

Less-than-full Reparation in International Law

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Abstract: State responsible for an internationally wrongful act is generally under an obligation to make full reparation for the injury caused by this act. This article argues however that there are general limitations to the obligation to make full reparation. It reviews the practice of States in endorsing less-than-full reparation or even actively campaigning against full reparation in certain circumstances. It also notes the importance of the recognition of less-than-full reparation by judges and scholars in order, in particular, to facilitate the peaceful settlement of international disputes. Lastly, it identifies three alternative criteria explaining less-than-full reparation.

Key words: reparation, international law, full reparation, less-than-full reparation, adequate reparation

1. Introduction

That the breach of an international obligation entails remedial obligations towards an injured State is a well-recognized principle in existing international law.¹ Arguably, it is also an indispensable feature of any legal system. Yet, the exact content of remedial obligations remains a matter of discussion. The frequent reference to an obligation to make “just,” “adequate” or “effective” reparation is unhelpful as long as criteria for justness, adequateness or effectiveness remain undefined.² International law scholars and practitioners have been sensitive to the risk that such indeterminacy could engender an interminable haggling between States. This could hinder the advancement of the rule of law in international relations. Therefore, international lawyers have generally preferred a more specific qualification of a remedial obligation as an obligation to make “full” reparation – a qualification which, in most of the cases that such scholars consider, appeared to them as “just and adequate”.

However, this article contends that the unconditional affirmation of the obligation of a responsible State to make full reparation is inconsistent with the general practice of States accepted as law. States have consistently agreed to less-than-full reparation under specific circumstances. Without contesting that a “just,” “adequate”, or “effective” reparation generally requires “full” reparation, I identify particular circumstances where limitations are well-established – and should be acknowledged by the doctrine.

It is admittedly difficult to determine what would constitute “full” reparations in concrete cases. Acknowledging this difficulty led some authors to argue that notions such as full reparation ‘do not facilitate decision making by tribunals or claims practice of parties because they are

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¹ See, J Barbeyrac (trs), *Grotius: The Rights of War and Peace*, 3rd edn (Innys et a, London, 1738) 370; J Crawford, *State Responsibility: The General Part* (CUP, Cambridge, 2013) 3.

² See, for instance, *Kuwait v Aminoil* (1982) 21 ILM 976 [143].

too general to provide practical guidance.’³ “Full” reparation certainly has a different significance with regard to each mode of reparation; while it may be relatively straightforward with regard to restitution, it raises difficult questions of valuation – arguably even more thorny on the international plane than on the domestic plane – and even more abstruse issues with regard to satisfaction. In a general – and somewhat philosophical – sense, one may actually doubt that reparations could ever be full when the injury affects more than fungible things. Loss of lives, environmental damages, or even loss of unique or irreplaceable properties cannot genuinely be made up for.⁴ Accordingly, reparations can arguably not aim to anything more than minimize the damages caused,⁵ rather than, as elusively suggested by the oft-quoted judgment of the Permanent Court of International Justice (the PCIJ) in the *Factory at Chorzów* case: ‘wipe out all the consequences of the illegal act,’⁶ or, as stated by an umpire in the *Lusitania* cases, make the injured party “whole.”⁷

“Full” reparation suggests something more specific than “just,” “adequate”, or “effective” reparation: it implies that the scope of reparation should be determined exclusively on the basis of the injury.⁸ “Full” reparation consequently excludes considerations that may otherwise be relevant as part of an assessment of a “just,” “adequate” or even “effective” reparation, such as considerations for the financial capacities of the responsible State, the financial needs of the injured party, or the objective need to sanction the breach of an international obligation. “Less-than-full” reparations refer to reparations that are reduced on the basis of considerations that are not exclusively related to the magnitude of the injury.⁹ This article shows that less-than-full reparations have consistently been granted under particular circumstances as a form of “just,” “adequate” or “effective” reparation and it determines the conditions for the limitation to the obligation to make full reparation.

