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The Development of International Law: The Case for Revisiting Compensation

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Abstract How can the development of public international law work in a decentralised and pluralist international society, where actors and institutions increasingly and deeply disagree on key questions? The paper identifies two concepts for discussing its viability: *clarity*, about the current law and the claim for change, and *coherence* of that claim with the existing law, both substantively and in relation to relevant procedures and institutions. After explaining how these concepts operate in international law more generally, the paper considers their application to the case study of compensation within the particular institutional setting of the United Nations International Law Commission.

Keywords: public international law; International Law Commission; International Court of Justice; compensation; State responsibility; Latvia

1. *Introduction*

The development of public international law presents one of the classic puzzles of the discipline. A sometime Professor of International Law at UCL began their Hague Academy course by asking the audience to imagine an island, inhabited by about two hundred families, not all equally fortunate, which formed a society that needed rules but lacked an institutionalized legislature.[1] We know,[2] as confirmed by the oral

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[1] M Mendelson, 'The Formation of Customary International Law' (1998) 272 Hague Recueil 161, 165–67.

[2] M Fitzmaurice, *Whaling and International Law* (CUP 2015) Chapter 7; H Hobbs and D Rothwell, 'Towards a Legal Era of Islands: The International and Constitutional Legal Status of Island Territories' (2024) 73 ICLQ 609; N Jones, *Self-Determination as Voice: The Participation of Indigenous People in International Governance* (CUP 2024).

proceedings before the United Nations ('UN') International Court of Justice ('ICJ' and 'Court') in December 2024 on *Obligations of States in respect of Climate Change* ('*Obligations of States*'), the high degree of sophistication that societies in small islands may bring to legal arrangements, domestically as well as internationally.[3] But as a metaphor for international society and the challenges for the international legal order, this island captures well the puzzle of how rules can be made and changed in a deeply pluralist and decentralized environment, particularly one that seems ever more divided on questions of a universal nature.[4] I will not belabour the final point in 2025, when in every week decades of international law happened.

Can the development of rules in such a society work at all? If so, how? To make the inquiry less abstract, consider the following three examples that I have reflected upon for some time.

First, an important question in the pending *Obligations of States*, particularly in light of withdrawal of certain States from the climate change treaty regime[5]: does the principle of prevention of significant harm to the environment apply to anthropogenic greenhouse gas emissions?[6] By way of example, the United Kingdom said 'no'—or, as a fallback, that customary international law did not differ in content from obligations in the Paris Agreement[7]—while Belize and Costa Rica took the opposite view on both points.[8]

Secondly, crippling compensation: does the principle of full reparation for internationally wrongful acts take into account the financial capacity of the responsible State when the form of reparation is compensation?[9]

[3] ICJ Press Release, '*Obligations of States in Respect of Climate Change* (Request for Advisory Opinion) Conclusion of the public hearings held from 2 to 13 December 2024' (13 December 2024).

[4] Not a new insight but—as every generation says—particularly relevant for our times, A Cassese, *International Law in a Divided World* (Clarendon Press 1986); D Bethlehem, 'Project 2100: Looking Back, Looking Forward: A 2020's Perspective on the International Legal Order' (Arnold & Porter and the Lauterpacht Centre for International Law Lecture, 13 November 2023) 1.

[5] Executive Order, 'Putting America First in International Environmental Agreements' (20 January 2025) <https://www.whitehouse.gov/presidential-actions/2025/01/putting-america-first-in-international-environmental-agreements/> Section 3(a), (b); C.N.71.2025.TREATIES-XXVII.7.d (Depositary Notification, 27 January 2025).

[6] *Obligations of States in Respect of Climate Change* (Request for advisory opinion submitted by the General Assembly of the United Nations) CR 2024/44 (6 December 2024) 11 paras 21–22 (Paparinskis).

[7] Ibid CR 2024/48 (10 December 2024) 42 paras 46–63 (Hermer). See also Timor-Leste, ibid CR 2024/51 (12 December 2024) 29 para 8 (Sthoeger).

[8] Ibid CR 2024/37 (3 December 2024) 9 paras 3–4, 7 (Wordsworth), 12 paras 2–6, 20–21 (Sander); ibid CR 2024/39 (4 December 2024) 11 paras 5–8 (Kohen).

[9] M Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) 83 MLR 1246.

The UN International Law Commission ('ILC' and 'Commission') said 'no' in the 2001 articles on responsibility of States for internationally wrongful acts ('2001 articles');[10] in 2021 the Inter-American Court of Human Rights noted the argument raised by the respondent State[11]; while the ICJ in 2022 left the question open in *Armed Activities on the Territory of the Congo*.[12]

Thirdly, does immunity *ratione materiae* from the exercise of foreign criminal jurisdiction apply in respect of crimes under international law? The ILC said 'no' in the draft articles on immunity of States from foreign criminal jurisdiction adopted on first reading in 2022 ('2022 draft articles on immunity of State officials'),[13] having determined by a vote in 2017 'a discernible trend towards limiting the applicability of immunity',[14] with which 'some members' disagreed.[15] Comments by States for the second reading reflect a degree of difference of perspective on draft article 7,[16] illustrated by a comparison of the most recent submissions by Germany and Israel[17]—and different views have been expressed even regarding characterization of the position of a singular State.[18]

[10] ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the ILC 2001: Volume II Part Two* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 30 para (5) of the commentary to art 34.

[11] IACtHR, *Profesores de Chañaral y otras Municipalidades v Chile* (Excepción preliminar, Fondo, Reparaciones y Costas) Sentencia de 10 de noviembre de 2021 paras 201, 226.

[12] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations) [2022] ICJ Rep 13 paras 110, 407.

[13] M Wood, 'The ILC's First Reading Draft Articles on 'Immunity of State Officials from Foreign Criminal Jurisdiction' (2022)' (2022) 26 Max Planck Yearbook of United Nations Law 717.

[14] ILC, 'Text of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading' in *Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022)* UN Doc A/77/10 para 68 draft art 7; 'Text of the draft articles and commentaries thereto' ibid para 69, paras (3), (9) of the commentary to draft art 7.

[15] Ibid para (12) of the commentary to draft art 7.

[16] 'Immunity of State officials from foreign criminal jurisdiction: comments and observations received from Governments' (7 May 2024) UN Doc A/CN.4/771 53-100; 'Immunity of State officials from foreign criminal jurisdiction: Additional comments and observations received from Governments: Addendum' (7 May 2024) UN Doc A/CN.4/771/Add.1 10-14; 'Immunity of State officials from foreign criminal jurisdiction: Additional comments and observations received from Governments: Addendum' (29 April 2024) UN Doc A/CN.4/771/Add.2 2; 'Immunity of State officials from foreign criminal jurisdiction: Additional comments and observations received from Governments: Addendum' (22 January 2025) UN Doc A/CN.4/771/Add.3 7-10.

[17] Cf 'Comments and observations: Addendum 3' ibid 8–9 (Germany), 9–10 (Israel).

[18] Cf C Kreß, 'Germany and International Criminal Law: Some Additional Reflections in Light of Another Set of Current Developments' (21 August 2024) EJIL:Talk!; I Walther, 'Über jeden Zweifel erhaben – Feststellung von Völkergewohnheitsrecht in der BGH-Rechtsprechung zur funktionellen Immunität ausländischer Staatsbediensteter' (2025) 85 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 199.

Legal issues summarised above have significant practical implications for the conduct of international relations. They also raise hard questions about the nature of international law and its determination and development in circumstances of strong disagreement between the relevant actors and institutions. I will return to these examples throughout the paper.

The breadth of the topic of development of international law presents a challenge for framing the argument, which is usually dealt with by narrowing the focus on either a particular field—as the President of the ICJ occasionally does in their yearly speech to the Sixth Committee of the UN General Assembly ('UNGA')[19]—or an institution, as in Hersch Lauterpacht's *Development of International Law by the International Court.*[20] In the same vein, I have chosen the substantive case study of development of international law of compensation, with an institutional eye to the inclusion in the long-term programme of work of the ILC in 2024 of the topic 'compensation for the damage caused by internationally wrongful acts' (and the self-interest that I proposed this topic).[21] By discussing the parameters for evaluating the development of international law with an eye to this particular topic, I hope by occasion to explain contemporary international law more generally.[22]

The focus on the Commission is almost self-explanatory. International society does not have an institutionalized legislature, but it plainly has institutions, also at the universal level, in various ways relevant for the development of international law. After attempts to give the UNGA power to establish the content of international law with binding force were rejected at the San Francisco Conference,[23] it was nevertheless

[19] See on development of the law governing maritime delimitation, 'Speech by H.E. Judge Peter Tomka, President of the International Court of Justice, to the Sixth Committee of the General Assembly' (2 November 2012) <https://www.icj-cij.org/sites/default/files/press-releases/6/17156.pdf>; institutional law of the UN, 'Discours de S. Exc. M. Ronny Abraham, président de la Cour internationale de Justice, devant la Sixième Commission de l'Assemblée générale' (6 November 2015) <https://www.icj-cij.org/sites/default/files/press-releases/0/000-20151106-PRE-01-00-BI.pdf>.

[20] H Lauterpacht, *The Development of International Law by the International Court* (CUP 1982). See also CJ Tams and J Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013).

[21] M Paparinskis, 'Compensation for the damage caused by Internationally Wrongful Acts' in *Report of the International Law Commission: Seventy fifth session (29 April–31 May and 1 July–2 August 2024)* UN Doc A/79/10 para 423, 125 Annex I.

[22] J Milton, 'Lycidas' in H Darbishire (ed), *The Poetical Works of John Milton* (OUP 1958) 447, 447.

