

## Article 36

### A. The Work of the International Law Commission

#### 1. First Reading on State Responsibility

Article 36 of the 2001 International Law Commission's (ILC) articles on responsibility of States for internationally wrongful acts (2001 Articles) may be traced to the work of the Fourth Special Rapporteur on State responsibility Arangio-Ruiz.<sup>1</sup> The work of earlier Special Rapporteurs' is less helpful: García-Amador's draft on reparation in the particular context of injury to the alien was not discussed by the ILC and had no impact on its subsequent work;<sup>2</sup> Ago dealt only with the rubric of the internationally wrongful act, without reaching the content of responsibility (and never seemed interested in compensation);<sup>3</sup> and Riphagen's discussion of compensation was brief and largely related to his (failed) argument for special rules on reparation for breaches of rules on the treatment of aliens.<sup>4</sup>

Arangio-Ruiz first addressed compensation incidentally in the 1988 Preliminary Report, mostly in relation to impossibility of restitution,<sup>5</sup> and then directly in the 1989 Second Report<sup>6</sup> (later commended as 'analytical' by France),<sup>7</sup> which the Commission discussed in 1990.<sup>8</sup> In the Second

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<sup>1</sup> 'Articles on responsibility of States 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 (hereafter 2001 ILC Articles) art 36.

<sup>2</sup> 'Sixth report on State responsibility, by Mr. F.V. García-Amador, Special Rapporteur' (26 January 1961) *Yearbook of the International Law Commission 1989: Volume II* UN Doc A/CN.4/SER.A/1961/Add.1 1 Chapter III.

<sup>3</sup> See lack of direct treatment in Roberto Ago, 'Le délit international' (1939) 68 *Hague Recueil* 417.

<sup>4</sup> 'Second report on the content, forms and degrees of international responsibility (Part two of the draft articles), by Mr. Willem Riphagen, Special Rapporteur' (1 May 1981) *Yearbook of the International Law Commission 1981: Volume II (Part 1)* UN Doc A/CN.4/SER.A/1981/Add.1 (Part 1) 79 arts 4(2), 5; 'Fifth report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur' (4 April 1984) *Yearbook of the International Law Commission 1984: Volume II (Part 1)* UN Doc A/CN.4/SER.A/1984/Add.1 (Part 1) 1 arts 6(2), 7; 'Sixth report on the content, forms and degrees of international responsibility (part two of the draft articles); and "Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes (part three of the draft articles), by Mr. Willem Riphagen, Special Rapporteur' (2 April 1985) *Yearbook of the International Law Commission 1985: Volume II Part 1* UN Doc A/CN.4/SER.A/1985/Add.1 (Part 1) 3 art 6(2) Commentaries 8, 9, 12; art 7 Commentary 2.

<sup>5</sup> 'Preliminary report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (9 and 22 June 1988) *Yearbook of the International Law Commission 1989: Volume II Part 1* UN Doc A/CN.4/SER.A/1988/Add.1 (Part 1) 6 Section II.C.4-6, para 132, art 7(4).

<sup>6</sup> 'Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (9 and 22 June 1989) *Yearbook of the International Law Commission 1989: Volume II Part 1* UN Doc A/CN.4/SER.A/1989/Add.1 (Part 1) 1 (hereafter Arangio-Ruiz's Second Report) Section II.

<sup>7</sup> 'Third report on State responsibility, by Mr. James Crawford, Special Rapporteur' (15 March, 15 June, 10 and 18 July and 4 August 2000) *Yearbook of the International Law Commission 1995: Volume II Part 1* UN Doc A/CN.4/SER.A/2000/Add.1 (Part 1) 3 (hereafter Crawford's Third Report) para 150.

<sup>8</sup> *Yearbook of the International Law Commission 1990: Volume II Part 2* UN Doc A/CN.4/SER.A/1990/Add.1 (Part 2) 71 paras 344-377.

Report, Arangio-Ruiz proposed two alternatives for Draft Article 8 (Reparation by equivalent): the shorter expressed the principle of compensation ‘for any damage not covered by restitution in kind’; the longer additionally addressed moral damage, loss of profits, causality, and contributory negligence.<sup>9</sup> In 1992, the Drafting Committee took the shorter alternative as the starting point and added to it language taken from the longer alternative as well as other draft provisions on causality, interest, and loss of profits.<sup>10</sup> In 1993, the ILC adopted Draft article 8 (Compensation) with commentary in the first reading<sup>11</sup> (renumbered as Draft article 44 in the 1996 ILC Draft articles on responsibility [1996 Draft articles]):

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.<sup>12</sup>

In the 1993 Sixth Committee, States endorsed the general principle of compensation as a form of reparation expressed in draft article 8,<sup>13</sup> even if raising various objections and suggestions regarding drafting, particularly of paragraph 2.<sup>14</sup>

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<sup>9</sup> Arangio-Ruiz’s Second Report (n 6) [191] art 8.

<sup>10</sup> *Yearbook of the International Law Commission 1992: Volume I* UN Doc A/CN.4/SER.A/1992 219 paras 39-51.