Such an argument implies a critique of the *Articles on the Responsibility of States for Internationally Wrongful Acts* adopted by the International Law Commission (ILC) in its second reading in 2001.¹⁰ Article 31 of these Articles on State Responsibility asserts that a responsible State is under the obligation to ‘make full reparation for the injury caused by the internationally wrongful act.’ Specific provisions in the Articles on State Responsibility exclude excessive forms of restitution¹¹ and satisfaction,¹² but they do not limit the obligation

³ D Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 *American J Intl L* (2002) 833, 845.

⁴ See, e.g., BE Allen, *The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons from Arbitral Practitioners*, in ME Schneider and J Knoll (eds) *Performance as a Remedy: Non-Monetary Relief in International Arbitration* (Swiss Arbitration Association and Juris, Huntington, New York, 2011) 281, 299; Summary Records of the 2399th meeting, 1 *Yrbk ILC* (1995) [24].

⁵ See, S Sharpe, *The Idea of Reparation*, in, G Johnstone and DW van Nees (eds) *Handbook of Restorative Justice* (Willan, Cullompton, 2007) 26.

⁶ *Factory at Chorzów*, Merits, Judgment of 13 September 1928, PCIJ Ser A No 17, (1927) 47.

⁷ Opinion in the *Lusitania Cases*, 1 November 1923, 7 *RIAA* 32, 39: ‘The remedy should be commensurate with the loss, so that the injured party may be made whole.’

⁸ See, for instance, Crawford, *supra* note 1, at 482, noting that ‘the quantum of compensation payable is limited by the requirement of causation’ (and by no other consideration).

⁹ Arguments for extending reparations through “punitive” reparations have also been made, but they are not as solidly recognized in States’ practice. See, *infra* note, at 169 and accompanying text.

¹⁰ 2(2) *Yrbk ILC* (2001) 26.

¹¹ According to *Ibid*, Art 35(2), restitution is excluded if it would ‘involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.’

¹² According to *Ibid*, Art 37(3), satisfaction is excluded if it would ‘be out of proportion to the injury’ or if it would ‘take a form humiliating to the responsible State.’

of a State to make full reparation, in particular through compensation. However, the clear and unqualified language of Article 31 masks a long debate and an unsettled disagreement among the members of the ILC. In 1959 already, when the ILC largely focused on State responsibility in the context of the takings of foreign property, Special Rapporteur García Amador recognized ‘cases and situations in which compensation which does not cover the full value of the expropriated property must be regarded as valid and effective.’¹³ At the occasion of a more structured debate on secondary obligations in the mid-1990s, some ILC members contended that ‘insistence on full reparation could be fraught with consequences for developing nations,’¹⁴ especially those with limited financial capacities. Another concern was that “full” reparation may give support to unreasonable claims that would imperil the peaceful settlement of international disputes. ‘The sad experience of the Versailles settlement which had become one of the causes of the later war,’ Igor Lukashuk stated, ‘had shown that [full restitution] was often impossible and even undesirable.’ In such circumstances, he argued, ‘a system of partial restitution’ could be preferable.¹⁵

Similar considerations were reflected in the document that the ILC provisionally adopted in first reading in 1996. Draft Article 42(3) then excluded remedies that would ‘result in depriving the population of a State of its own means of subsistence.’¹⁶ The ILC’s Commentary acknowledged this exclusion as the application of ‘a legal principle of general application.’¹⁷ Indeed, the language of Draft Article 42(3) was drawn from article 1(2) of the *International Covenant on Economic, Social and Cultural Rights*, which provides that ‘[i]n no case may a people be deprived of its own means of subsistence.’¹⁸ States’ reaction to Draft Article 42(3) was mixed. Some States viewed the phrasing as too vague, hence likely to create “avenues for abuses,”¹⁹ or a ‘pretext by the wrongdoing State to refuse full reparation.’²⁰ Other States clearly supported such exclusions but called for a clearer delimitation and a more precise provision.²¹ No State, however, took a principled position in support of full reparation.