[23] *Documents of the United Nations Conference on International Organization, San Francisco, 1945* (Vol. III, documents 1 and 2); ibid (Vol. VIII, document 1151); ibid (Vol. IX, documents 203, 416, 507, 536, 571, 792, 795, 848). See also *The Work of the International Law Commission* (Vol I, 10th edn, UN 2023) 4–5; A Reinisch and J Tropper, 'Article 13' in B Simma and others (eds), *The Charter of the United Nations: A Commentary* (4th edn, OUP 2024) 715, 719.

entrusted with the task of 'encouraging the progressive development of international law and its codification',[24] which in due course led to the creation of the ILC.[25] It is not surprising that development of international law is often addressed either as part of the discussion of the Commission's work or by using its contribution as a particularly appropriate test case for hypotheses of how international law works.[26]

I will consider the development of international law in three parts: first, sketch a tentative academic *Bildungsroman*, which may inform my overall approach to the topic; secondly, explain the variety of considerations that shape the development of international law, drawing upon examples from research and practice; and, thirdly and finally, reflect on whether compensation is an appropriate topic for the development of international law in the 2020s. I build on insights articulated by Vaughan Lowe in a series of articles some twenty years ago that emphasized the importance of clarity and coherence for the development of international law—*clarity*, about the current law and the claim for change, and *coherence* of the claim with the existing law, both substantively and in relation to relevant procedures and institutions.[27] These considerations are key in light of the possible paths of development of infinitely varied international law through her institutions,[28] and of particular importance if but-of-course assumptions about international law are themselves subject to pressures of development.

[24] Charter of the United Nations with the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi art 13, sub-paragraph (a).

[25] UNGA Res 174(II) 'Establishment of an International Law Commission' (21 November 1947) *Official Records of the General Assembly, Second Session, Resolutions* 105; Reinisch and Tropper (n 23) 720–21. See also *The Work of the International Law Commission* (n 23) 5–6; K van Douwen, 'Seventeen Men at Lake Success: In Search of the International Law Commission' (2024) 37 Leiden Journal of International Law 557; O Sender, *International Law-Making by the International Court of Justice and the International Law Commission* (CUP 2024) 32–43.

[26] *The International Law Commission Fifty Years After: An Evaluation* (UN 2000); G Nolte (ed), *Peace Through International Law: The Role of the International Law Commission* (Springer 2009); United Nations (ed), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill 2020) Part 2; O Sender and M Wood, 'The Work of the International Law Commission between 1997 and 2022: A Positive Assessment' (2022) 25 Max Planck Yearbook of United Nations Law 645; and generally (2023) 26 Max Planck Yearbook of the United Nations Law.

[27] V Lowe, 'The Iraq Crisis: What Now?' (2003) 52 ICLQ 859, 860–64; V Lowe, '"Clear and Present Danger": Responses to Terrorism' (2005) 54 ICLQ 185, 190–94.

[28] RR Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 ICLQ 549; N Krisch and E Yildiz, 'The Many Paths of Change in International Law: A Frame' in N Krisch and E Yildiz (eds), *The Many Paths of Change in International Law* (OUP 2023) 3.

I will not address particular recent developments because such musings tend to date quickly. I will speak in general terms about *change*, and I will say that everything in a legal order may change, despite longevity of rules and institutions, regularity and routineness of their invocation, and even possible deployment of foreign or dead languages for their designation. Resistance to legal developments considered by some *not* progressive is to be taken seriously by participants in the legal order because law will not do the work for them. While '[a] calm and vinous optimism possess[es] [our] banquet', '[o]utside the owls hunt [] maternal rodents and their furry brood'.[29]

2. *From General to Particular and Back Again*

I have particular gratitude to UCL Laws as the first institution to give me a permanent contract (as much as I enjoyed my earlier fleeting presence at Merton College Oxford and the New York University). And I am also an Eastern European international lawyer, formally so in the eyes of the UNGA.[30] In preparing this paper, I flicked through Martti Koskenniemi's piece on the world seventy-five years after Lauterpacht's *Function of Law in the International Community* where Koskenniemi suggested that *FLIC* could only have been written from the inside of the German public law tradition in which Lauterpacht had been brought up, from a vivid sense of the urgency of the legal system's ultimate foundations.[31] This observation led me to reflect on how my approach to development of international law is informed by the legal tradition of my own upbringing.

I start with a degree of caution. I am a generalist international lawyer, and tend to think that a sound doctrinal answer to a question about international law, particularly of universal character, necessarily includes engagement with different materials and teachings 'from the various legal systems and regions of the world', having due to regard 'to, *inter alia*, gender and linguistic diversity' (to use the language from the Commission's draft conclusions on subsidiary means for the determination of rules of

[29] E Waugh, *Scoop* (Chapman & Hall 1938) 306, 308.

[30] UNGA Decision 76/406 'Election of the Members of the International Law Commission' (12 November 2021) in *Resolutions and Decisions Adopted by the General Assembly During Its Seventy-Sixth Session (Volume II: Decisions: 14 September–24 December 2021)* UN Doc A/76/49 (Vol. II) 6; <https://legal.un.org/ilc/elections/2021election_outcome.shtml>.

[31] M Koskenniemi, 'The Function of Law in the International Community: 75 Years After' (2008) 79 BYBIL 353, 356.

international law, the topic led by Special Rapporteur Charles Jalloh).[32] The perspective of particular States, whether united by regional, numerical, directional or other characteristics, constitutes and enriches the process of determination and calibration of universal consensus as a necessary part of the general conversation.[33]

The identification of that consensus is, however, not limited to the initial actors or catalysts, for either exclusivity of articulation of perspectives or their evaluation.[34] By way of example, in the oral proceedings in *Obligations of States* before the ICJ, the judgment of the European Court of Human Rights in *Verein KlimaSeniorinnen Schweiz v Switzerland* was invoked by participants from diverse regions and legal settings,[35] including State Parties to other or no regional human rights instruments, as on the very first day of oral proceedings by Vanuatu, Albania, Germany, Antigua and Barbuda, and Australia.[36] This is international law argument as it should be. (And, of course, the particularly affected participants may choose not to engage: Switzerland did not mention the case.)[37] In sum, if a sound generalist argument is already shaped by all the regionally and otherwise particularist wrinkles, one wonders about the value of prioritizing a second particularist gaze.

The legal history of Eastern Europe may, nevertheless, offer certain insights about the nature of law and international legal process, valid in general but perhaps more obscured in other settings, which I will introduce by reference to two examples. First, Pēteris Stučka, an influential figure in the Latvian social democratic movement since the late nineteenth century,[38] whose work was described by Hans Kelsen as 'the first

[32] ILC, 'Text of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted thus far by the Commission' in *Report of the International Law Commission: Seventy Fifth Session (29 April–31 May and 1 July–2 August 2024)* UN Doc A/79/10 para 74 draft conclusion 5.

[33] 'Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi' in *Yearbook of the ILC 2006: Volume II Part One (Addendum 2)* UN Doc A/CN.4/SER.A/2006/Add.1 (Part 1/Add.2) 1 paras 199–201.

[34] Ibid paras 202–03.

[35] ECtHR, *Verein KlimaSeniorinnen Schweiz and others v Switzerland* (app no 53600/20) Grand Chamber Judgment of 9 April 2024.

[36] *Obligations of States in Respect of Climate Change* (Request for advisory opinion submitted by the General Assembly of the United Nations) CR 2024/35 (2 December 2024) 110 para 4 (Wewerinke-Singh), 134 para 7(iii) (Blair), 147 paras 20, 23 (Zimmermann); ibid CR 2024/36 (2 December 2024) 17 paras 21, 23 (Phillips), 49 para 3(b) (Parlett).

[37] T Eicke, 'Strasbourg and Climate Change: Taking Stock' (UCL, 6 February 2025) 10–11, available at J Rozenberg, 'Climate Change Challenge' (10 February 2025) A Lawyer Writes <https://rozenberg.substack.com/p/climate-change-challenge>.

[38] АА Плотниек, *Петр Стучка и истоки советской правовой мысли: 1917–1925* (Учёные записки Латвийского государственного университета имени П. Стучки. № 129 1970); 'Editors' Introduction' in R Sharlet, PB Maggs and P Beirne (trs), *P. I. Stuchka: Selected Writings on Soviet Law and Marxism* (Routledge 1989) ix.

important attempt to develop a specifically Soviet theory of law'.[39] The second example, more firmly located in the realm of international law, relates to the statehood journey of the Republic of Latvia—of whose foundation Stučka was one of the key antagonists.

It is easier to say what Stučka was *not* in the early history of Soviet Russia: among many other posts, he was the first People's Commissar for Justice, the first Chief Justice of the Supreme Court, the editor-in-chief of the first Soviet Encyclopaedia of State and Law, and the first director of the Institute of Soviet Law, not to mention briefer stints such as the head of the government of Soviet Latvia 1918–20. He also drafted the 1917 First Decree on Courts, which abolished all the pre-existing Russian courts (replacing them by revolutionary tribunals and local elected courts), as well as those pre-existing laws contrary to revolutionary consciousness.[40] (Speaking in Bentham House, I note that in a contemporary article Jeremy Bentham was invoked to support Stučka's hopes for simplified and accessible future codifications.)[41] A specialist of international law Stučka was not,[42] but he *was* the notably rare generalist writer to conceptualize law to fit both the domestic sphere and the international,[43] avoiding the more common treatment of the latter as the embarrassing special case to be tucked away at the very end of exposition.[44] (Bentham is, as for many things, another exception.[45])

[39] H Kelsen, *The Communist Theory of Law* (Scientia Verlag Aalen 1976) 62. See П Стучка, *13 лет борьбы за революционно-марксистскую теорию права: Сборник статей. 1917-1930.* (Гос. юрид. изд-во 1931); П Стучка, *Учение о советском государстве и его конституции* (7-е изд, Государственное социально-экономическое изд-во 1931); Sharlet ibid.