<sup>11</sup> *Yearbook of the International Law Commission 1993: Volume I* UN Doc A/CN.4/SER.A/1993 165 paras 42-73; 172 33-77, 174 paras 1-33, 177 paras 1-10; *Yearbook of the International Law Commission 1993: Volume II Part 2* UN Doc A/CN.4/SER.A/1993/Add.1 (Part 2) 58.

<sup>12</sup> ‘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) 58 (hereafter 1996 Draft articles) art 44.

<sup>13</sup> Summary Records of the 22nd Meeting of the Sixth Committee (1 November 1993) UN Doc A/C.6/48/SR.22 para 102 (Denmark on behalf of the Nordic countries); Summary Records of the 23rd Meeting of the Sixth Committee (2 November 1993) UN Doc A/C.6/48/SR.23 para 31 (Iran); Summary Records of the 24th Meeting of the Sixth Committee (2 November 1993) UN Doc A/C.6/48/SR.24 para 58 (Brazil); Summary Records of the 26th Meeting of the Sixth Committee (3 November 1993) UN Doc A/C.6/48/SR.26 paras 6 (Poland), 22 (Australia), 38 (Bulgaria), 65 (Argentina).

<sup>14</sup> Summary Records of the 22nd Meeting (1993) *ibid* para 103 (Denmark on behalf of the Nordic countries); Summary Records of the 23rd Meeting (1993) *ibid* para 31 (Iran); Summary Records of the 24th Meeting (1993) *ibid* paras 4 (Sudan), 16 (Slovenia), 23 (China), 45 (the UK), 57-58 (Brazil); Summary Records of the 26th Meeting (1993) *ibid* paras 6 (Poland), 22 (Australia); Summary Records of the 27th Meeting of the Sixth Committee (4 November 1993) UN Doc A/C.6/48/SR.27 paras 17-18 (the US).

## 2. Second Reading on State Responsibility

The Fifth Special Rapporteur on State responsibility Crawford touched upon compensation in passing in the First<sup>15</sup> and Second reports on State responsibility,<sup>16</sup> and then addressed it directly in the 2000 Third report on State responsibility,<sup>17</sup> noting that '[g]overnment comments ... raise a number of important questions'.<sup>18</sup> The main issue was whether the accepted principle of assessment of compensation should be spelled out in more detail, as well as what limitations might be expressed to avoid disproportionate burdens on the responsible State.<sup>19</sup> On whether assessment of compensation should be addressed by general principle or detailed criteria, there had at the point been relatively few recent reasoned awards dealing with assessment of material damage as between States (outside the field of diplomatic protection).<sup>20</sup> That courts and tribunals other than the International Court of Justice (ICJ) now dealt with compensation provided a reason for hesitating to spell out in more specific detail the content of that principle, in light of the different contexts of application.<sup>21</sup> Two further reasons for caution were that much of the controversy over quantification of damage arose regarding the particular primary obligation of expropriation, which was not the function of the ILC to address, and questions in the context of injury to aliens were more appropriately dealt with as part of the Commission's work on diplomatic protection.<sup>22</sup> On limitation of crippling compensation claims, Crawford saw no case for a general provision because compensation was only payable where loss had actually been suffered, States could always establish limitation of liability regimes in particular fields, and claims procedures had consistently reduced compensation payable compared with amounts claimed.<sup>23</sup>

For these reasons, Crawford proposed two minor changes to the first reading wording: first, express compensation as an obligation of the responsible State; secondly, subsume both

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<sup>15</sup> On whether damage was a general prerequisite for a wrongful act (answered negatively), 'First report on State responsibility, by Mr. James Crawford, Special Rapporteur' (24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998) *Yearbook of the International Law Commission 1995: Volume II Part 1* UN Doc A/CN.4/SER.A/1998/Add.1 (Part 1) 3 para 117.c, generally paras 108-118.

<sup>16</sup> On circumstances precluding wrongfulness and compensation, 'Second report on State responsibility, by Mr. James Crawford, Special Rapporteur' (17 March, 1 and 30 April, 19 July 1999) *Yearbook of the International Law Commission 1999: Volume II Part 1* UN Doc A/CN.4/SER.A/1999/Add.1 (Part 1) 3 paras 305, 338-349.

<sup>17</sup> Crawford's Third Report (n 7) Section I.B.3.

<sup>18</sup> *Ibid* para 150.

<sup>19</sup> *Ibid* para 153, generally paras 150-153.

<sup>20</sup> *Ibid* para 155.

<sup>21</sup> *Ibid* para 158, also paras 156-157.

<sup>22</sup> *Ibid* paras 158.a-b.

