human rights is mostly analogous to general rules.<sup>188</sup> Responsibility may be invoked either by injured non-State actors or, more rarely in practice, by (usually injured) States.<sup>189</sup> Implementation of responsibility usually takes place through judicial invocation by victims but traditional inter-State countermeasures can also be employed (without going as far to affect fundamental human rights in the responsible State itself).<sup>190</sup> Responsibility for the breach of some human rights obligations is subject to the aggravated responsibility regime<sup>191</sup> (adding obligations of non-recognition and cooperation to the usual content of responsibility),<sup>192</sup> to a regime for invocation of responsibility by States other than injured States,<sup>193</sup> and possibly also to the so-called third-party countermeasures.<sup>194</sup> With the narrow exception of the rule limiting countermeasures, law of responsibility and law of human rights interact in the normal, complementary way of the conceptually distinct secondary and primary rules.

How can the tension identified by the EECC between crippling compensation awards and human rights obligations be articulated in technical terms? It is helpful to start by identifying what the Awards do *not* stand for. The EECC was certainly not making a point about primary rules. The crippling effect of compensation did not require revisiting decisions on wrongfulness, and continuance of (breach-based) responsibility is confirmed by compensation being suggested as capped, rather than extinguished. The EECC was not making a point about circumstances precluding wrongfulness, which are too hard to successfully invoke to have been applied in a fit of absent-mindedness,<sup>195</sup> do not easily fit the partial dismissal, and would in any event explain delay but not capping. The rationale was also not based on a special rule on compensation. The EECC did nod to the post-Versailles practice of giving weight to needs of the affected population, but the footnoted earlier decision denies any legal effect of that practice on custom.<sup>196</sup> And there must be more to the argument than mere conflict with a treaty, which would, in the view of some, leave States in the presence of two conflicting dispositive obligations without resolving it.<sup>197</sup>

187 *Jaloud v the Netherlands* App no 47708/08 (ECtHR GC, 20 November 2014) Reports 2014 at [98].

188 See *Diallo* (Compensation) n 9 above; *Georgia v Russia* n 33 above; Novak, n 141 above.

189 For example *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE)* (Order) [2019] ICJ Rep 361.

190 2001 ILC Articles, n 12 above, Art 50(1)(b).

191 Human rights obligations that are generally accepted as peremptory are prohibitions of torture, apartheid and racial discrimination, and slavery, and the right of self-determination, ILC, 'Peremptory norms of general international law (*jus cogens*)' (29 May 2019) UN Doc A/CN.4/L.936 Annex.

192 2001 ILC Articles, n 12 above, Art 41.

193 2001 ILC Articles, *ibid*, Art 48; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep (2012) 422 at [68], [69].

194 2001 ILC Articles, *ibid*, Art 54; Dawidowicz, n 76 above.

195 See on challenges in invoking necessity, n 85 above.

196 *Ethiopia's Damages Claims* n 29 above at [21], and n 97 above.

197 The rule that countermeasures do not affect fundamental human rights in the 2001 ILC Articles, Art 50(1)(b) is based on either the multilateral structure of obligations or the nature of rights held by actors not parties to the treaty, which would not be transposable to rules on compensation in

My claim is that once the impossible has been eliminated, the only remaining rule that can deliver on the EECC's promise is a *waiver*.<sup>198</sup> The Awards therefore stand for the proposition that the Covenants waive the right of States Parties to invoke responsibility against other States Parties in the form of compensation to the extent that the financial burden is crippling. In a technical sense, States can waive compensation claims in treaties,<sup>199</sup> and there is no reason of principle why a waiver could not be drafted so as to be prospective in application, partial in effect, and with scope varying by reference to factors external to the particular instrument.

The problem with the waiver argument is threefold. The first challenge relates to its technical effect: it is not clear that mutual waivers by States can be opposed to responsibility accruing to, and independently invoked by non-State actors. Non-State actors' rights directly implemented through judicial mechanisms are usually treated as unaffected by their home States' conduct,<sup>200</sup> to the extent that applicable rules do not provide otherwise. Consequently, the hypothesised waivers could operate in inter-State dispute settlement (like EECC or ICJ) but not against non-State actors' claims in human rights and investment tribunals. The second challenge is interpretative. It is not obvious that the Covenants contain a waiver clause hypothesised above. It is certainly not explicit, as waivers of compensation usually are,<sup>201</sup> and an orthodox treaty interpreter<sup>202</sup> will doubt that such an important right can be disposed of silently<sup>203</sup> in an instrument dealing with a different subject matter.<sup>204</sup> Finally, human rights actors have not invoked the argument by reference to either the EECC directly or the substance of its hypothesised rationale. The literature and practice on tension

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inter-State disputes, M. Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYBIL 264, 329-334.

198 2001 ILC Articles, *ibid*, Art 45(a). Another reading of the EECC's position is as simply resolving the tension that could arise in practice between different obligations. The necessary implication of this reading is to significantly limit broader relevance: if EECC's argument is limited to those rare tribunals with general jurisdiction that would include human rights treaties, *Ethiopia's Damages Claims* n 29 above at [22], it would not have applied to almost any of the actual multi-billion claims, either in investment treaty disputes or in most other international tribunals of limited jurisdiction.

199 See on post-World War Two practice at n 112 above.

200 For example parallel inter-State and individual claims in the ECtHR, *Georgia v Russia* n 33 above, and explicit waiver by individual investors of outstanding investor-State claims, Softwood Lumber Agreement (adopted 12 September 2016) Art XI(2), Annex 2A, at <https://ustr.gov/sites/default/files/uploads/factsheets/Trade%20Topics/enforcement/softwood%20lumber/2006%20U.S.-Canada%20Softwood%20Lumber%20Agreement.pdf>.