[40] Декрет о суде. СУ РСФСР, 1917. № 4. ст. 50. See Плотниек (n 38) 40–62.

[41] П Стучка, 'Пролетарская революция и суд' в Стучка, *13 лет борьбы за революционно-марксистскую теорию права* (n 39) 14, 18.

[42] Kelsen (n 39) 156. See also S Krylov, 'Les notions principales du droit des gens (La doctrine soviétique du droit international)' (1947) 70 Hague Recueil 407; НН Кириловская, *Система международного права и его науки в отечественной международно-правовой доктрине* (Издательство «Юрлитинформ» 2008) 65–74, 104–9.

[43] П Стучка, 'Что такое право' в Стучка, *13 лет борьбы за революционно-марксистскую теорию права* (n 39) 40, 46; П Стучка, 'Право-революция' ibid 48, 49. See also ИД Мацко, 'Между «Борьбой» и «Компромиссом»: к становлению раннесоветской доктрины международного права' в КС Коровин (ред), *Советский конституционализм (1918–1925 гг.): доктрины, институты и репрезентации* (Уральский государственный юридический университет 2019) 39.

[44] WE Rumble (ed), J Austin, *The Province of Jurisprudence Determined* (CUP 1995) Lecture VI; HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) Chapter X; R Dworkin, 'A New Philosophy for International Law' (2013) 41 Philosophy & Public Affairs 2; J Raz, 'The Future of State Sovereignty' in W Sadurski, M Sevel and K Walton (eds), *Legitimacy: The State and Beyond* (OUP 2019) 69.

[45] MW Janis, 'Jeremy Bentham and the Fashioning of "International Law"' (1984) 78 AJIL 405. Bentham's writings on international law will appear in due course in *The Collected Works of Jeremy Bentham* <https://uclpress.co.uk/book-series/the-collected-works-of-jeremy-bentham/>.

After the collapse of the Stučka-run Soviet Latvia,[46] Soviet Russia 'unreservedly recognise[d]' the statehood of Republic of Latvia in the 1920 Peace Treaty under 'the right of self-determination for all nations, even to the point of total separation from States with which they have been incorporated, and in view of the desire expressed by the Latvian people to possess an independent national existence'.[47] By the late 1930s, this sentiment had run its course.[48] Nevertheless, 'despite Latvia's occupation and annexation by the Soviet Union in circumstances involving the use of force and duress [in 1940], the underlying illegality and sparsity of its express recognition on the part of third States could not displace the continuity of statehood—a proposition generally accepted upon Latvia's factual recovery [in 1990–1991] of independence forcibly suppressed more than half a century earlier'.[49]

The story of how collective non-recognition buttressed the juridical bridge of Baltic statehood over the span of half a century until facts on the ground caught up is well known to international lawyers and I do not intend to revisit it here.[50] I rather want to consider the reaction of the post-World War Two international institutions, particularly those engaged in development of international law, to the absence of a State member of the previous universal organization due to annexation—indeed, itself the President of the League's Council during the discussion of annexation of Ethiopia in 1938.[51] I will consider in turn the Court and the Commission.

The ICJ during the Cold War dealt with many cases regarding fundamental questions of international law, including self-determination, territory, and use of force[52]—but none of these judgments or advisory

[46] J Smele, *The "Russian" Civil Wars, 1916-1026: Ten Years that Shook the World* (OUP 2016) 93–6.

[47] Treaty of Peace between Latvia and Russia (adopted 11 August 1920, entry into force 4 October 1920) 2 LNTS 195 Art 2. See B Simpson, 'Socialism and Self-Determination: Lenin, International Law, and National Liberation' in R Grosescu and N Richardson-Little (eds), *Socialism and International Law: The Cold War and Its Legacies* (OUP 2024) 45, and for context M Laserson, 'The Recognition of Latvia' (1943) 37 AJIL 233.

[48] Z Steiner, *The Triumph of the Dark: European International History 1933-1939* (OUP 2011) 934–39.

[49] *Obligations of States in respect of Climate Change* (Request for advisory opinion submitted by the General Assembly of the United Nations) CR 2024/44 (6 December 2024) 8 para 13 (Āboltiņa).

[50] See materials at ibid fns 17, 18, and generally I Ziemele (ed), *International Law from a Baltic Perspective* (Brill 2021); L Mälksoo, 'The Baltic States' in A van Aaken and others (eds), *The Oxford Handbook of International Law in Europe* (OUP 2023) 551.

[51] 'Fifth Meeting (Public)' (1938) 19 Official Journal of the League of Nations 333, 331–41; 'Sixth Meeting (Public)' ibid 342, 342–47.

[52] V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (Grotius Publications CUP 1996) Part III.

opinions addressed Latvia. Two disputes on more technical issues in the 1950s occasioned passing remarks. In the *Fisheries* case in 1951, where the permissibility of straight baselines was at issue, Norway invoked Latvian rules of neutrality in the 1930s as throwing light on the meaning of 'international waters', to which Sir Eric Beckett on behalf of the UK objected, among other things because 'Latvia [was] no longer independent'.[53]

In *Aerial Incident of 27 July 1955,* Israel and Bulgaria disputed the meaning of Article 36, paragraph 5, of the Statute of the ICJ, regarding the possibility of relying on declarations recognizing as compulsory the jurisdiction of the Permanent Court of International Justice, and also addressed the relevance of the 1935 declaration of Latvia.[54] Pierre Cot on behalf of Bulgaria observed, in my translation from the original French, that Latvia had sunk in the turmoil of war and disappeared as a State—and while Shabtai Rosenne on behalf of Israel disagreed regarding the implications for the ICJ Statute, he similarly noted that 'it would be fair to say that in 1945 there was room for doubt, to put it at its lowest, as to the position of … Latvia after the restoration of peace'.[55] The Court did not mention the argument at all. The Joint Dissenting Opinion of Judges Lauterpacht, Wellington Koo, and Percy Spender noted that, for the drafters of the Court's Statute, '[i]n all the circumstances, of which the Court must take judicial notice, the position of … Latvia created no problem'.[56] (The contemporary volumes of *Oppenheim* edited by Lauterpacht footnoted Baltic States to a paragraph praising non-recognition as 'a supplementary weapon of considerable legal and moral potency [in the absence of regularly functioning machinery for enforcing international law]').[57]

The ILC Special Rapporteurs were comfortable discussing Latvian practice from the 1920s–30s, including in their work on offences

[53] *Fisheries Case (UK v Norway)* ICJ Pleadings, Oral Arguments, Documents (Volume IV) 92 (Beckett), also 287 (Bourquin); ibid (Volume III) 363, 384 (Rejoinder submitted by Norway).

[54] *Eleventh Annual Report of the Permanent Court of International Justice (June 15th, 1934–June 15th, 1935), Series E, No. 11* 256, 264.

[55] *Ariel Incident of 27 July 1955 (Israel v Bulgaria)* ICJ Pleadings, Oral Arguments, Documents 396 (Cot), 478 (Rosenne), also 144–45 (Observations and Submissions of Israel on the Preliminary Objections of Bulgaria).

[56] *Aerial Incident of July 27th, 1955 (Israel v Bulgaria)* [1959] ICJ Rep 127, Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender 156, 184.

[57] H Lauterpacht, *Oppenheim's International Law: A Treatise* (Vol I: Peace, 7th edn, Longmans, Green and Co. 1947) 140 fn 1; H Lauterpacht, *Oppenheim's International Law: A Treatise* (Vol I: Peace, 8th edn, Longmans, Green and Co. 1955) 145 fn 3.

against the peace and security of mankind,[58] the most-favoured-nation clauses,[59] succession of States in respect of treaties[60] and matters other than treaties,[61] State responsibility,[62] and jurisdictional immunity of States and their property.[63] The 1920 Peace Treaty was mentioned several times, including in the text of the commentary to the 1981 draft articles on succession of States in respect of State property, archives and debt ('1981 draft articles') as an illustration of practice regarding succession to currency and libraries.[64]

[58] 'Second Report on a Draft Code of Offences Against the Peace and Security of Mankind by Mr. J. Spiropoulos, Special Rapporteur' in *Yearbook of the ILC 1951: Volume II* UN Doc A/CN.4/SER.A/1951/Add.1 44 para 144.

[59] 'First report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur' in *Yearbook of the ILC 1969: Volume II* UN Doc A/CN.4/SER.A/1969/Add.1 157 fn 84, para 48.

[60] 'Third report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur' *Yearbook of the ILC 1970: Volume II* UN Doc A/CN.4/SER.A/1970/Add.1 26 para (2) of the commentary to draft art 6; 'Fifth report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur' in *Yearbook of the ILC 1972: Volume II* UN Doc A/CN.4/SER.A/1972/Add.1 1 para (4) of the commentary to draft art 21.

[61] 'Fourth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—draft articles with commentaries on succession to public property' in *Yearbook of the ILC 1971: Volume II Part One* UN Doc A/CN.4/SER.A/1971/Add.1 (Part 1) 157 para (17) of the commentary to draft art 7; 'Sixth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—draft articles with commentaries on succession to public property' in *Yearbook of the ILC 1973: Volume II* UN Doc A/CN.4/SER.A/1973/Add.1 3 para (13) of the commentary to draft art 12; 'Eleventh report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur. Draft articles on succession in respect of State archives, with commentaries' in *Yearbook the ILC 1979: Volume II Part One* UN Doc A/CN.4/SER.A/1979/Add.1 (Part One) 67 para 132.