<sup>23</sup> *Ibid* para 163, generally paras 161-164, also 22, 41-42.

paragraphs into a single one, leaving loss of profits to the commentary and interest to a separate article:

A State which has committed an internationally wrongful act is obliged to compensate for any economically assessable damage caused thereby, to the extent that such damage is not made good by restitution.<sup>24</sup>

ILC, in Crawford's summary, 'was faced with a choice between two solutions: it could either draft article 44 succinctly, stating a very general principle in flexible terms, or it could go into some detail and try to be exhaustive'.<sup>25</sup> The Commission discussed in particular the treatment of loss of profits, moral damage, compensation for expropriation, and the relevance of particular primary rules.<sup>26</sup> In his concluding remarks, Crawford expressed readiness to consider a more detailed provision, on the understanding that it was essential to take account of the different legal relations involved, including legal relations with non-State entities.<sup>27</sup> He noted that a majority of the Commission had favoured reintroduction of the reference to loss of profits, and that moral damage to individuals was clearly covered.<sup>28</sup> In light of the discussion, the 2000 Drafting Committee provisionally adopted on second reading draft Article 37 (Compensation), with language identical to Article 36 of the 2001 Articles.<sup>29</sup> States were generally welcoming.<sup>30</sup> In 2001, the ILC adopted commentary to (the renumbered) Article 36.<sup>31</sup> In the Sixth Committee, States mostly did not address this topic.<sup>32</sup>

### 3. Later ILC Work on Compensation

The ILC also addressed compensation under State responsibility after the adoption of the 2001 Articles. The 2006 ILC Articles on diplomatic protection did not (despite Crawford's

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<sup>24</sup> Ibid para 165.

<sup>25</sup> *Yearbook of the International Law Commission 2000: Volume II Part 2* UN Doc A/CN.4/SER.A/2000/39 (hereafter *Yearbook 2000 Vol II Part 2*) para 192.

<sup>26</sup> Ibid paras 188-197.

<sup>27</sup> Ibid para 230.

<sup>28</sup> Ibid paras 231-232.

<sup>29</sup> 'Draft articles provisionally adopted by the Drafting Committee on second reading' *ibid* 65 art 37 para 44.

<sup>30</sup> 'Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur' (2 and 3 April 2001) *Yearbook of the International Law Commission 2001: Volume II Part 1* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 1) 1 (hereafter Crawford's Fourth Report), 24 (see limited criticisms regarding moral damage and the unhelpful 'financial accessibility'), also paras 33.c, 34.

<sup>31</sup> *Yearbook of the International Law Commission 2001: Volume I* UN Doc A/CN.4/SER.A/2001 (hereafter *Yearbook 2001 Vol I*) 103 paras 6-7, 267 paras 34-44.

<sup>32</sup> But see Summary Records of the 13th Meeting of the Sixth Committee (31 October 2001) UN Doc A/C.6/56/SR.13 para 20 (Israel) (noting lack of detail).

expectations)<sup>33</sup> deal with the question of quantification of compensation arising in the context of injury to aliens.<sup>34</sup> The 2011 ILC Articles on responsibility of international organizations followed the text of Article 36 of the 2001 Articles in drafting the provision on compensation.<sup>35</sup> The 2022 ILC Draft principles on protection of the environment in relation to armed conflicts reaffirmed the obligations of full reparation under international law of damage to the environment in and of itself, in line with the 2001 Articles.<sup>36</sup> Compensation is currently being discussed as part of the topic of succession of States in respect of State responsibility,<sup>37</sup> and has been identified as a possible future topic.<sup>38</sup> Finally, the ILC also addressed compensation under primary rules on transboundary harm.<sup>39</sup>

## B. Article 36 and Custom

The principle of compensation in Article 36(1) explicitly builds on custom<sup>40</sup> and was uncontroversial in the ILC, with only minor textual changes between the Draft article 8(1) adopted in 1992 and Article 36(1) of the 2001 ILC Articles.<sup>41</sup> It was broadly endorsed by States in the first reading<sup>42</sup> (the US described Draft article 44(1) as ‘a long-established principle reflected in customary international law and innumerable bilateral and multilateral agreements’),<sup>43</sup> and was not criticised in the second reading.<sup>44</sup> The ICJ and inter-State arbitration tribunals have referred

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<sup>33</sup> Crawford’s Third Report (n 7) para 158.b.

<sup>34</sup> ‘Articles on diplomatic protection’ *Yearbook of the International Law Commission 2006: Volume II Part 2* UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2) 24 General Commentary 1, fn 21 (referring back to 2001 Articles art 36).

<sup>35</sup> Except for replacing the term ‘State’ by ‘international organization’, ‘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) 40 art 36 Commentary 4.

<sup>36</sup> ‘Draft principles on protection of the environment in relation to armed conflicts’ *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)* UN Doc A/77/10 Chapter V para 58 draft principle 9 Commentary 2.

<sup>37</sup> ‘Fourth report on succession of States in respect of State responsibility, by Pavel Šturma, Special Rapporteur’ (27 March 2021) UN Doc A/CN.4/743 Section III.A.2, 37 Annex draft article 7; *Report of the International Law Commission: Seventy-second session (26 April–4 June and 5 July–6 August 2021)* UN Doc A/76/10 paras 129-130, 146, 159.