201 *Jurisdictional Immunities* n 61 above at [22].

202 Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 Arts 31-33.

203 *Elettron Sicula SpA (ELSI) (US v Italy)* [1989] ICJ Rep 15 at [50].

204 In human rights practice, the second sentence of Article 1(2) of the Covenants, n 183 above, has not been applied in such a context, S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights* (Oxford: OUP, 3<sup>rd</sup> ed, 2013) 162-163, B. Saul and Ors, *The International Covenant on Economic, Social and Cultural Rights* (Oxford: OUP, 2014) 116-125. The contrary argument would have to rely heavily on object and purpose and the principle of effectiveness, for example *Pinochet (No 3)*-type argument on implied waiver, critically discussed in R. O'Keefe, *International Criminal Law* (Oxford: OUP, 2015) 440, 451-453, and EECC's emphasis on the effects that 'large diversion of national resources from the paying country' have on (human rights-mandated) 'health care, education and other public services' n 29 above at [21].

between human rights and economic institutions is vast<sup>205</sup> and appreciates the impact of compensation awards,<sup>206</sup> but at least its more prominent proposals are not directed at capping compensation.<sup>207</sup> The (sparse) practice in investment law is directed at conduct of the claimant, rather than capacity of the State,<sup>208</sup> and even the furthest human rights arguments are directed at disciplining implementation of responsibility, rather than the distinct issue of determination of its content.<sup>209</sup> Just as with investment arbitration, the legal takeaway is that the post-2009 international law simply has not picked up the argument.

## GENERAL PRINCIPLES OF LAW

General principles of law constitute the third principal source of international law. Compared to the law of treaties, to a considerable extent accurately expressed in the 1969 Vienna Convention on the Law of Treaties, and custom, methodologically elaborated in judicial practice and the 2018 ILC Conclusions on the Identification of Customary International Law, general principles are much less settled in terms of rules on identification of their existence, content, and effect. The pragmatic expectation is that general principles, despite their historical impact on State responsibility, are unlikely to be significant in modern law shaped so strongly by traditional inter-State interaction in the 1990s and subsequently.<sup>210</sup> The minor role played by general principles in the treatment of this topic in both the 2001 ILC Articles and the EECC's Awards confirms it.

205 See S. Joseph, *Blame It on the WTO: A Human Rights Critique* (Oxford: OUP, 2011); M. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62 ICLQ 31; D. Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (Oxford: OUP, 2015); J. Linarelli, M. Salomon, and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford: OUP, 2018).

206 'UN experts send a letter to the UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform, urging systemic changes to the ISDS system' (7 March 2019) ('extremely high amount of arbitral awards') 2 at [https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL\\_ARM\\_07.03.19\\_1.2019.pdf](https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf).

207 O. de Schutter, 'Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' (19 December 2011) UN Doc A/HRC/19/59/Add.5; 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' (10 August 2017) UN Doc E/C.12/GC/24 at [13], [29], [50].

208 *Urbaser SA and Or v Argentina* ICSID Case no ARB/07/26, Award, 8 December 2016 at [1193]-[1210] (human rights counterclaims); *Bear Creek Mining Corporation v Peru* ICSID Case no ARB/14/21 (*Bear Creek*), Partial Dissenting Opinion of Arbitrator Sands, 12 September 2017 (human rights as a contribution to injury); 2019 Dutch Model BIT (22 March 2019) Art 23 (behaviour of the investor possibly relevant for compensation) at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>.

209 General Comment no 24, n 207 above at [29], fn 76.

210 H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, 1927) Sections VII-VIII; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: CUP, 1953) Part IV. But see M. Jackson, 'State Instigation in International Law: A General Principle Transposed' (2019) 30 EJIL 391; *Iran v US*, IUSCT Cases nos A15 (II:A), A26 (IV) and B43, Partial Award no 604-A15 (II:A)A26 (IV)/B43-FT, 10 March 2020 at [1793]-[1795], [1797]-[1798] at [http://www.iusct.net/General%20Documents/Partial%20Award%20No.%20604/A15\(II-A\)%20doc%202350-T-Award%20\(10%20March%202020\)%20EN.pdf](http://www.iusct.net/General%20Documents/Partial%20Award%20No.%20604/A15(II-A)%20doc%202350-T-Award%20(10%20March%202020)%20EN.pdf).

Nevertheless, the uncertainty about rules on recognition and change of general principles may also occasionally empower them as means for articulating arguments of systemic importance.<sup>211</sup> This section will consider the relevance of two categories of general principles of law: derived from national legal systems and formed within the international legal system.<sup>212</sup>

### Derived from national legal systems

A successful argument for a general principle derived from national legal systems needs to demonstrate both that the principle exists in a majority of domestic legal systems and that it is capable of being transposed to the international legal system.<sup>213</sup> The clearest argument for limiting crippling compensation on this ground was made by the Chair of the ILC Yamada, who ‘referred to a Japanese civil procedure rule on measures of constraint. Such items as clothing, bedding, furniture and kitchen utensils which were required for livelihood, food and fuel etc. must be exempted from attachment. Those rules had been adopted on the basis of a more than 100-year-old German model’.<sup>214</sup> It is plausible to assume that most domestic legal orders would in some way temper the effects of compensation payments on impecunious debtors. However, the assumption does not suffice for the legal argument: a majority of legal systems (not a limited number of developed States) need to be shown to adopt the rule,<sup>215</sup> and, most importantly, to approach the matter in the same technical manner.<sup>216</sup> The key question is whether the relevant rules of domestic law would be classified as ‘secondary’ in the sense of international law, rather than primary, limitation-of-liability, adjudicative, or indeed insolvency-related.<sup>217</sup> If, as Yamada’s example suggests, the rule in question relates to judicial and enforcement procedure,<sup>218</sup> it is doubtful that it can be transposed internationally, where responsibility arises independently from the presence and character of such institutions. The final challenge is fitting the transposed principle into the law of responsibility at the international level, where most issues are already addressed by customary rules. Taking these points together, it is doubtful that an argument can successfully be made for such a general principle to limit crippling compensation, *per* Yamada, under the rubric of circumstances precluding wrongfulness.<sup>219</sup> There is no