[62] 'Fourth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—The internationally wrongful act of the State, source of international responsibility (continued)' in *Yearbook of the ILC 1972: Volume II* UN Doc A/CN.4/SER.A/1972/Add.1 71 fns 179, 180; 'Seventh report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—The internationally wrongful act of the State, source of international responsibility (continued)' in *Yearbook of the ILC 1978: Volume II Part One* UN Doc A/CN.4/SER.A/1978/Add.1 (Part 1) 31 fn 156; 'Eighth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur. The internationally wrongful act of the State, source of international responsibility (continued)' in *Yearbook of the ILC 1979: Volume II Part One* UN Doc A/CN.4/SER.A/1979/Add.1 (Part 1) 3 fn 222.

[63] 'Seventh report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur' in *Yearbook of the ILC 1985: Volume II Part One* UN Doc A/CN.4/SER.A/1985/Add.1 (Part 1) 21 fns 113, 114.

[64] ILC, 'Draft articles on succession of States in respect of matters other than treaties' in *Yearbook of the ILC 1979: Volume II Part Two* UN Doc A/CN.4/SER.A/1979/Add.1 (Part 2) 15 para (26) of the commentary to draft art 10; ILC, 'Draft articles on succession of States in respect of State property, archives and debt' in *Yearbook of the ILC 1981: Volume II Part Two* UN Doc A/CN.4/SER.A/1981/Add.1 (Part 2) 20 para (26) of the commentary to draft art 13, para (19) of the commentary to draft art 25.

The Commission was more circumspect regarding the character and consequences of the events of 1940. The Special Rapporteur on the topic culminating in the 1981 draft articles spoke of 'uniting of the Soviet Union and the Baltic States', where the initial non-recognition 'was normalized later'[65]—a framing notable in light of their emphasis on the relevance of the 1920 Peace Treaty,[66] explicit comparison between the 1940 Soviet conduct and annexation of Ethiopia,[67] and overall strong focus on self-determination and other genuinely public elements of the field throughout the truly illustrious international law career.[68] Nor did the individual members of the Commission appear particularly interested in the issue. I have come to appreciate the summary records of the Commission as a form of art but in the first 2252 meetings, from the start of its work until Latvia became a member of the United Nations in 1991, the possible unlawfulness of the events of 1940 is recorded as raised once, in an exchange between Georges Scelle and Jesús María Yepes in the afternoon session of 4 June 1951.[69]

You may well think that this is not an unusual story. International law, probably more than other types of law, reflects society in all relevant respects—*ubi societas, ibi ius*—including the composition, interests, values, and necessities of the particular epoch.[70] International lawyers, doctrinal and those partial to theoretical and historical perspectives alike, are familiar with the inequalities and omissions of the international legal process, even when engaged through institutions or arguments purportedly universal in character.[71] Still, the discussion

[65] 'Eighth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur' in *Yearbook the ILC 1976: Volume II Part One* UN Doc A/CN.4/SER.A/1976/Add.1 (Part 1) 55 para (37) of the commentary to draft art 16.

[66] 'Seventh report on succession of States in respect of matters other than treaties by Mr. Mohammed Bedjaoui, Special Rapporteur - draft articles on succession to public property, with commentaries' in *Yearbook the ILC 1974: Volume II Part One* UN Doc A/CN.4/SER.A/1974/Add.1 (Part 1) 91 para (20) of the commentary to draft art 14.

[67] Ibid paras (17)–(36) of the commentary to draft art 1.

[68] See Bedjaoui's Sixth Report (n 61) para (7) of the commentary to draft art 27; M Bedjaoui, *Pour un nouvel ordre économique international. Nouveaux défis au droit international* (UNESCO 1979); *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Declaration of President Bedjaoui 268; M Bedjaoui, 'L'humanité en quête de paix et de développement: Cours général de droit international public (2004) 324 Hague Recueil 8, 325 Hague Recueil 9.

[69] *Yearbook of the ILC 1951 Volume I* UN Doc A/CN.4/SER.A/1951 111 paras 46, 47.

[70] A Pellet, 'L'adaptation du droit international aux besoins changeants de la société internationale' (2007) 329 Hague Recueil 9.

[71] A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005); M Hébié, *Souveraineté territoriale par traite* (PUF 2015); N Tzouvala, *Capitalism as Civilisation: A History of International Law* (CUP 2020); CL Lim, 'The Aims and Methods of Postcolonial International Law' (2024) 437 Hague Recueil 9. Cf Provisional summary record of the 3665th meeting (18 June 2024) UN Doc A/CN.4/SR.3665 5, 7.

does illustrate certain points relating to *change*. Everything in a legal order, by which I do mean everything regarding rules and institutions, can change, and possibly in a technically straightforward manner. Recall Stučka's briskly drafted 8 paragraphs and 646 words in the First Decree on Courts.[72] Everything can change even when rules at issue appear necessarily implicit, almost tautological, as the just-created ILC suggested regarding the State's right to exist and preserve its existence.[73] And the Court and Commission's work shows how universalism of rules and institutions is entirely compatible with dramatic changes regarding status and rights of participants.

It took only eight years for Latvia to go from chairing the Council of League of Nations to 'creat[ing] no problem' for the UN.[74] Within the latter setting, such choices as delineation of the right to self-determination in the 'defining moment in the consolidation of State practice on decolonization'[75] as *prima facie* applicable solely 'in respect of a territory which is geographically separate',[76] enabled its articulation and powerful implementation through the UN[77] with but the rare awkward shrug in the Baltic direction.[78] Political disagreement was underpinned by institutional consensus. Notably, when the UK representative spoke of Baltic States as 'the world's three newest colonies' forcibly incorporated into the Soviet Union, it was to show that rhetorically 'much better ammunition' would be deployed if Soviets continued criticizing British colonial policies, rather than to challenge the treatment of Baltic States in legal terms in this setting ('there is little which we in the [UN] can do to help these people under Soviet domination', the British Minister said).[79]

It may be that peculiarities in the juridical backdrop to my upbringing sketched above add a keener appreciation for fragility, of rules of

[72] See n 40; also H Mantel, *Wolf Hall* (Fourth Estate 2009).

[73] *Yearbook of the ILC 1949: Summary Records and Documents of the First Session Including the report of the Commission to the General Assembly* UN Doc A/CN.4/13 and Corr. 1-3 278 para 49.

[74] See text at n 51, 56.

[75] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 para 150.

[76] UNGA Res 1541(XV) 'Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter' (15 December 1960) UN Doc A/RES/1541(XV) principle IV.

[77] *Chagos* (n 75) Chapter IV.A.2, 3.

[78] See text at n 56; U Özsu, *Completing Humanity: The International Law of Decolonization, 1960–82* (CUP 2023) 91.

[79] General Assembly, 15th session: 925th plenary meeting, Monday, 28 November 1960, New York UN Doc A/PV.925 paras 19, 30 (Ormsby-Gore).

international law as well as interests protected by rules. That, in turn, leads to greater attentiveness to whether all relevant legal materials and perspectives are taken into account in the conversation, particularly when those affected or interested are not at the table—in short, be like Scelle and Yepes![80] Or the same insight on fragility could be acquired by an appropriately nuanced and inclusive application of the generalist approach, not requiring much beyond a careful read of judgments and provisional measures orders issued by the Court in the last few years. Or perhaps the better response is that the international law journey from the general to particular should always be accompanied and reinforced by the return ticket. I remain agnostic.

3. *The Development of International Law*

Section 2 mostly dealt with the broad brush of the international legal process in universal international institutions. But not everything happens in the UN, and the smaller print dispersed throughout the international legal order is equally important. The Baltic claim for continuity of statehood between 1940 and the early 1990s mostly fell through the institutional cracks at the universal level but was ultimately upheld through the minutiae of the decentralized process of collective non-recognition: law as both the grain of sand slowing the processes in unfavourable times[81] and the drop of oil smoothing more favourable developments.[82] I will now tackle the first half of the title and address certain factors calibrating the development of international law, identified in an inductive manner by reference to issues I have reflected upon in research and practice. I will consider in turn clarity of the legal claim about the development of international law (sub-section A) and its coherence with particular characteristics as well as broader systemic assumptions of existing international law (B).

[80] See text at n 69.

[81] U Bergmane, *Politics of Uncertainty: The United States, the Baltic Question, and the Collapse of the Soviet Union* (OUP 2023) 29–30. Cf HS Russell, 'The Helsinski Declaration: Brobdingnag or Lilliput?' (1976) 70 AJIL 242, 249–53; A Movchan, 'Problems of Boundaries and Security in the Helsinki Declaration' (1977) 154 Hague Recueil 1 Chapter III.

[82] Bergmane ibid Chapters 2–5. See generally VM Zubok, *Collapse: The Fall of the Soviet Union* (Yale University Press 2021) Part II.

A. *Clarity of the Legal Claim*

I will make five points about the clarity of claims. I will first introduce the concept, then address the vocabulary through which the claim is articulated and the ambiguities in the vocabulary itself, and conclude with a discussion of two distinctions within the rubric of claims: between rules and their application, and doctrine and normativity. In short, what sort of claim about international law is being made by the actor making the case for development?

First, it is important to be clear about what the legal claim is. The ILC working group on sea-level rise in relation to international law under the co-chairpersonship of Patrícia Galvão Teles, Juan José Ruda Santolaria, and Nilufer Oral addressed in 2024 the question of continuity of statehood in circumstances where the land surface became totally or partially submerged or rendered uninhabitable by rising sea levels.[83] The summary of the discussion notes the call by some members for:

> the need to carefully identify the precise rationale for … statements [by States during the debates in the Sixth Committee], without reading into them views that States had potentially consciously chosen not to put forward … those States that supported the continuity of statehood could have made claims of several kinds, including: (1) that there existed an established positive international law rule on the point; (2) that there could be flexibility in the application of a vague but still positive rule to address the point; (3) that there existed reasons why developing international law in a certain direction would go with the grain of the legal system, particularly when invoking situations by analogy; and (4) that they were taking no position on the existence or desirability of positive rules at all and were simply indicating a policy preference.[84]

The precise rationale of the claim may well mean lack of any legal claim at all: clarity stands here for accuracy with which the position is articulated, rather than its substantive concreteness. Conscious vagueness has value.[85] By way of example, the United States' comments to the ILC

[83] 'Sea-level rise in relation to international law: Additional paper to the second issues paper (2022) by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law' (19 February 2024) UN Doc A/CN.4/774 Part One.