<sup>38</sup> ‘Compensation under international law’ in Working paper prepared by the Secretariat, ‘Long-term programme of work’ (31 March 2016) UN Doc A/CN.4/679/Add. 1 Section II.E; C Grossman Guiloff, ‘Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law’ *Report of the International Law Commission: Seventy-first session (29 April–7 June and 8 July–9 August 2019)* UN Doc A/74/10 358 Annex B para 23.a.

<sup>39</sup> ‘Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities’ *Yearbook of the International Law Commission 2006: Volume II Part 2* UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2) 58 (hereafter Principles on the allocation of loss) Principle 4.

<sup>40</sup> 2001 ILC Articles (n 1) art 36 Commentary 2, fn 511; also Crawford’s Third Report (n 7) paras 155, 157.

<sup>41</sup> Cf. 1996 Draft articles (n 12) art 44(1); 2001 ILC Articles (n 1) art 36(1); also Arangio-Ruiz’s Second Report (n 6) para 191 art 8 (Alternative A); Crawford’s Third Report (n 7) para 165.

<sup>42</sup> See n 13.

<sup>43</sup> Crawford’s Third Report (n 7) para 150.

<sup>44</sup> See nn 30, 32.

to Article 36 to support their findings on the principle of compensation.<sup>45</sup> Citations of Article 36(1) by inter-State tribunals are quantitatively perhaps lighter than expected, but it has not been challenged by States,<sup>46</sup> judicial and arbitral practice is consistent with its drafting, and other provisions closely related to Article 36(1) (e.g. Article 31 on full reparation and Article 34 on forms of reparation) have been explicitly recognized as customary.<sup>47</sup> Article 36(1) is also routinely cited in investor-State arbitration.<sup>48</sup> Taking together the ILC's aim to codify customary judicial authorities, broad endorsement of the principle of compensation by its members and States in the drafting process, and overall positive subsequent reception in State and judicial practice, the conclusion is that Article 36(1) is reflective of custom.<sup>49</sup>

Article 36(2) addresses the types of damage that may be compensable and the methods of quantification that may be employed.<sup>50</sup> Quantification of compensation was more controversial in the ILC than the general principle, raising questions of both drafting and substance in both readings.<sup>51</sup> States raised various concerns about the first reading language,<sup>52</sup> with a particularly strong pushback by the US against its 'decodifying' effect on loss of profits.<sup>53</sup> The second reading language was more favourably received<sup>54</sup> (including by the US),<sup>55</sup> and the main post-adoption angle of criticism was that Article 36(2) did not say much rather than it said much incorrectly.<sup>56</sup> The provision has been endorsed by the ICJ and other inter-State tribunals (if more

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<sup>45</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 43 para 460; The "Enrica Lexie" Incident (*Italy v India*), PCA Case no 2015-28, Award, 21 May 2020 (hereafter *Italy v India*) para 1088 fn 1934.

<sup>46</sup> E.g. *Italy v India* ibid [881] (Italy).

<sup>47</sup> *Georgia v Russia (I)* (Just Satisfaction) [GC] Judgment of 31 January 2019 (hereafter *Georgia v Russia*) para 54; *Iran and the 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 (hereafter *Iran and the US*) paras 1787, 1788; *Italy v India* ibid para 1082; Armed Activities on the Territory of the Congo (*DRC v Uganda*) (Reparations) (Judgment of 9 February 2022) (hereafter *DRC v Uganda*) paras 70, 101.

<sup>48</sup> *EDF International SA and Ors v Argentina*, ICSID Case no ARB/03/23, Decision of the Annulment Committee, 5 February 2016 para 319; generally Report of the UN Secretary General, 'Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies' (29 April 2022) UN Doc A/77/74 31-2 (and entries on Article 36 in earlier compilations).

<sup>49</sup> John Barker, 'Compensation' in James Crawford and Ors (eds), *The Law of International Responsibility* (OUP 2010) 599, 600-601.

<sup>50</sup> 2001 ILC Articles (n 1) art 36(2) Commentary 7.

<sup>51</sup> See n 14, *Yearbook 2000 Vol II Part 2* (n 25) paras 231-232.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid paras 192, 231.

<sup>54</sup> Crawford's Fourth Report (n 30) para 34.

<sup>55</sup> US Statement in the Sixth Committee (27 October 2000) <<https://2009-2017.state.gov/documents/organization/6598.doc>> accessed 1 April 2022 2.

<sup>56</sup> Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833, 856; Rosalynn Higgins, 'Overview of Part Two of the Articles on State Responsibility' in James Crawford and Ors (eds), *The Law of International Responsibility* (OUP 2010) 537, 539; Christine Gray, 'Remedies' in Cesare PR Romano and Ors (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 871, 881.

strongly on rejecting the speculative elements than in awarding loss of profits claims),<sup>57</sup> States have invoked it,<sup>58</sup> and it is routinely cited as customary in investor-State arbitral decisions.<sup>59</sup> Taking into account these considerations, Article 36(2) is also reflective of custom.