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211 For example providing a basis for a new source of international law, *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253 at [46].

212 M. Vázquez-Bermúdez, ‘First Report on General Principles of Law’ (5 April 2019) UN Doc A/CN.4/732 at [253].

213 *ibid* at [223]–[225], [230].

214 *ILC Yearbook 2000* n 68 above, 23 at [44].

215 *Passage through the Great Belt (Finland v Denmark)* (4 July 1991) CR 91/13 44–48 (Treves on behalf of Denmark).

216 J. Crawford, ‘Second Report on State Responsibility’ (17 March, 1 and 30 April, 19 July 1999) UN Doc A/CN.4/498 and Add. 1–4 97, ‘Annex: Interference with Contractual Rights: A Brief Review of the Comparative Law Experience’ at [15].

217 *ibid* and *ILC Yearbook 2000* n 68 above, 174 at [14] (Crawford).

218 Civil Execution Act (Act No 4 of March 30, 1979), Art 131(i) at [http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=&vm=2&id=70](http://www.japaneselawtranslation.go.jp/law/detail_main?re=&vm=2&id=70).

219 *ILC Yearbook 2000* n 68 above, 23 at [44].

reason to revisit the briskness of Crawford's dismissal, to the effect that necessity and distress postpone, not annul, compensation, and would not really address the cases of extreme war reparations claims.<sup>220</sup>

### Formed within the international legal system

General principles formed within the international legal system are deduced from existing treaties and custom, or otherwise by consensus of the international community.<sup>221</sup> The ILC noted that the limitation of crippling compensation 'reflected a legal principle of general application'.<sup>222</sup> A number of legal principles could be relevant here. The first and the most obvious connection, noted by the UK to underline the uncertainty about its intended effect,<sup>223</sup> is the principle of permanent sovereignty over natural resources, recognised as a principle of custom.<sup>224</sup> Historically, permanent sovereignty framed the multilateral contestation of rules on sovereign regulatory powers and investment protection, and the standard of compensation for expropriation was a key element in that debate.<sup>225</sup> The principle does not particularise into a certain rule of compensation but calibrates the broader systemic optics, calling for balanced legal rules that do not excessively favour acquired rights of aliens and investors. The second, related principle is self-determination.<sup>226</sup> Again, no particular rule on compensation necessarily follows, but normative contiguity of a peremptory norm of general international law (*jus cogens*)<sup>227</sup> must play some role in thinking about normative priorities and the grain with which practice and other authorities are to be read. The third, backdrop concept is the right of a State to survival.<sup>228</sup> The fourth and somewhat different principle is good faith, increasingly permeating judicial mechanisms for implementation of State responsibility.<sup>229</sup> The question to reflect upon is whether an invocation of responsibility in the form of crippling compensation constitutes an abuse of process that precludes admissibility of the claim to compensation, in light of the normative considerations noted above and the tendency in post-War state practice not to make such claims.<sup>230</sup>

220 *ibid.*, 24 at [49].

221 Vázquez-Bermúdez, n 212 above at [234].

222 1996 ILC Articles, n 66 above, Art 42(3), Commentary 8(a).

223 *ILC Yearbook 1998* n 70 above, 145 at [3].

224 Covenants, n 181 above, Art 1(2); *Armed Activities* n 23 above at [224].

225 See, for various disciplinary treatments, Brownlie 'Legal Status of Natural Resources in International Law (Some Aspects)' n 162 above, 269–271; N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: CUP, 1997) 49–56; S. Pahuja, *Decolonising International Law* (Cambridge: CUP, 2011) ch 4.

226 UNGA Res 1803 (XVII) 'Permanent Sovereignty over Natural Resources' (14 December 1962) 2<sup>nd</sup> recital; Covenants, n 181 above, Art 1(1).

227 ILC 'Peremptory norms of general international law (*jus cogens*)' n 191 above, Annex (h).

228 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 at [96].

229 *South China Sea Arbitration (Philippines v China)* PCA Case no 2013–19, Award, 12 July 2016 at [1172], [1200]; *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) [2018] ICJ Rep at [144]–[152].

230 cf *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara* Final Award, 4 May 1999, *Yearbook Commercial Arbitration 2000* at [201]–[212], [318]–[344]; J. Paulsson, *The Unruly Notion of Abuse of Rights* (Cambridge: CUP, 2020) xii, 61–67.

Finally, the multilateral shift in State responsibility shows that the fabric of international law is open to creation of principles attuned to interests of actors and institutions beyond the injured and responsible States.

General principles of this kind can have very significant effect for the international legal argument by calibrating the perspective. They set out structural assumptions and normative preferences of the legal order, identify the grain with which practice is read, and generally guide interaction between other norms in an interstitial manner.<sup>231</sup> Re-reading the 1990s discussions with a sympathetic eye to these general principles will further reinforce doubts about the position of the 2001 ILC Articles that I expressed above. But nothing will come of nothing: even the most charitable reading of practice of the last two decades cannot get around the basic point that it is not there.