[84] *Report of the International Law Commission: Seventy fifth session (29 April–31 May and 1 July–2 August 2024)* UN Doc A/79/10 para 352.

[85] T Endicott, 'The Value of Vagueness' in A Marmor and S Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 14; H Asgeirsson, *The Nature and Value of Vagueness in the Law* (Bloomsbury 2020). Cf Provisional summary record of the 3629th meeting (23 May 2023) UN Doc A/CN.4/SR.3629 3, 3.

refer to '[i]ts *policy* that sea-level rise driven by human-induced climate change *should not* cause any country to lose its statehood or its membership in the United Nations, its specialized agencies, or other international organizations'.[86] Conversely, Latvia made a concrete legal claim in *Obligations of States*: 'as a matter of positive international law, existing statehood is *not* affected by climate change-related sea-level rise because factual control over territory is not always a necessary criterion for the continued juridical existence of States'.[87]

Evaluation of clarity of the claim depends upon who makes it and where it is made. Institutional context matters: compare Lauterpacht the prophetic scholar, the scholar as judge, and the judge.[88] For the ILC, a position taken by the Commission itself is adopted, articulated, and evaluated differently from that of the Special Rapporteur, the Chair of a Drafting Committee, a Drafting Committee, a Working Group or a Study Group, a member introducing a possible new topic or a member.[89] And success may vary in different roles. I praised Scelle, an exceptional scholar in his own right,[90] as the rare ILC member to raise issues not benefiting those at the table[91]—but as the Special Rapporteur on arbitral procedure his draft remains the only ILC output that the Sixth Committee sent back because it went beyond what the majority of Governments would be prepared to accept.[92] Yet further granularity is provided by benchmarks against which the claim is assessed, such as codification, progressive development, recommended practice[93] as well as what the Commission called a discernible trend[94] (and some members a 'trend').[95] And the meaning of the benchmarks themselves may

[86] 'Information Provided by the United States of America on its Practice Concerning Sea-Level Rise in Relation to International Law' (2025) <https://legal.un.org/ilc/sessions/76/pdfs/english/slr_us.pdf> 2 (emphasis added).

[87] *Obligations of States in respect of Climate Change* (Request for advisory opinion submitted by the General Assembly of the United Nations) CR 2024/44 (6 December 2024) 8 para 10 (Āboltiņa) (emphasis in the original).

[88] See text at n 56–7; and CW Jenks, 'Hersch Lauterpacht - The Scholar as Prophet' (1960) 36 BYBIL 1; G Fitzmaurice, 'Hersch Lauterpacht – The Scholar as Judge' (1961) 37 BYBIL 1, (1962) 38 BYBIL 1, (1963) 39 BYBIL 133.

[89] *The Work of the ILC* (n 23) 69.

[90] 'The European Tradition in International Law: Georges Scelle' (1990) 1 EJIL 193–249.

[91] See text at n 69.

[92] *The Work of the ILC* (n 23) 143–44.

[93] ILC, 'Draft articles on diplomatic protection' in *Yearbook of the ILC 2006: Volume II Part Two* UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2) para 49 art 19.

[94] 2022 draft articles on immunity of State officials (n 14) para (9) of the commentary to draft art 7.

[95] Ibid para (12) of the commentary to draft art 7.

change, as recently shown by Christiane Ahlborn regarding 'progressive development',[96] originally understood not as the Commission's statement of *lex ferenda* customary international law but, to quote its Statute, as 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which law has not yet been sufficiently developed in the practice of States'.[97]

Secondly, the legal claim is articulated through the shared generalist vocabulary on sources and actors of international law. In the ILC I have inclined towards the methodologically more traditional end of the spectrum of views expressed, considering rules on actors and sources reflected in the Statute of the Court to be broadly satisfactory for contemporary discussions.[98] In my view, there is little legally relevant that would *not* be capable of explanation in these terms, provided that the vocabulary is conceived sufficiently flexibly to take into account the material reality of modern international relations, including what the ILC calls 'rules of the [international] organization[s]',[99] and the distinction made by the Special Rapporteur on non-legally binding agreements Matthias Forteau between the effects produced by certain materials themselves and the effects that other rules make these materials produce.[100]

Even the Commission's rare choice not to follow the text of the Statute of the Court, replacing 'civilized nations' with 'community of nations' in the 2023 draft conclusions on general principles of law—in my view a justified departure, even though I was not a member when that decision was made—is explained in the commentary as 'not intended to modify the scope or content of Article 38, paragraph 1 (c), of the Statute'.[101] And odd assertions in State practice and judicial decisions that do not

[96] C Ahlborn, 'The Meaning of Codification and Progressive Development in the International Law Commission's Mandate – Time for a Review?' (2024) 27 Max Planck Ybk United Nations L 45.

[97] 'Statute of the International Law Commission' (n 25) art 15.

[98] 'Statute of the International Court of Justice' (n 24) art 38, para (1). See the 3629th meeting (n 85) 6; the 3665th meeting (n 71) 7.

[99] ILC, 'Draft articles on responsibility of international organizations' in *Yearbook of the ILC 2011: Volume II Part Two* UN Doc A/CN.4/SER.A/2011/Add.1 (Part 2) para 87 art 2, sub-paragraph (b). Cf Provisional summary record of the 3615th meeting (27 April 2023) UN Doc A/CN.4/SR.3615 4, 6; Provisional summary record of the 3659th meeting (30 April 2024) UN Doc A/CN.4/SR.3629 11, 12.

[100] 'First report on non-legally binding international agreements, by Mathias Forteau, Special Rapporteur' (21 June 2024) UN Doc A/CN.4/772* para 137.

[101] ILC, 'Text of the draft articles on general principles of law adopted by the Commission on first reading' in *Report of the International Law Commission Seventy-fourth session (24 April–2 June and 3 July–4 August 2023)* UN Doc A/78/10 para 40 draft conclusion 2; 'Text of the draft conclusions and commentaries thereto' ibid para 41, paras (2), (3) of the commentary to draft conclusion 2.

fit traditional vocabulary may simply be manifestly bad law, to be challenged through the international legal process, including available institutions. For investment law that may occur through ICSID annulment committees.[102]

Thirdly (and somewhat conversely), not all dragons have been slain: hard questions remain regarding certain important aspects of traditional vocabulary. By way of example of lively discussions in this quinquennium of the Commission, I note the important second reading on general principles of law (led by Special Rapporteur Marcelo Vázquez-Bermúdez), which will also engage with general principles of law formed within the international legal system;[103] the topic on subsidiary means, where the Commission suggested the existence of subsidiary means beyond those enumerated in Article 38, paragraph 1(d), of the Statute;[104] and the definition of 'international organization', expressed in terms textually different from earlier outputs in the draft guidelines on settlement of disputes to which international organizations are parties (led by Special Rapporteur August Reinisch).[105] And answers to the hard questions will not persuade everyone. As an external observer, I find it not entirely easy to follow the Commission's reasoning on why subsequent practice is a relevant material of interpretation not only under Article 31, paragraph (3) (b), of the Vienna Convention on the Law of Treaties (VCLT), but also Article 32[106]—although I am encouraged by similar scepticism from the Court.[107]

[102] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentina,* ICSID Case no ARB/97/3, Decision on Annulment, 3 July 2002, paras 93–115; *Venezuela Holdings BV and Ors v Venezuela,* ICSID Case no ARB/07/27, Decision on Annulment, 9 March 2017 paras 137-187.

[103] 2023 draft conclusions (n 101) draft conclusions 3, sub-paragraph (b), 7; 'Fourth report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (18 February 2025) UN Doc A/CN.4/785 paras 68–90, 120–53.

[104] 2024 draft conclusions on subsidiary means (n 32) draft conclusion 2, sub-paragraph (c). See also 'Third report on subsidiary means for the determination of rules of international law by Charles Chernor Jalloh, Special Rapporteur' (29 January 2024) UN Doc A/CN.4/781, particularly Chapter V.

[105] Cf ILC, 'Text of the draft guidelines on settlement of disputes to which international organizations are parties provisionally adopted by the Commission at its seventy-fourth session' in *Report of the International Law Commission Seventy-fourth session (24 April–2 June and 3 July–4 August 2023)* UN Doc A/78/10 para 48 draft guideline 2, sub-paragraph (a); 2011 article (n 96) art 2, sub-paragraph (a). See also the 3615th meeting (n 99) 6–7.

[106] ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' in *Yearbook of the ILC 2018: Volume II Part Two* UN Doc A/CN.4/SER.A/2018/Add.1 (Part 2) para 51 conclusions 4–9, 11–13.

[107] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* [2020] ICJ Rep 300 para 69; also ibid Separate Opinion of President Yusuf 340 paras 29–32; ibid Declaration of Judge Gaja 371 para 10; ibid Dissenting Opinion of Judge Robinson 415 paras 30–7; ibid Dissenting Opinion of Judge *ad hoc* Kateka 442 para 18. But see ibid Dissenting Opinion of Judge Bhandari 390 para 51.