### C. Content of Article 36

#### 1. Content of Article 36(1)

a) *'The State responsible for an internationally wrongful act is under an obligation'*

The opening phrase of Article 36(1) is relevant for three points. First, Article 36 deals with compensation caused by an internationally wrongful act,<sup>60</sup> established in accordance with rules set out in Part One. It addresses neither the question of compensation for any material loss caused by an act in relation to which a circumstance precluding wrongfulness has been invoked<sup>61</sup> nor compensation required by particular primary obligations.<sup>62</sup> Secondly, consistently with other provisions of Part Two<sup>63</sup> (and in a change from the first reading),<sup>64</sup> compensation is expressed as an obligation of the responsible State and not the right of the injured State.<sup>65</sup> Also for the purpose of consistency, the addressee of the obligation is expressed as '[t]he State responsible for an international wrongful act', replacing 'the State which has committed an internationally wrongful act' in the first reading.<sup>66</sup>

Thirdly, this drafting choice leaves open the question of applicability of Article 36 to obligation to compensate non-State entities, of particular importance in the fields of human rights and

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<sup>57</sup> Ahmadou Sadio Diallo (*Guinea v DRC*) (Compensation) [2012] ICJ Rep 324 (hereafter *Guinea v DRC*) para 49 (citing to the Commentary); The M/V "Norstar" Case (*Panama v Italy*) [2019] ITLOS Rep 10 (hereafter *Panama v Italy*) para 431.

<sup>58</sup> E.g. Arctic Sunrise (*The Netherlands v Russia*) (Award on the Merits) (2015) 32 RIAA 205 para 392 (the Netherlands).

<sup>59</sup> 2022 SG Report (n 48) 31-2 (and entries on Article 36 in earlier compilations).

<sup>60</sup> 2001 ILC Articles (n 1) art 36(1) Commentary 1.

<sup>61</sup> Ibid art 27(2).

<sup>62</sup> E.g. ILC Principles on the allocation of loss (n 39) 58 Principle 4 (environmental law); *Yearbook 2000 Vol II Part 2* (n 25) para 196 (investment law).

<sup>63</sup> Cf. 2001 ILC Articles (n 1) arts 35, 37(1).

<sup>64</sup> Cf. 1996 Draft Articles (n 12) art 44(1) Commentary 5.

<sup>65</sup> 2001 ILC Articles (n 1) art 36 Commentary 5; further Crawford's Third Report (n 7) paras 25-26, 163; *Yearbook of the International Law Commission 2000: Volume I* UN Doc A/CN.4/SER.A/2000 (hereafter *Yearbook 2000 Vol I*) 390 para 29. See, however, on specification of the preferred form of reparation by the injured State, 2001 ILC Articles (n 1) art 43(2)(b).

<sup>66</sup> *Yearbook of the ILC 2000 Vol I* ibid.

investment law.<sup>67</sup> The commentaries' routine reliance on decisions by bodies considering claims by non-State entities<sup>68</sup> reflects Crawford's multi-layered modern conception of responsibility that takes into account such legal relations<sup>69</sup>, treating '[t]he rules and principles developed by these bodies' as 'manifestations of the general principle stated in article 36'.<sup>70</sup> This approach is in line with subsequent dispute settlement practice conceptualising compensation claims as raising essentially the same legal issues, whether State responsibility is invoked by States<sup>71</sup> or by non-State entities before human rights and investor-State bodies.<sup>72</sup>

b) 'to compensate'

The verb 'compensate' expresses the point indicated by the title of Article 36 that its function is purely compensatory and, by implication, not punitive.<sup>73</sup> The Commission's explicit rejection of punitive damages as a form of reparation, even for serious breaches of obligations under peremptory norms of general international law,<sup>74</sup> is in line with the position adopted in subsequent judicial practice.<sup>75</sup> The exclusion of 'punitive' damages in this sense, however, does not require compensation for damage actually suffered to be limited because of disproportionate or crippling requirements concerning the responsible State,<sup>76</sup> which is a different legal proposition.<sup>77</sup>

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<sup>67</sup> See the general without-prejudice rule on content of responsibility, 2001 ILC Articles (n 1) art 33(2) Commentaries 3-4.

<sup>68</sup> 2001 ILC Articles (n 1) art 36 Commentaries 6, 19, 27, 32 (and fns 515, 516, 520-22, 524, 546-7, 549-50, 552-53, 555-60, 564-565, 567, 570, 574-76, 578-79). See also 1996 Draft Articles (n 12) art 44 Commentaries 36-39.

<sup>69</sup> *Yearbook 2000 Vol II Part 2* (n 25) para 230 (Crawford), also Crawford's Third Report (n 7) para 156(a)-(c).

<sup>70</sup> Ibid Article 36 Commentary 6.