### THREE FUTURES FOR CRIPPLING COMPENSATION

International law on crippling compensation could further develop in three directions. The first (and most likely) future is the present: legal permissibility of crippling compensation. It is helpful to recall the key moments in the legal process up to this point. No consensus on permissibility of crippling compensation under customary law existed in the 1990s, as the divided opinion of the great minds in the ILC and States outside it show. The most relevant practice regarding war reparations, including the ongoing work of the UNCC, could plausibly be – and was – read either way. The categorical endorsement of permissibility of crippling compensation in the 2001 ILC Articles misstated this ambiguity, and the EECC's Awards provided a strong authority against crippling compensation. However, the ILC's position was in turn endorsed by (the lack of) State practice of the next two decades. Of particular relevance is the general and widespread failure of States to challenge crippling compensation claims in investor-State arbitration as well as practice related to the ILC work on responsibility of international organisations. The bellwether authority of the EECC's Awards has apparently never been invoked in any legal setting in a favourable light. Treaty law is not helpful either. The EECC's reliance on the Covenants to cap compensation, whatever the technical rationale may have been – I hypothesised waiver – has had no effect, even in the usually open-minded human rights community. Finally, general principles drawn from domestic law will not affect the clear custom, and general principles within the international legal order might require the reading of practice limiting crippling compensation more favourably – but there is so little of it that even the most charitable squint does not affect the result. The international legal process has come out in favour of permitting crippling compensation, and every new failure to raise an objection to such claims further reinforces this positive law. The normative preference of current international law remains exclusively corrective justice.

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231 V. Lowe, 'The Politics of Law-Making: Are the Methods and Character of Norm Creation Changing?' in M. Byers (ed), *The Role of Law in International Politics* (Oxford: OUP, 2000) 207, 212–221.



The second approach accepts the soundness of Crawford's point that crippling compensation should not be addressed at the level of general secondary rules, and explores seriously the tools for settling the matter on a case-by-case basis.<sup>232</sup> In normative terms, corrective justice is insufficient but no general alternative is proposed, deferring instead to the choice of specialist fields to strike their own balance between corrective justice, deterrence, loss allocation, and other purposes<sup>233</sup> in light of peculiarities of their subject-matter and institutional structure.<sup>234</sup> At the level of primary rules, examples could range from tweaks of particular rules, like relaxation of promptness or valuation standards for lawful expropriation by reference to the effects on the State,<sup>235</sup> to recalibrating scope and content of fields of law so as to prevent the characterisation as wrongful of conduct likely to give rise to crippling compensation.<sup>236</sup> Another technique would consider limitation-of-liability clauses, either related to particular primary rules, instruments and activities, or building on the EECC's Awards to rationalise the capping of crippling awards on the basis of widely ratified human rights instruments.<sup>237</sup> At the level of secondary rules, methods of valuation most likely to lead to crippling compensation could be reconsidered.<sup>238</sup> For dispute settlement mechanisms, changes could range from relatively small tweaks, for example applicable law clauses that permit reliance on considerations not reflected in positive law,<sup>239</sup> to building on broader trends of resistance to international institutions to limit the role of formalised dispute settlement bodies in general and those with strong enforcement powers and non-State actors' access in particular.<sup>240</sup> Finally, the discussion could be moved away from the rubric of 'international dispute settlement' and towards other fields and disciplines ('transnational justice', 'collective security') with different priorities,<sup>241</sup> more open to dropping legally permissible claims for the sake of long-term systemic interests and individual rights.<sup>242</sup> An instructive example from a different but not entirely unrelated field is the UNSC sanctions'

232 *ILC Yearbook 2000* n 68 above, 174 at [14] (Crawford); also *ILC Yearbook 1990* n 73 above, 196 at [19] (Arangio-Ruiz).

233 Van Aaken, n 45 above, 158-161.

234 For example S. Ratner, 'Compensation for Expropriation in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction' (2017) 111 *AJIL* 7, 24-32.

235 See practice discussed at notes 163, 165 above.

236 J. Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions' (2015) 78 *MLR* 793.

237 At <http://indicators.ohchr.org/>. As to the practice of agreements limiting responsibility in relation to particular activities, 2011 *ILC Articles* n 176 above, Art 31, Commentary 6.

238 See notes 89-90 above, 248 below.

239 For example, 'international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances' *Croatia/Slovenia*, PCA Case no 2012-04, Final Award, 29 June 2017 at [946]-[947], [1079], [1122].

240 M.R. Madsen, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 *Int'l J L Context* 197.

241 M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *MLR* 1, 4-9.

242 For effective application of those concerns, further legal changes may be necessary, for example rules permitting home States of investors to waive their claims as part of broader debt rescheduling, or creation of *sui generis* mechanisms with in-built safeguards against crippling claims, notes 108-109 above.

practice,<sup>243</sup> where significant institutional changes were driven by appreciation of humanitarian impact of collective security measures.<sup>244</sup> Sovereign debt in the era of COVID-19 may well eventually provide another helpful analogy.<sup>245</sup>