The fourth point relates to the distinction between determination of rules and their application.[108] Recall the question posed in the introduction whether the principle of prevention of significant harm to the environment, traditionally invoked in disputes between neighbouring States in fields such as transboundary water law,[109] also applied globally to anthropogenic greenhouse gas emissions.[110] The answer partly turns on whether territorial contiguity is characterized as an element of the content of the rule or a happenstance of its application, which dictates whether practice and *opinio juris* expressed in non-contiguous settings need to be demonstrated. The distinction between determination and application is, despite its importance, not straightforward, either in principle or practice—unsurprisingly, since the law of sources (and responsibility) takes an agnostic attitude regarding the existence and nature of institutions within and through which international law is applied. Even the VCLT does not enlighten since the term 'application' is used to indicate both opposability in certain legal circumstances and factual application.[111]

The distinction between determination and application does not clearly emerge from international dispute settlement practice either. Interventions under Article 63 of the ICJ Statute, textually limited to issues of construction and by implication excluding application,[112] do not reflect a uniform conception of the dividing line.[113] One Judge has noted critically that 'several Declarations make submissions that go beyond this limited scope' of 'construction of the provisions in question at the relevant stage of the proceedings'[114] (although the vagueness of

[108] A Gourgouinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 J Int'l Dispute Settlement 31.

[109] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 para 101; 'Report of the Implementation Committee on its fourteenth meeting' (24 May 2022) UN Doc ECE/MP.WAT/IC/2022/2 para 16, 'Annex: Replies of the Implementation Committee to questions on the Water Convention received from several Latin American countries'.

[110] See text at n 5–8.

[111] Cf Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331 art 2, paragraph 1(d) ('reservation'); ibid art 25 (provisional application); ibid art 30 (application of successive treaties); with ibid art 31, para 3(a)-(b) (subsequent practice and subsequent agreement in relation to interpretation).

[112] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order of 3 July 2024) [2024] ICJ Rep 729 para 45.

[113] See declarations of intervention and interventions in the pending cases concerning the Convention on the Prevention and Punishment of the Crime of Genocide, <https://www.icj-cij.org/pending-cases>.

[114] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* [2023] ICJ Rep 354, Declaration of Vice-President Gevorgian 381 paras 8–9; also ibid Dissenting Opinion of Judge Xue 391 paras 18–23.

the relevant primary obligations that call for assessment *in concreto* may make that boundary particularly porous).[115] Investment law faces this challenge in relation to fair and equitable treatment, where legitimate expectations, 'something of a *leitmotif* in the case-law on the fair and equitable treatment standard',[116] is not entirely easy to explain either in terms of principles of treaty interpretation or under general principles of law.[117] One response, suggested by the *Eurus Energy Holdings Corporation v Spain* ('*Eurus*') tribunal chaired by James Crawford, is to conceptualize legitimate expectations as 'essentially *consideranda* … relevant factors to be taken into account in the interpretation and application'.[118] In short, the blurriness of the dividing line complicates clear articulation of claims.

The fifth point relates to the distinction between doctrinal and normative claims. The commentary to the 2018 ILC conclusions on identification of customary international law notes dryly that 'writers … do not always distinguish (or distinguish clearly) between law as it is and the law as they would like it to be'.[119] The distinction is, however, not an easy one. Rhetorical styles differ between disciplines, schools of thought, and languages; doctrinal and normative claims are themselves richly varied; and sophisticated doctrine is sensitive to normative debates, just as effective normative critique will competently engage doctrine. Nevertheless, a transparent pursuit of the distinction is important, in scholarship as well as in the ILC. Recall the question posed in the introduction, whether immunity *ratione materiae* applies in respect of crimes under international law[120] (to be considered by the Commission in the second reading of the 2022 draft articles on immunity of State officials).[121] Those following the immunities debate will know its subtlety and nuance, but in my view the disagreement partly turns on whether certain broader systemic considerations are characterized as relevant

[115] *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 para 430.

[116] *Eurus Energy Holdings Corporation v Spain,* ICSID Case no ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021 para 316.

[117] See J Hepburn, 'The Legal Justification for the Doctrine of Legitimate Expectations in International Investment Law' (2025) 36 EJIL 43.

[118] *Eurus* (n 116) para 317.

[119] ILC, 'Draft conclusions on identification of customary international law' in *Yearbook of the ILC 2018: Volume II Part Two* UN Doc A/CN.4/SER.A/2018/Add.1 (Part 2) para 66 para (3) of the commentary to conclusion 14.

[120] Text at n 13–18.

[121] 'Second report on immunity of State officials from foreign criminal jurisdiction by Claudio Grossman Guiloff, Special Rapporteur' (29 January 2025) UN Doc A/CN.4/780 Chapter III.A.

for doctrinal determination of rules or solely for normative change or critique.[122]

I am sympathetic to calls for the ILC to communicate to its audiences whether particular claims are about codification or progressive development, even if both elements may be intertwined. The general commentary to the 2022 draft articles on immunity of State officials promises 'to provid[e] States with enough information in this regard and ensur[e] the transparency that must govern the work of the Commission'.[123] I agree.[124] I am less persuaded, however, by the view sometimes expressed that explicit language coding is the only way to communicate the distinction, which should also be identifiable by the type of reasoning employed.[125] In sum, clarity of the claim is important *and* may be articulated in various ways.

B. *Coherence with International Law*

I now turn to the coherence of claims made with international law, with an eye to key characteristics of the particular field, treatment of similar issues, and broader systemic assumptions. I will again make five points. I will consider what it means for claims to go with the grain of international law, address pertinent characteristics of the international legal order with which the claims cohere and the repeat character of States as participants therein, and introduce relative shallowness of systemic assumptions and the institutional variety. In short, how does the claim about development fit with(in) international law?

Recall the typology of claims, including 'reasons why developing international law in a certain direction would go with the grain of the legal system, particularly when invoking situations by analogy', and Latvia's submission to the ICJ that 'existing statehood is *not* affected by climate change-related sea-level rise'.[126] Latvia's Agent went on to say that Latvia's conviction about continuing statehood in these circumstances was reinforced by the legal principle underpinning Latvia's experience of continuing statehood since creation in 1918.[127] This is

[122] Cf 2022 draft articles on immunity of State officials (n 14) paras (10), (12) of the commentary to draft art 7.

[123] Ibid para (12) of the general commentary.

[124] Provisional summary record of the 3677th meeting (4 July 2024) UN Doc A/CN.4/SR.3677 3, 3.

[125] *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)* [2022] ICJ Rep 614 para 111.

[126] Text at n 84, 87.

[127] *Obligations of States in respect of Climate Change* (Request for advisory opinion submitted by the General Assembly of the United Nations) CR 2024/44 (6 December 2024) 8 para 12 (Āboltiņa).

an example of an argument that goes with the grain of international law by showing that a particular claim is consistent with how law deals with relevantly comparable questions. Recall also the suggestion by the *Eurus* tribunal that legitimate expectations were best conceptualized as a circumstance of application of fair and equitable treatment.[128] Such a claim goes with the grain of how rules drafted by reference to equity are approached in other fields, such as equitable and reasonable utilization in transboundary water law[129] or delimitation of the continental shelf to achieve an equitable solution in law of the sea.[130]

If claims may go with the grain of international law they sometimes may also go against it.[131] Comparison may reveal that claims are *not* similar and therefore should be dealt with differently. That is what the Commission did in its second reading on immunity of State officials by merging draft articles 5 and 6 so as 'not to have symmetrical structures for Parts Two and Three [and] to emphasize the differences between immunity *ratione personae* and immunity *ratione materiae*.'[132] And there may be reasonable disagreement on *what* goes with the grain. In the same topic, I argued in the plenary for a definition of an 'act performed in an official capacity' in draft article 2, sub-paragraph (b), that would align law of immunity with rules on attribution in articles 4 to 7 of the 2001 articles.[133] The Drafting Committee took a different approach.[134]

Secondly, the coherence has to take into account the nature of international law – certainly unlike domestic law, but the decentralisation of international society makes it less easily capable of succinct description in positive terms. I find helpful the concept of tension, between concepts that are distinct, even opposite, *and* simultaneously express an important truth about the nature of international law.[135] The relevant tensions between general and special, universal and regional, and

[128] Text at n 116, 118.

[129] *Silala* (n 125) para 95.

[130] *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* ITLOS Judgment of 28 April 2023 paras 90, 95–98, 243–47.

[131] V Lowe, 'The Limits of the Law' (2016) 379 Hague Recueil 9, 28; JC Scott, *Against the Grain* (Yale University Press 2017).

[132] Statement of the Chairperson of the Drafting Committee, Ms. Phoebe Okowa, 'Immunity of State Officials from Foreign Criminal Jurisdiction' (30 July 2024) <https://legal.un.org/ilc/documentation/english/statements/2024_dc_chair_statement_iso.pdf> 12.

[133] The 3677th meeting (n 124) 5–6.

[134] Statement of Chairperson Okowa (n 132) 8.

[135] M Paparinskis, 'The Vocabulary and Disputes of Public International Law: a Reflection on Tensions' (2024) 13 Cambridge Int'l L J 193.

formal and informal may combine in different ways, as reflected in arguments presented to the Court in *Obligations of States.*[136] And I referred to the Commission's statement in its work on subsidiary means that '[i]n assessing the representativeness of teachings, due regard should also be had to, inter alia, gender and linguistic diversity', explained in the commentary as non-exhaustive, and 'in addition to racial diversity, may include ethnic, cultural and religious diversity, as well as sexual orientation'.[137] A sound claim will engage and cohere with the relevant perspectives to fit international law.