<sup>71</sup> *Guinea v DRC* (n 57) paras 13 ('other international courts, tribunals and commissions ... have applied general principles governing compensation when fixings its amount'), 24, 33, 40; *ibid* Declaration of Judge Greenwood 391 (hereafter *Guinea v DRC Greenwood*) paras 8-9; Arctic Sunrise (*The Netherlands v Russia*) (Award on Compensation) (2017) 32 RIAA 317 (hereafter *The Netherlands v Russia Compensation*) paras 74-81.

<sup>72</sup> 2022 SG Report (n 48) 31-2 (and entries on Article 36 in earlier compilations).

<sup>73</sup> 2001 ILC Articles (n 1) art 36 Commentary 4.

<sup>74</sup> Ibid art 36 Commentary 4, art 37 Commentary 8, Chapter III Commentary 5; also Crawford's Third Report (n 7) paras 174, 190, 380, 409; Crawford's Fourth Report (n 30) para 45, 25.

<sup>75</sup> Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v Nicaragua*) [2018] ICJ Rep 15 (hereafter *Costa Rica v Nicaragua*) para 31; *DRC v Uganda* (n 46) para 102; also *Georgia v Russia* (n 46) para 75; and by analogy 'Duzgit Integrity' (*Malta v São Tomé and Príncipe*), Award on Reparation, 18 December 2019 (hereafter *Malta v São Tomé and Príncipe*) para 211 (rejecting a request for a punitive interest rate).

<sup>76</sup> 2001 ILC Articles (n 1) art 34 Commentary 5.

<sup>77</sup> Rejected *ibid* (following Crawford, see text at n 23); left open in *DRC v Uganda* (n 46) para 407. See Martins Paporinskis, 'A Case against Crippling Compensation in International Law of State Responsibility' (2020) 83 MLR 1246.

c) *'damage caused thereby'*

The general reference maintains the causal link between conduct and damage (with the qualification of damage as 'financially assessable' considered for inclusion but ultimately deferred to paragraph 2 as a more appropriate place for indicating what compensation should amount to).<sup>78</sup> Both 'damage' and 'caused' have to be read by reference to Article 31, due to the drafting choice of the second reading to address these issues as aspects of the general principle of full reparation, rather than relating specifically to compensation (as in the 1996 Draft articles).<sup>79</sup> Article 31 elaborates 'caused' from its paragraph 1 in the commentary, emphasising the variety of factors that may be relevant for applying causality for different breaches of international obligations,<sup>80</sup> accepting mitigation of damage<sup>81</sup> but rejecting (in a departure from the first reading)<sup>82</sup> concurrency as an element affecting the scope of reparation.<sup>83</sup> Article 31(2) refers to 'damage, whether material or moral', and explains them in the commentary as, respectively, damage to property or other interests of the State or its nationals assessable in financial terms and such items as individual pain and suffering, loss of loved ones or personal affront.<sup>84</sup>

d) *'insofar as such damage is not made good by restitution'*

The final phrase of Article 36(1) addresses the relationship between compensation and restitution by way of primary of restitution, which was uncontroversial at the ILC.<sup>85</sup> While compensation is perhaps the most commonly sought form of reparation in international practice,<sup>86</sup> Crawford made a strong argument in favour of the principle of primacy of restitution, emphasising its preferability in policy terms to the alternative of primacy of compensation, with its implication that States might, after the event, purchase the freedom not to respect their obligations.<sup>87</sup> Subsequent inter-State dispute settlement practice is consistent with Article 36(1).<sup>88</sup>

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<sup>78</sup> *Yearbook 2000 Vol I* (n 65) 390 para 29.

<sup>79</sup> *Yearbook 2001 Vol I* (n 31) 103 para 6. Cf. 1996 Draft Articles (n 12) art 42, art 44 Commentaries 6-13 (on causality), Commentaries 16-19 (on material and moral damage); 2001 ILC Articles (n 1) arts 31, 36. See also Crawford's Third Report (n 7) paras 27-29, 31-37.

<sup>80</sup> 2001 ILC Articles (n 1) art 31 Commentaries 9-10; in line with *Costa Rica v Nicaragua* (n 74) para 34.

<sup>81</sup> *Ibid* Commentary 11; explicitly endorsed in *Iran and the US* (n 46) para 1796.

<sup>82</sup> 1996 Draft Articles (n 12) art 44 Commentaries 12-13.

<sup>83</sup> 2001 ILC Articles (n 1) art 31 Commentaries 12-13; explicitly endorsed in *DRC v Uganda* (n 46) para 98.

<sup>84</sup> *Ibid* art 31(2) Commentary 5.

<sup>85</sup> 1996 Draft Articles (n 12) art 44 Commentary 14; 2001 ILC Articles (n 1) art 36 Commentary 3. The change from 'if and to the extent that the damage is not made good by restitution in kind' in the first reading to 'insofar as such damage is not made good by restitution' was without legal effect, *Yearbook of the ILC 2000 Vol I* (n 65) 390 para 29.

<sup>86</sup> 2001 ILC Articles (n 1) art 36 Commentary 2.

<sup>87</sup> Crawford's Third Report (n 7) para 143, and generally paras 135-143.