The third (and least likely) development is a challenge of current position at the level of customary secondary rules. In a technical sense, that would require generating (new) general practice that is accepted as law (*opinio juris*).<sup>246</sup> It is helpful to consider separately *how* the challenge could be presented and *what* it could be. The key mechanism that generates State practice on the issue at the moment is dispute settlement, particularly investor-State arbitration. The most important change is for States to start challenging the principle of crippling compensation in individual disputes. Whether or not these challenges are accepted in particular cases, pleadings will count towards the widespread practice necessary for generating a new rule<sup>247</sup> (and litigators can afford to be somewhat opportunistic on reparation, where tribunals have already gone against the grain of 2001 ILC Articles on a number of smaller points).<sup>248</sup> Treaty texts, particularly on subject-matters likely to give rise to crippling compensation claims, may be drafted to contain an express statement on what parties accept as customary on State responsibility.<sup>249</sup> Finally, the challenge should be raised in appropriate multilateral settings: the Sixth Committee,<sup>250</sup> ILC,<sup>251</sup> human rights review mechanisms, particularly under the auspices of the UN (regular reports to human rights treaty bodies, observations under Universal Periodic Review, submissions to UN Special Rapporteurs),<sup>252</sup> UNCITRAL,<sup>253</sup>

243 2001 ILC Articles, n 12 above, Art 50, Commentary 7.

244 K. Annan, *We the Peoples: The Role of the United Nations in the 21<sup>st</sup> Century* (New York, NY: UN, 2000) 49-50.

245 IMF, 'Joint Statement World Bank Group and IMF Call to Action on Debt of IDA Countries' 25 March 2020 at <https://www.imf.org/en/News/Articles/2020/03/25/pr20103-joint-statement-world-bank-group-and-imf-call-to-action-on-debt-of-ida-countries>; L. Buckheit and S. Hagan, 'From coronavirus crisis to sovereign debt crisis' *Financial Times* 26 March 2020; UN, 'Debt and COVID-19: A Global Response in Solidarity' 17 April 2020 at [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief\\_on\\_debt\\_relief\\_and\\_covid\\_april\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_debt_relief_and_covid_april_2020.pdf).

246 2018 ILC Conclusions, n 77 above, Conclusion 2; J. Finnis, *Natural Law & Natural Rights* (Oxford: OUP, 2<sup>nd</sup> ed, 2011) 238-245.

247 *Duzgit Integrity* n 29 above at [25]-[26] (Kateka).

248 *ConocoPhillips* is a good example, applying Discount Cash Flow analysis to valuation and awarding compound interest, n 1 above at [279], [828], despite the scepticism of the 2001 ILC Articles on both points, see n 12 above, Art 36, Commentary 26; Art 38, Commentaries 8-9.

249 2018 ILC Conclusions, n 77 above, Conclusion 11(1)(a), Commentary 5. For an example of treaty referring to customary law and to reparation, see CPTPP, n 157 above, respectively Arts 9.6, 9.8 (fn 17), annex 9-A, and Art 9.29(4).

250 The regular discussion of the appropriate form for the 2001 ILC Articles, n 56 above.

251 ILC Secretariat, 'Long-term programme of work' (31 March 2016) UN Doc A/CN.4/679/Add. 1 at [35]-[41] ('Compensation under international law').

252 See notes 206-207 above.

253 See some reparation-related issues, UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019) UN Doc A/CN.9/970 at [38], [84]; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019) UN Doc A/CN.9/1004 at [24]. Nigeria and Pakistan reportedly criticised 'mega-awards' in a recent meeting, A. Roberts and T. St. John, 'UNCITRAL and ISDS Reform: in Sickness and in Health' 23 October 2019 EJIL: Talk! at <https://www.ejiltalk.org/uncitral-and-isds-reform-in-sickness-and-in-health/>, also UN Doc A/CN.9/WG.III/WP.156

OECD,<sup>254</sup> and UNCTAD.<sup>255</sup> One second order effect of the international community's response to the grave and immediate challenge of COVID-19 may well be re-examination of State responsibility, providing an opportunity for moving the law on crippling compensation in a more communitarian direction.<sup>256</sup>

An equally important question is *what* the challenge of crippling compensation should be – recall how inconsistency of States at the ILC undermined the strength of the argument.<sup>257</sup> Authorities discussed so far have expressed themselves very differently,<sup>258</sup> suggesting that the strength of objection to the rule obscures significant doctrinal and normative uncertainties implicit in supportive authorities, which would become important should support for the rule emerge. In a loose sense, all these authorities support a normative trade-off of the (private) interest of the injured actor in favour of a broader public interest – but conceptualise the latter very differently, from a self-interested inter-State society to a common value-based international community to a legal order serving individuals as ultimate beneficiaries.<sup>259</sup> Let me highlight some of the more important practical issues. Is the 'crippling' qualification related to the functioning of the State, the needs of the peoples, or both? Does it apply in the same or different manner for different States,<sup>260</sup> ie is there a *de minimis* standard below which no State may be beggared, is 'crippling' relative to pre-compensation well-being, or does it apply solely by reference to the

(9 November 2018) at [8] (Indonesia), UN Doc A/CN.9/WG.III/WP.161 (4 March 2019) at [4], [14] (Morocco), UN Doc A/CN.9/WG.III/WP.176 (17 July 2019) at [101]-[102] (South Africa).

254 <http://www.oecd.org/daf/inv/investment-policy/oecdroundtablesonfreedomofinvestment.htm>.

255 UNCTAD's *Reform Package for the International Investment Regime* (Geneva: UN, 2018) 46 at [https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD\\_Reform\\_Package\\_2018.pdf](https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf).

256 M. Paparinskis, 'COVID-19 and the Foundations of International Law' 31 March 2020 at <http://opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-foundations-of-international-law/>.