Thirdly, one important assumption that claims have to cohere with is that States and at least some international organizations participate in the international legal process as repeat players. Formalized dispute settlement framing may obscure the legal interest of participants beyond winning the case,[138] whether it relates to dispute settlement in the same or other international courts and tribunals, or international relations outside the courtroom. Consistency is important in international law, both in the technical sense of calibrating the weight of the legal claim,[139] and for the avoidance of embarrassment of (being caught) flip-flopping. By way of example, participants in *Obligations of States* may well have reviewed submissions for consistency with positions taken in a variety of settings, including before regional and universal human rights bodies, in the climate change treaty regime, and pursuant to the principle of sincere cooperation, as applicable. And sometimes the temporal scope of consistency is very wide indeed. When Latvia recognized the jurisdiction of the ICJ as compulsory in 2019, it noted, *pace* Lauterpacht,[140] that '[t]his declaration replaces the declaration made on behalf of the Latvian Government to the Statute of the Permanent Court of International Justice [in 1935]'.[141]

The fourth (and somewhat contrarian) observation is that systemic assumptions that claims need to cohere with may be *shallow*, in the

[136] See text at n 3, 5–8.

[137] 2024 draft conclusions on subsidiary means (n 32) draft conclusion 6, paras (12), (13) of the commentary to draft conclusion 6.

[138] V Lowe, 'The Function of Litigation in International Society' (2012) 61 ICLQ 209, 213–14.

[139] 2018 conclusions on subsequent agreements and subsequent practice (n 106) para (12) of the commentary to conclusion 9; 2018 conclusions on identification of customary international law (n 119) conclusion 8, para 1.

[140] See text at n 56.

[141] Declaration of Latvia recognizing as compulsory the jurisdiction of the International Court of Justice under Art 36, para 2, of the Statute of the Court (24 September 2019) <https://www.icj-cij.org/declarations/lv> para 3.

sense that a limited number of events significantly change how the broader balance is struck. Judicial decisions provide the clearest examples—think how differently the balance between bilateral and multilateral interests in the ICJ would be perceived if Judge Xue's approach to *erga omnes* claims had been adopted by the Court in just two judgments—but the point applies beyond the courtroom.[142] For the last twenty years, one (standard) story about the ILC contrasted the golden era of the Cold War when its draft articles led to the great codification conventions with the lukewarm reception by the Sixth Committee more recently. However, in December 2024 the UNGA decided 'to elaborate and conclude a legally binding instrument on the protection of persons in the event of disasters'[143] and 'convene the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity',[144] both on the basis of ILC draft articles (and the latter the first diplomatic conference on that basis since the establishment of the International Criminal Court).[145] I am not arguing for a mirror image of the standard ILC story—nuance is needed in evaluating such an institution[146]—but suggesting a degree of caution in identifying systemic balance when the relevant assumptions are shallow, as they often will be for international law.

The fifth point relates to institutional variety of international law and its effects on how coherence is tested. A saying in certain circles many moons ago went that a generalist international lawyer knew something about everything and everything about something. I agree, and would only add that they should preferably know everything about at least two different kinds of 'something', not to become too accustomed to

[142] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections) [2022] ICJ Rep 477, Dissenting Opinion of Judge Xue 520. Cf *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422 para 69; *Genocide (The Gambia v Myanmar)* ibid paras 107–112.

[143] UNGA Res 79/128 'Protection of persons in the event of disasters' (12 December 2024) UN Doc A/RES/79/128 para 4.

[144] UNGA Res 79/122 'United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity' (12 December 2024) UN Doc A/RES/79/122 para 4.

[145] UNGA Res 51/207 'Establishment of an international criminal court' (17 December 1996) UN Doc A/RES/51/207 para 5; UNGA Res 52/160, 'Establishment of an international criminal court' (28 January 1998) UN Doc A/RES/52/160 para 1.

[146] O Sender, 'Two Views of the International Law Commission: A Conversation with Professor Alain Pellet and Sir Michael Wood' (2024) 27 Max Planck Ybk Int'l L 16; A Pronto, 'The Reception by the Sixth Committee of the Output of the International Law Commission' (2024) 27 Max Planck Ybk Int'l L 322.

institutional peculiarities of a single specialist field—which for me are investment and transboundary water law, very different indeed in institutional terms. To give a one sentence summary of each, investment law is a lightly institutionalized field where key issues are framed by and by reference to *ad hoc* investor-State international arbitration decisions, with reactions by States mostly dispersed through variously limited means of review mechanisms, engagement with the underlying instruments, and compartmentalized multilateral discussions. Water law is State-driven, often through standing institutional bodies or meetings of parties to instruments, with reasonable disagreement about the value of formalized dispute settlement. The development of international law will surely take different routes through and around the institutions, both in specialist fields and universal settings.[147] In short, procedure and methods matter.[148]

4. *The Case for Revisiting Compensation*

I now turn to the second half of my title and will demonstrate how the parameters of clarity and coherence in the development of international law apply to one particular case study. The merits of the proposal to revisit 'compensation for the damage caused by internationally wrongful acts' as a topic within the ILC are set out in the syllabus attached to the 2024 annual report,[149] and the reader should form their views on reactions thereto,[150] including in the Sixth Committee.[151] I will suggest

[147] 'Report of the 2022 United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development' (Lisbon, 27 June–1 July 2022) UN Doc A/CONF.230/2022/14 para 235.

[148] *The Work of the ILC* (n 23) Part II; 2024 Annual Report (n 84) paras 426–30. For a particularly well-informed view, Pronto (n 146).

[149] Paparinskis 'Compensation' (n 21).

[150] Asian-African Legal Consultative Organization, 'Verbatim Record of Discussions: Sixty-Second Annual Session' (9–13 September 2024) AALCO/62/BANGKOK/2024/VR 130–131, 142, 151; CAHDI, 'Report of the 67th meeting of the CAHDI' (17 March 2025) CAHDI (2024) 28 paras 111-113; UNCITRAL, 'Note by the Secretariat: Possible reform of investor-State dispute settlement (ISDS): Draft guidelines on the calculation of damages and compensation in ISDS' (** June 2025) UN Doc A/CN.9/WG.III/WP.255 Annex paras 4, 28, 37, Section F paras 14, 26.

[151] 'Report of the International Law Commission on the work of its seventy-fifth session (2024): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-ninth session, prepared by the Secretariat' (3 February 2025) UN Doc A/CN.4/778 para 127.

five questions for evaluating the appropriateness of development of international law regarding this topic, addressing in turn whether it raises important issues of law and policy, the rationale for and parameters of its revisitation, the approach to be taken, and the ultimate institutional fit.

First, compensation, in my view, does raise important issues of international law and policy. In contemporary international dispute settlement, '[c]ompensation is addressed in a rich body of reasoned decisions by inter-State courts and tribunals as well as bodies considering claims brought by individuals and other non-State entities'.[152] By way of example of substantively and institutionally varied developments since the publication of the syllabus, the UNGA called in September 2024 for the creation of an international register of damage after an ICJ advisory opinion.[153] In December, reparation in general and compensation in particular were addressed in *Obligations of States* oral proceedings, with some participants calling for judicial elaboration of general rules applicable to environmental damage and plurality of injured and responsible actors, in order to assist in discussions on climate change in a variety of settings.[154] And in January 2025 an annulment committee considering the challenge of the largest ever ICSID arbitral award noted that '[s]triking the balance between the best incentive to induce the State's compliance with the Treaty and crossing the line of impermissible punishment for exercising sovereignty over natural resources with the risk of the investor's overcompensation is the challenge of any reparation model'.[155] The practical importance of the law of compensation across various fields and institutions gives particular urgency to the inquiry of whether and how compensatory '[r]emedies serve social as well as individual needs'.[156]

[152] Paparinskis 'Compensation' (n 21) para 4.

[153] UNGA Res A/RES/ES-10/24 'Advisory opinion of the International Court of Justice on the legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory, including East Jerusalem, and from the illegality of Israel's continued presence in the Occupied Palestinian Territory' (19 September 2024) UN Doc A/RES/ES-10/24 paras 10, 1; *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* ICJ Advisory Opinion of 19 July 2024 paras 269-271.

[154] *Obligations of States in respect of Climate Change* (Request for advisory opinion submitted by the General Assembly of the United Nations) CR 2024/44 (6 December 2024) 11 para 34 (Paparinskis).

[155] *ConocoPhillips Petrozuata BV and Ors v Venezuela,* ICSID Case no ARB/07/30, Decision on Annulment, 22 January 2025 para 678.

[156] D Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833, 845; also S Besson, 'Theorizing International Responsibility Law, an Introduction' in S Besson (ed), *Theories of International Responsibility Law* (CUP 2022) 1, 11–12.

Secondly, engagement with the law of compensation has to take into account the way how the topic is currently treated in international law—hence '*re*-visiting' as the operative verb. The starting point is that '[t]he Commission addressed rules on compensation in its [2001 articles], recognized to be reflective of customary international law', 'expressed in article 36 [on compensation] and other provisions related to reparation more generally', in terms 'prudent in light of the available materials, and ... to be read alongside its very thorough commentary'.[157] Since these documents largely set the contemporary vocabulary, it would be sensible to 'follow [the] conceptual framework and analytical distinctions' of 'the Commission's work on responsibility', including the distinction between primary and secondary rules as well as the general character of the new legal relations that arise from the commission by a State of an internationally wrongful act.[158] In short, development of international law of compensation should go with the grain of current framework and distinctions.