<sup>88</sup> *Costa Rica v Nicaragua* (n 74) para 31; *Italy v India* (n 45) para 1088; *DRC v Uganda* (n 46) para 101.

The factual prevalence of compensation in some fields, such as investment law, is explicable by the preferences of disputing parties and the particular weight of permanent sovereignty over natural resources against restitution in mixed arbitrations.<sup>89</sup>

## 2. Content of Article 36(2)

a) *'The compensation shall cover any financially assessable damage'*

The opening phrase raises three issues. First, its key concept is 'any financially assessable damage', that is, any damage which is capable of being evaluated in financial terms.<sup>90</sup> This qualification is intended to exclude compensation for what is sometimes referred to as 'moral damage' to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons.<sup>91</sup> Financially assessable damage encompasses damage suffered by the State itself as well as both material and non-material damage suffered by non-State entities.<sup>92</sup> It does not mean, however, that compensation is limited to losses the value of which can be precisely calculated – the intention of the language is to capture susceptibility in principle to evaluation in financial terms, even if it involves estimation, approximation or the use of equivalents, or indeed equitable considerations<sup>93</sup> (e.g. regarding non-material damage to non-State entities).<sup>94</sup>

Secondly, the opening phrase answers the question posed in a sub-section heading of Crawford's Third Report, 'Assessment of compensation: general principle or detailed criteria?', by mostly adopting the former approach. Principles of assessment were viewed as variable, depending on the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome. At the same time, commentaries provide examples of the types of compensable damage and the methods of quantification.<sup>95</sup> The categories include damage to the State as such (e.g. shooting down of its aircraft or sinking of its ships, attacks on its diplomatic premises and personnel or

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<sup>89</sup> Crawford's Third Report (n 7) para 143.

<sup>90</sup> 2001 ILC Articles (n 1) art 36 Commentary 5. The change from 'economically' to 'financially' assessable between the first and second readings made the point more accurate, *Yearbook of the ILC 2000 Vol I* (n 65) 390 para 30, with a marginal substantive difference, Crawford's Fourth Report (n 30) para 34.

<sup>91</sup> *Ibid* art 36 Commentary 1; further Commentaries 4-5, art 37 Commentary 3; *Yearbook 2000 Vol I* (n 65) 390 para 30.

<sup>92</sup> 2001 ILC Articles (n 1) art 36 Commentaries 5, 16.

<sup>93</sup> Crawford's Third Report (n 7) para 159; Crawford's Fourth Report (n 30) para 34.

<sup>94</sup> *Guinea v DRC* (n 57) para 24.

<sup>95</sup> 2001 ILC Articles (n 1) art 36 Commentary 7; further Crawford's Third Report (n 7) paras 158-160.

other public property, the costs incurred in responding to pollution damage, and environmental damage)<sup>96</sup> as well as diplomatic protection claims regarding material damage (especially as concerns personal injury and takings of, or damage to, tangible property) and non-material damage to nationals.<sup>97</sup>

Thirdly, how persuasive is the criticism of Article 36(2) for unhelpful vagueness?<sup>98</sup> Overall, the balance struck between the flexible principle in the text and fairly detailed identification of the better examples of application in the commentary has aged well. With an eye to the increased and diversified case law on compensation in the last 20 years,<sup>99</sup> it is hard to see what more of lasting value ILC could have derived in 2000-2001 from the few then-recent inter-State decisions and the output of specialist tribunals varied in character, quantity, and quality.<sup>100</sup> (Indeed, the one topic where the ILC did make a general point, cautioning against Discount Cash Flow, is least in line with subsequent practice.)<sup>101</sup> The three post-2001 ICJ judgments on compensation in human rights, environmental, and humanitarian law adopt a similar approach, posing the legal question in terms of general principles of, or consistent with the 2001 ILC Articles,<sup>102</sup> and answering it by reference to diverse (and mostly post-2001) authorities that constitute the best examples of application in the particular field.<sup>103</sup>

The methodology of identification of custom by reference to Article 36(2) and application in a consistent and coherent manner with an eye to the better examples of practice,<sup>104</sup> pre-2001 in the commentaries and post-2001 often helpfully collated by the Secretary General, provides an appropriate framework for other fields and bodies as well.<sup>105</sup> In addition to the ICJ judgments noted above, reasoned decisions on compensation have been rendered in inter-State cases on law of the sea,<sup>106</sup> human rights,<sup>107</sup> and by the Iran-US Claims Tribunal,<sup>108</sup> as well in cases brought by

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<sup>96</sup> 2001 ILC Articles *ibid* Commentaries 8-15.

<sup>97</sup> *Ibid* Commentaries 16-26.

<sup>98</sup> See n 56.

<sup>99</sup> Secretariat (n 38) para 38.

<sup>100</sup> Crawford's Third Report (n 7) paras 155-159.

<sup>101</sup> Cf. 2001 ILC Articles (n 1) art 36 Commentary 26; *BayWa RE Renewable Energy GmbH and Or v Spain*, ICSID Case no ARB/15/16, Award, 25 January 2021 (chaired by Crawford) para 51.