257 See n 72 above.

258 Versailles, n 104 above ('inadequate resources'), Potsdam, n 105 above ('enough resources to enable subsistence without external assistance'), Agreement between Israel and Germany, n 105 above ('the limits of their capacity'); External Debts Agreement, n 105 above ('capacity to pay'), San Francisco, n 107 above ('insufficient resources to maintain a viable economy and meet other obligations'), Brownlie, *Use of Force* n 83 above, 147 ('economic capacity of the State and avoidance of undue hardship to population'), Shi, *ILC Yearbook 1990* n 73 above, 165 at [57] ('excessively onerous and might deprive the developing country of its right to development'); Bennouna, *ibid*, 177 at [6] ('excessively onerous burden ... complete ruin of a State'); UNCC, n 108 above ('requirements of people, payment capacity, and needs of economy'), Tomuschat, *ILC Yearbook 1995* n 66 above ('vital needs of the people'), Villagrán Kramer, *ILC Yearbook 1996* n 66 above ('extremely severe terms and conditions adversely affecting economic development'), 1996 ILC Draft Articles, n 66 above ('population's means of subsistence'), Germany, n 72 above ('endangering the whole social system of the State'), the UK, n 70 above ('financial hardship'), the US, n 70 above ('extreme cases of serious social instability'); 2001 ILC Articles, n 12 above ('disproportionate and even crippling requirements'); *Ethiopia's Damages Award* n 29 above at [22] ('needs of the affected population').

259 On competing conceptions of community, see Lowe, 'The Function of Litigation' n 82 above, 209; G. Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community'' (2013) 83 BYBIL 13.

260 The UK, n 70 above.

amount awarded?<sup>261</sup> To what extent are foreign-held assets relevant?<sup>262</sup> Can the argument against crippling compensation be invoked when the primary rule protects objects, and reparation could in principle take the form of restitution (as the case may be for expropriated investments, like *ConoccoPhillips*, or plundered natural resources, like *Armed Activities*)? How is the rule of crippling compensation affected by the EECC-type situation, where the claimant is a comparably impoverished State? Is the answer different if the wrongful act in question is the sole or contributing cause to that state of affairs, for example use of force? How can the rule be operationalised in a decentralised (arbitral) dispute settlement setting with incomplete overlap of parties and strong confidentiality rules? How can it be applied at the enforcement stage of arbitral awards, particularly if the applicable rules do not permit review of substance or challenge on public policy grounds?<sup>263</sup> Is it relevant whether the crippling effect of compensation materialised at the moment when responsibility was incurred, invoked, determined by a third party, or at a later point (such as enforcement)? At the end of the day, how much inconsistency is tolerable?<sup>264</sup> These are not trivial questions, and while some answers are easier, others follow neither from first principles nor consensus in State or judicial practice. Even those concerned about crippling compensation may well conclude that the micro-case-by-case approach is the better way to proceed – not because the ILC’s point about triviality of the issue is right but because the problem is too hard for a general rule to be crafted to address it.

In my view, a persuasive response must start from an appropriate conception of the structure of the inchoate rule, striking the balance between vagueness and specificity<sup>265</sup> necessary for a successful challenge of a well-established principle, with the co-ordination problem both likely and already demonstrated. I propose to think of impermissibility of crippling compensation as a tripartite rule, consisting of a core proposition vague in the literal sense of the word, a methodology for asking questions, and a list of relevant factors and circumstances for answering them. Equitable delimitation in law of the sea and equitable utilisation in water law are structured in such terms.<sup>266</sup> The core proposition is

261 cf debt relief, n 173 above.

262 The UK, n 70 above.

263 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (done 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, Art 54. But see treatment of arbitral awards in Debt Relief (Developing Countries) Act 2010 ss 5–7.

264 The cost of uncertainty may be significant, eg M. Lando, *Maritime Delimitation as a Judicial Process* (Cambridge: CUP, 2019) ch 2.

265 T. Endicott, *Vagueness in Law* (Oxford: OUP, 2000); V. Lowe, ‘The Limits of the Law’ (2016) 379 *Hague Recueil* 9, 31–32.

266 The intellectual pedigree of my proposal is Bennouna’s intervention, *ILC Yearbook 1990* n 73 above, 168 at [6]–[7], [10], criticised precisely for introducing the concept that seemed (at that point) ‘somewhat ineffective in the case of the law of the sea’, *ibid*, 181 at [44] (Pellet). See *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* and *Land Boundary on the Northern part of Isla Portillos (Costa Rica v Nicaragua)* [2018] ICJ Rep 139 at [135]; L. Cafisch, ‘Equitable and Reasonable Utilization and Factors Relevant to Determining Such Utilization (Article 5 and 6)’ in L. Boisson de Chazourned and Ors (eds), *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: A Commentary* (Oxford: OUP, 2018).

expressed at a high level of abstractness, to capture the ambiguity of the normative argument, maximise support and because it would need to be suitable for application for breaches of various primary rules – ‘no crippling compensation’ would draw upon various positive and normative pedigrees while not being beholden to any particular one. The second layer of methodology comes from the EECC’s Awards, which express the standard as triggered by such excessiveness of the ultimate financial burden, given economic condition and capacity to pay, as to compromise the State’s ability to meet its people’s basic needs.<sup>267</sup> The practicalities for application of the methodology, identification of relevant considerations, and implementation in the institutional setting are left for determination by State and judicial practice, in the normal manner of international legal process. Finally, the general principles of international law discussed above, particularly permanent sovereignty over natural resources and self-determination, provide the normative grain for reading the law. The key to successful change in the law is to concentrate on generating consensus on the core principle *and* be tolerant of practical challenges and considerable diversity in individual instances of application during the initial – quite possible lengthy – stages of that process.