Thirdly, development would also go beyond the Commission's existing work, variously providing greater granularity to recognized rules, addressing relevant issues beyond the scope of earlier outputs, and engaging with new practices of application. The ILC could 'address compensation in terms that are general in scope and also sufficiently detailed in substance to reflect its importance in the law of responsibility',[159] similarly to how the 2006 ILC articles on diplomatic protection elaborated rules reflected in a single provision of the 2001 articles.[160] The ILC could also directly engage with the plentiful decisions on content of responsibility in the fields of investment and human rights law[161] that, formally speaking, fall outside the scope of the 2001 articles.[162] The syllabus notes in this respect the question of 'the extent, if any, that the applicable secondary rules may be affected by the character of the entity invoking responsibility, particularly (certain) non-State entities'.[163]

[157] Paparinskis 'Compensation' (n 21) para 3.
[158] Ibid para 7, generally Chapter III.
[159] Ibid para 5.
[160] 2006 ILC articles (n 93) para (2) of the general commentary.
[161] United Nations Legislative Series, *Materials on the Responsibility of States for Internationally Wrongful Acts* (2nd edn, UN 2023) 305–445; C Grossman Guiloff, 'Contributions of Latin America to International Law: Reparations for Human Rights Violations' in A Chethman, A Huneeus and S Puig (eds), *Latin American International Law in the Twenty-First Century* (OUP 2025) 387.
[162] 2001 articles on State responsibility (n 10) art 33, para 2.
[163] Paparinskis 'Compensation' (n 21) para 14. See also P-M Dupuy, 'Concluding Remarks: ARSIWA – A Reference Text Partially Victim of Its Own Success?' (2022) 37 ICSID Review – Foreign Investment L J 601, 608–15.

Finally, the 'diverse authorities that constitute the best examples in the particular field of international law' since the adoption of the 2001 articles could be canvassed for the practices of application.[164]

Fourthly, the syllabus tentatively suggests how the topic could be approached, either as draft principles (the preferred form) or draft articles.[165] The focus would primarily be on article 36 of the 2001 articles, also addressing other issues necessarily implicated by identification of rules on compensation and commonly involved with their application in practice, such as article 31 (reparation), 38 (interest), and 39 (contribution to the injury).[166] Work on the topic *would* address compensation for the breach of all primary rules, including situations where the right to compensation accrues directly to any person or entity other than a State or where compensation arises under the law of responsibility of international organizations—although not compensation by a person convicted by an international court or tribunal such as the International Criminal Court.[167] At the same time, forms of reparation other than compensation, or issues in Parts One and Three of the 2001 articles, would *not* be addressed.[168] In other words, the scope of the topic would be drawn around content of responsibility, leaving outside the basis or implementation of responsibility, and within the rubric of content only compensation and other rules it necessarily implicates would be addressed.

The final question relates to the overall temporal and institutional fit. Let me repeat the highest possible praise for how the Commission approached reparation and compensation in the 2001 articles, guided by the stellar Special Rapporteur James Crawford[169] (and building on the work of the penultimate Special Rapporteur Gaetano Arangio-Ruiz,[170] whose contribution is, in my view, significantly underappreciated).[171] But reparation was not a central preoccupation of scholarship in the

[164] Paparinskis ibid para 8.
[165] Ibid para 26.
[166] Ibid para 10.
[167] Ibid paras 11–13.
[168] Ibid para 10.
[169] J Crawford, *State Responsibility: The General Part* (CUP 2013); J Crawford and F Baetens, 'The ILC Articles on State Responsibility: More Than a 'Plank in a Shipwreck'?' (2022) 37 ICSID Review – Foreign Investment L J 13.
[170] Paparinskis 'Compensation' (n 21) para 22.
[171] See G Palmisano (a cura di), *Gaetano Arangio-Ruiz. La lezione di una vita: cos'è e com'è il diritto internazionale* (Roma Tre Press 2023); P Benvenuti (a cura di), *L'accertamento delle gravi violazioni del diritto internazionale. Dalle proposte di Gaetano Arangio-Ruiz alla prassi contemporanea* (Roma Tre Press 2025).

final phases of the project[172] (albeit with some influential exceptions),[173] and the available practice was sparse: '[w]hen the Commission turned to compensation in the 1990s, it could therefore draw upon only "relatively few recent reasoned awards dealing with the assessment of material damage as between State and State"'.[174] By way of example, the UK observed in 1993 that '[m]any of the authorities culled … were somewhat old, and there was a legitimate question of how far the guidance they provided remained valid for the current times'.[175]

I noted above the change of the legal landscape in the last 25 years in quantitative terms, by burgeoning State and institutional practice and decisions of international courts and tribunals[176]—but of greater importance is the qualitative shift in the underlying balance of interests. Throughout the last century, the law of responsibility and particularly reparation were viewed as dividing the world into claimant and respondent States,[177] with consensus hard to identify because 'law on the subject has been formed in a period characterized by an intense conflict of systems and interests'.[178] In my view, the contemporary dynamic is different, due to the greater diffusion of interests by States and other participants throughout the specialised fields and institutions, which blur the likely procedural position in future disputes and thus makes the development of balanced secondary rules a more attractive proposition.[179]

[172] 'Symposium: Counter-Measures and Dispute Settlement: The Current Debate within the ILC' (1994) 5 EJIL 20–115; (1999) 10 EJIL 339–460; *The International Law Commission Fifty Years After* (n 26) Parts II, V; (2002) 13 EJIL 1053–255; 'Symposium: The ILC's State Responsibility Articles' (2002) 96 AJIL 773–890.

[173] C Gray, 'The Choice between Restitution and Compensation' (1999) 10 EJIL 413; 'Presentation by Mr. Vaughan Lowe' in *The International Law Commission Fifty Years After* (n 26) 122, 130; Shelton (n 155).

[174] Paparinskis 'Compensation' (n 21) para 2.

[175] Summary Records of the 24th Meeting of the Sixth Committee (2 November 1993) UN Doc A/C.6/48/SR.24 para 45.

[176] See text at n 152–56.

[177] M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 37; BS Chimni, 'The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective' (2020) 31 EJIL 1211, 1213–219.

[178] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3 para 89.

[179] 'Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' in *Yearbook of the ILC 1989: Volume II Part One* UN Doc A/CN.4/SER.A/1989/Add.1 (Part 1) 1 para 33.

I will leave the reader with the explanation from the syllabus for that difference, and why the Commission in the second half of the 2020s may well be the right fit for development of the law of compensation:

> "All States may face claims regarding compensation and may invoke responsibility of other States themselves or have nationals that directly invoke it. … States would seem to have a shared interest in greater clarity regarding the content of applicable rules and the better instances of their application, to further peaceful settlement of international disputes before international courts and tribunals, as well as by other means in less formalized settings where compensation claims – or defences against such claims – are considered, prepared and settled. … The richness and representativeness of the body of decisions, particularly since the adoption of the [2001 articles] may permit, after careful assessment, identification of genuinely universal rules on compensation that reflect the perspectives from the various legal systems and regions of the world. The key recent decisions have been rendered in intra-African and intra-Latin American disputes (and in other cases Western European and other States have often been respondents), and recent rules have been strongly shaped by the contributions of African and American regional institutions. The leading teachings on compensation and reparation also reflect a high degree of gender diversity. … The Commission's work on international responsibility is at the core of these developments, and it is the Commission, taking into account the important contributions by courts and tribunals as well as by specialised organizations, that would be best placed to address the topic at the general and universal level."[180]

5. *Conclusion*

The development of international law is a large topic, unsurprisingly for the breadth and depth of the discipline and the complex and troubled story of its making. The peculiarly decentralized character of international society translates into a legal order simultaneously fragile and robust, shaped by voices and silences within and beyond universal institutions, as illustrated by the Eastern approaches case study in Section 2. While specialist fields and institutions are important, certain parameters are generally relevant for calibrating the development of rules within such an order, and are set out in Section 3 and illustrated by their application to the particular topic of compensation in Section 4. The

[180] Paparinskis 'Compensation' (n 21) paras 17, 18.

argument is not exhaustive. The paper may have said more about multilingualism, bilateralism and multilateralism, vagueness and concreteness, formal and informal means of dispute settlement, and subsidiary means and judicial dialogue, but the line has to be drawn somewhere. More positively, the infuriating incompleteness of any generalist inquiry into the discipline may also be viewed as its relevant characteristic. International law never stops.[181]

I conclude with a broader point about law and the interests it protects. Choices matter. Law will not do the work for its beneficiaries, even when rules are long-standing and routinely repeated, have *jus cogens* character or are intrinsic to the legal order, if they are challenged and not defended. The international legal order is currently structured around the interaction of close-to-two hundred sovereign, equal, and independent polities as well as international organizations. But it can also be expressed in other ways, and indeed for most of the existence has (been argued to have) been[182]—which is different from saying that international law and lawyers would be unimportant in a differently organized world.[183] I note a cautionary question from a decade ago of whether legal rules may be developing on spheres of influence that would significantly qualify the principles of the sovereign equality and independence of States.[184] The answer, and with it the viability and effectiveness of public international law and its current foundations, depend upon the long-term conviction and conduct of its key actors, particularly States. That remains to be seen.

[181] On 30 May 2025, the ILC decided to include the topic 'Compensation for the damage caused by internationally wrongful acts' in its programme of work and appointed Mārtiņš Paparinskis as Special Rapporteur for the topic, 2025 Annual Report (n *) para 437.

[182] ФФ Мартенс, Современное международное право цивилизованных народов (Том I-II, тип. М-ва путей сообщения (А.Бенке) 1882); J Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (2 vols, William Blackwood and Sons 1883); J Rawls, *The Law of Peoples* (Harvard University Press 1999).

[183] AJP Taylor, *The Struggle for Mastery in Europe 1848-1918* (OUP 1954); G Mattingly, *Renaissance Diplomacy* (Penguin Books 1973); D Kennedy, 'International Law and the Nineteenth Century: A History of an Illusion' (1996) 65 Nordic J Int'l L 385; L Mälksoo, 'The Science of International Law and the Concept of Politics: The Arguments and Lives of the International Law Professors at the University of Dorpat/Iur'ev/Tartu 1855–1985' (2005) 76 BYBIL 383; M Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (CUP 2021).

[184] Lowe, 'The Limits of the Law' (n 131) 32–3.