<sup>102</sup> *Guinea v DRC* (n 57) para 13; *Costa Rica v Nicaragua* (n 74) paras 29-35, 41; *DRC v Uganda* (n 46) paras 99-102.

<sup>103</sup> Cf. *Guinea v DRC* (n 57) paras 13, 24, 33, 40, 49; *Costa Rica v Nicaragua* (n 74) para 52, generally Section III; *DRC v Uganda* (n 46) para 407, generally Section III.

<sup>104</sup> *Guinea v DRC* Greenwood (n 71) para 7.

<sup>105</sup> 2022 SG Report (n 48) 31-2 (and entries on Article 36 in earlier compilations).

<sup>106</sup> *The M/V "Virginia" Case (Panama/Guinea-Bissau)* [2014] ITLOS Rep 4 (hereafter *Panama/Guinea-Bissau*); *The Netherlands v Russia* Compensation (n 71); *Panama v Italy* (n 57); *Malta v São Tomé and Príncipe* (n 75).

<sup>107</sup> Eg *Georgia v Russia (I)* (n 46).

<sup>108</sup> Eg *Iran and the US* (n 46).

non-State entities, particularly before African, American, and European regional human rights courts and investor-State tribunals.<sup>109</sup> It may well be that the quantity and quality of post-2001 practice make compensation under international law a sufficiently important, feasible, and concrete new topic for the ILC.<sup>110</sup>

*b) 'including loss of profits insofar as it is established'*

The concluding phrase raises five issues. First, compensation for loss of profits was the most controversial aspect of the drafting process of Article 36. Crawford described the first reading as having given it an endorsement as lukewarm as can be imagined,<sup>111</sup> and strongly pressed the Commission to delete it entirely to address solely in commentaries<sup>112</sup> – a suggestion, however (and uncommonly), rejected by the Commission. Indeed, the changes from the first reading language in paragraph 2 ('compensation ... may include ... , where appropriate, loss of profits') were not intended to affect the substantive point that full reparation might but not always would require compensation of loss of profits<sup>113</sup>. Secondly, in line with the distinction between identification of the rule and its application discussed above, the commentary 'explains that there were situations where loss of profits was covered and others where it was not'.<sup>114</sup> Thirdly, on the 'not' side, there is a general caution against claims with inherently speculative elements,<sup>115</sup> specifically against awarding loss of profits and interest over the same period of time to avoid double recovery,<sup>116</sup> and application of the usual range of limitations on the recovery of damages.<sup>117</sup> Fourthly, three categories of lost profits awarded are identified as 'covered':<sup>118</sup> from income-producing property when there has been no interference with title as distinct from temporary loss of use;<sup>119</sup> from income-producing property between the date of taking of title and

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<sup>109</sup> 2022 SG Report (n 48) 31-2 (and entries on Article 36 in earlier compilations).

<sup>110</sup> Secretariat (n 38) paras 37-38.

<sup>111</sup> Crawford's Third Report (n 7) para 149.

<sup>112</sup> Ibid para 165.

<sup>113</sup> 2001 ILC Articles (n 1) art 36 Commentary 27; *Yearbook 2001 Vol I* (n 31) 103 para 7.

<sup>114</sup> *Yearbook 2000 Vol I* (n 65) 390 para 30.

<sup>115</sup> Ibid Commentaries 27, 32; endorsed in *Guinea v DRC* (n 57) [49]. For other rejections of speculative or unestablished claims, see *Panama v Italy* (n 57) paras 432-433; *Iran and the US* (n 46) paras 1870-1871.

<sup>116</sup> Ibid Commentary 33, art 38 Commentary 11. On double recovery, the Commission did not consider the concern about awarding loss of profits if valuation of income-producing assets has already taken into account their effectiveness in producing future profits, Abby Cohen Smutny, 'Some Observations on the Principle Relating to Compensation in the Investment Treaty Context' (2007) 22 ICSID Review 1, 11-14.

<sup>117</sup> Ibid art 36 Commentary 32; e.g. rejection due to lack of causality in *Panama/Guinea-Bissau* (n 106) paras 436-440.

<sup>118</sup> Ibid art 36 Commentaries 27-31.

<sup>119</sup> *The Netherlands v Russia* Compensation (n 71) paras 65-68.

adjudication; and lost future profits after adjudication.<sup>120</sup> Finally, in line with Crawford's suggestion, the Commission expressed the rule on interest in a separate provision, Article 38.<sup>121</sup>

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**Keywords** compensation, damage, damages, valuation, loss of profits

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<sup>120</sup> *ADM and Or v Mexico*, ICSID Case no ARB(AF)/04/05, Award, 21 November 2007 paras 281-293. Determination of future profits developed in investor-State arbitration is mostly conceptualised as relating to valuation of the investment and not loss of profits in the technical State responsibility sense.

<sup>121</sup> 2001 ILC Articles (n 1) art 38; Crawford's Third Report (n 7) Section I.5.