The argument for an exception to the principle of full compensation is certainly open to criticism, which may loosely be divided into the more technical arguments about responsibility and disputes and the more conceptual ones about the impact on international legal order. Some of the more technical criticisms are that my argument it is too ambitious (and would not fit the current responsibility regime), too modest (and should rather be institutionalised), too vague (and could not be addressed by dispute settlement), or too specific (and would undermine the compliance pull of State responsibility). The (partly overlapping) conceptual criticism is concerned that my argument undermines broader functions of the international legal order regarding dispute settlement and compliance. On the more technical side, I do call for an explicit departure from the position taken by the ILC and broadly endorsed by States, which is a significant change from the current law. But discussions in and around the ILC were driven not by a sense of incompatibility of such a rule with the broader system (see above, section headed ‘The case for permissibility of crippling compensation’) but rather by a misjudgement of its future direction (see section headed ‘The case against crippling compensation’). Is the topic better addressed by a centralised treaty-based institution, rather than the chaos of the decentralised legal process? It is doubtful that such an institution would fit the structure of the decentralised international order, demonstrated by rejection of the dispute settlement mechanism for State responsibility in the 1990s and sovereign bankruptcy court in the 2000s.<sup>268</sup> If I have understated the political maturity of 2020s international society (as some reactions to COVID-19 suggest),<sup>269</sup> the default custom would still have the advantage of (relative) immediacy and general application, and could be superseded by any special rules when they work through the political process.

267 *Ethiopia’s Damages Claim* n 29 above at [22].

268 Lastra and Buckheit, n 68 above, Part V; Crawford *General Part* n 29 above, 39–42.

269 See discussion regarding sovereign debt at n 245 above.

On the conceptual side, would *ex post* judicial application of a vague principle raise problems with ease of administration and undermine the broader function of peaceful settlement of disputes?<sup>270</sup> Much depends on the institutions in question, but law of the sea applies structurally similar rules in a decentralised manner,<sup>271</sup> and the principle of contribution to injury shows how a responsible actor-favourable principle successfully develops on a case-by-case basis.<sup>272</sup> Would the suggested rule undermine the ordering and compliance pull of international law? In doctrinal terms, State responsibility already contains significant qualifications to default obligation of compensation, both under the rubric of circumstances precluding wrongfulness and in principles of mitigation and contribution,<sup>273</sup> and in any event compensation has rarely been a central remedy.<sup>274</sup> The benchmark of compliance has its own conceptual problems<sup>275</sup> but the law and economics literature does not identify full compensation as a stand-alone factor, addressing remedies either as part of the balance struck in specialised institutions or as a back-up, after the failure of performance and restitution.<sup>276</sup> At the end of the day, '[r]emedies serve social as well as individual needs',<sup>277</sup> and a trade-off between private and genuinely public interests justifies the narrow exception. Pushing the law of content of responsibility to not cripple States and their peoples, by rejecting the exclusive bilateralism and taking into account interests of the international community, including principles reflective of *jus cogens*, goes with the grain of the general multilateralist shift of State responsibility.

## CONCLUSION

I started with a juxtaposition of two very different Venezuela-related developments in early March of last year: the country-wide blackout and the IMF announcement of impending economic collapse on the one hand, and the USD 8.6 billion award in *ConoccoPhillips* on the other hand. Why did an international tribunal (and disputing parties, including the respondent State itself) treat as legally irrelevant the current conditions of the State and the likely effect that compensation awards may have on it and its peoples? Why did the great

270 The best criticism of my suggestion, even if written with an eye to primary rules on compensation, is E. Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge: Grotius Publications Limited, 1991) 130-136.

271 Lando, n 264 above.

272 *Occidental v Ecuador Award*, n 14 above at [663]-[687]; *Yukos v Russia* n 13 above at [1594]-[1637]; *Bear Creek* n 210 above (Sands); *Duzgit Integrity* n 29 above at [197]-[199].

273 Paddeu, n 76 above; n 36 above.

274 C. Gray, *Judicial Remedies in International Law* (Oxford: OUP, 1990).

275 B. Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 *Michigan JIL* 345; R. Howse and R. Teitel, 'Beyond Compliance: Rethinking why International Law Really Matters' (2010) 1 *Global Policy* 127.

276 J. Pauwelyn, *Optimal Protection of International Law* (Cambridge: CUP, 2008) chs 5-6; A. Guzman and A.O. Sykes, 'Economics of International Law' in F. Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions* (Oxford: OUP, 2017) 460-462; Ratner, n 234 above.

277 Shelton, n 10 above, 845.

20<sup>th</sup> century shift in State responsibility from bilateralism to multilateralism – ‘Anzilotti to Ago’ to Crawford – leave the core of rules on content of responsibility frozen in the bilateralist amber?<sup>278</sup> The exploration of the answer provides a three-fold contribution to current scholarship.

First, it demonstrates the messy reality of the formalist international legal process and demystifies the manner in which the diffused judgment on what international law is may be arrived at.<sup>279</sup> The international legal argument calls for identification of consensus of the broader community at a particular point. But that exercise has to keep in mind the remarkable stability of sources’ structure of international law throughout the last century, the fundamental changes in international institutions through which consensus could be articulated, and shifts in preferences by leading actors between various institutions and times. Institutional set-up directly influences who can contribute to law-making: every State can in principle weigh in on issues debated by the ILC or the Sixth Committee; disputing parties choose how legal arguments are presented in formalised dispute settlement, with the rights of non-disputing parties to intervene dependant on the mechanism but likely limited; while war reparations’ practice is likely to be particularly shaped by parties to the conflict and institutions addressing it. Consistency, both temporal and subject-matter, is a key consideration for effectiveness.<sup>280</sup> The best rule may plausibly look different from the perspective of a State historically claimant in war reparations and with interests in strong rules for implementing responsibility for economic injuries (the US, the UK), a State historically a respondent in war reparations but with interest in economic injury law (Germany, Japan, Italy), and a State historically a claimant in war reparations but currently defending against a crippling investment claim (Czechia).<sup>281</sup> Identifying consensus of such widely different actors is the reality of the decentralised but nonetheless observable real authority of international law,<sup>282</sup> which even on this semi-natural corollary of the legal order<sup>283</sup> is formed by the accumulating sediments of identifiable individual and collective choices.<sup>284</sup> The important, if perhaps unsurprising insight is that when a broad-brush picture (of the shift from bilateralism to community interests) diverges from the consensus on a particular point reflected in the small-print (confirming bilateralism), it is the latter position that is determinative.

The second contribution is to the study of why certain arguments in international legal process are successful. If a veil of ignorance is dropped over

278 G. Nolte, ‘From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations’ (2002) 13 EJIL 1083.

279 Crawford ‘Chance, Order, Change: The Course of International Law’ n 50 above, 21–22.

280 See n 126 above.

281 See n 72 above, where the position taken plausibly reflects a compromise between Czechoslovakia’s historical position on post-World War Two reparations claims, Czechia’s pending defence of large investment claims, *CME* Brownlie, n 83 above, and possible future claims implicating post-World War Two conduct, A. Gattini, ‘A Trojan Horse for Sudeten Claims? On Some Implications of the *Prince of Liechtenstein v. Germany*’ (2002) 13 EJIL 513; *Certain Property (Liechtenstein v. Germany)* (Preliminary Objections) [2005] ICJ Rep 6.

282 Crawford, ‘Chance, Order, Change: The Course of International Law’ n 62 above, 21–22.

283 A. Pellet, ‘The Definition of Responsibility in International Law’ in Crawford, n 37 above, 4.

284 Crawford, ‘The Current Political Discourse’ n 50 above, 2, 21.

everything that happened after 1996, international law would suggest *some* limitation of crippling compensation. After all, the 1996 ILC Draft Articles endorsed it, reflecting the views of the overwhelming majority of its members, the previous 50 years of war reparations treaties did limit the effects of compensation claims, and the backdrop general principles of self-determination and permanent sovereignty provided the normative grain with which this practice could be read. There are three reasons, with the veil of ignorance lifted, why international law moved in a different direction. First, developed States took full advantage of the opportunities offered by the law-making process within the ILC.<sup>285</sup> Secondly, States critical of crippling compensation mostly missed the right timing in 1998–1999, were inconsistent and vague on substance, and did not generate competing practice in other settings, even by reliance on the unexpectedly favourable EECC Awards.<sup>286</sup> Thirdly, some of the more influential ILC voices against crippling compensation were no longer present when the second reading of the 2001 ILC Articles was elaborated.<sup>287</sup> This story is consistent with the formalist description of the international legal process, which rewards technical competence of actors and consistency of their conduct over time. The first two reasons are also consistent with the insight of critical literature that apparently contingent events have structural causes,<sup>288</sup> for example current and historical availability of resources to be allocated to legal expertise, historical continuity of the particular polity, and privileged access to international organisations and one-time law-making opportunities.<sup>289</sup>

The third contribution is a challenge of taken-for-granted doctrinal assumptions on their own terms, shaping the future direction in a very important area of international law. Current international law permits crippling compensation – but it need not necessarily, and can be changed so as not to. There will be areas where technical expertise is only incidental to high politics, like war reparations, and the tendency of expertise to follow the capacity of States to allocate relevant resources has already been noted. It is unsurprising to see the practice of the US, the UK, and France referred to throughout the paper. But with an eye to the future, the more important point seems to me to be a different one: the relative democratisation of the international legal process. ‘Relative’ carries considerable weight here, and institutional capacity is relevant for appreciating the practical impact of points of principle debated in tribunals and international organisations. Nevertheless, the most important choices were made through the least resource-demanding exercise: recall that the entirety of war reparations counted, at the end of the day, for nothing, while the position taken by the 2001 ILC Articles was shaped more than anything by submissions of just four

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285 See n 70 above.

286 See n 72 above.

287 See n 73 above.

288 S. Marks, ‘False Contingency’ (2009) 62 CLP 1.

289 Crawford, ‘Chance, Order, Change: The Course of International Law’ n 50 above, 262–266, 268–271; Anghie, ‘Legal Aspects’ n 163 above, 153–156; E. Benvenisti and G.W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’ (2017) 60 *Stanford L Rev* 595, 612–614.



States, none of them longer than a paragraph.<sup>290</sup> These are not resource-heavy activities, any more than a default addition of a boilerplate objection to crippling compensation in pleadings and submissions to international organisations would be.<sup>291</sup> It is important for affected actors not to understate the extent to which legal arguments can shape the development of international law from within the legal process, and to take full advantage of opportunities accorded in modern law by multilateral institutions and formalised dispute settlement.

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290 See n 70 above. The only thing that France said was that ‘Paragraph 3 [of Article 42 of the 1996 ILC Draft Articles] should be deleted. There is no apparent justification for its inclusion in article on reparation’ *ibid*.

291 For example a routine quote of the EECC Awards or (the new bellwether authority) Judge Kateka’s dissent in *Duzgit Integrity* n 29 above at [25], [26].