These suggestions were not discussed in length during the second reading. The ILC was certainly under significant pressure to bring to an end a project initiated half a century earlier. It appears to have made a semi-conscious decision of eluding what many members considered a difficult and mostly academic question. The few mentions of the question during the second reading questioned the necessity of limiting the obligation to make “full” reparation, given the general nature of the project on the responsibility of States and the difficulty of delimitating such limitation.²² Special rapporteur James Crawford noted, ‘there was no reason to fear that

¹³ Fourth Report on State Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur, 2 (1) *Yrbk ILC* (1959) 1 [89].

¹⁴ Summary record of the 2314th meeting, 1 *Yrbk ILC* (1993) [78] (PS Rao).

¹⁵ Summary record of the 2392nd meeting, 1 *Yrbk ILC* (1995) [31] (using the word ‘restitution’ in the general sense of ‘reparation’). See, also, *ibid* [37] (C Tomuschat); *Ibid* [84] (A Mahiou); Summary record of the 2454th meeting, 1 *Yrbk ILC* (1996) [19] (‘some members of the Drafting Committee’).

¹⁶ Draft Articles on State Responsibility with Commentaries thereto adopted by the ILC on first reading (Draft Articles on State Responsibility with Commentaries), 2(2) *Yrbk ILC* (1996) 58.

¹⁷ *Ibid*, Commentary under Art 42 [8(a)].

¹⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Art 1(2).

¹⁹ Comments and observations received by Governments, 2(2) *Yrbk ILC* (1998) 81, 146 (United States).

²⁰ Comments and observations received by Governments, 2(1) *Yrbk ILC* (1999) 101, 108 (Japan).

²¹ See, in particular, Comments and observations received by Governments, *supra* note 19, 145-146 (United Kingdom); Comments and observations received from Governments, 2(1) *Yrbk ILC* (2001) 33, 61-62 (Poland).

²² Summary record of the 2613th meeting, 1 *Yrbk ILC* (2000) [17] (J Crawford).

the requirement to [make full reparation] would deprive [the responsible] State of its own means of subsistence’ considering that ‘[v]astly greater liabilities of States in the context of international debt arrangements were settled every year than ever arose from compensation payments.’²³ As a legal practitioner, James Crawford approached the project as one of relevance to international courts and tribunals but oversaw its pertinence as guidance to the practice of States in *negotiating* the settlements of international disputes.

Among the few members who disagreed, Raoul Goco and PS Rao took position against what they viewed as an unnecessary reference to “full” reparation. From their perspective, reparation had only to be “as complete as possible” in particular circumstances.²⁴ While the obligation to make “full” reparation suggests that relevant consideration should be limited to the injury itself, the obligation to make reparations “as complete as possible” would in particular authorize considerations for the financial situation of the parties to the dispute.

The draft Articles on State Responsibility are only a ‘subsidiary means for the determination of rules of law.’²⁵ Their repeated acknowledgment in the resolutions of the UN General Assembly²⁶ does not alter the obligations of responsible States inasmuch as State practice remains inconsistent with its specific provisions.²⁷ Nevertheless, the draft Articles on State Responsibility have had a great influence on the practice of international law in the past fifteen years.²⁸ The general affirmation of an obligation to make full reparation in the Articles on State Responsibility was echoed by decisions adopted by international jurisdictions.²⁹ As evidenced in the following, however, this influence has not always facilitated an effective peaceful settlement of international disputes; it sometimes led to incoherent judgments through which international jurisdictions displaced considerations for a diminution of reparation to other grounds, or, to the contrary, tried to impose full reparation despite States’ frank opposition. Few jurisdictions have had the courage to explicitly assert that, despite article 31 of the draft Articles on State Responsibility, remedial obligations might consist in less-than-full reparations.³⁰ Article 31 of the Articles on State Responsibility has probably constituted an

²³ Ibid, [18] (J Crawford). See, also, Third report on State Responsibility, by Mr. James Crawford, Special Rapporteur (Crawford’s third report), 2(1) *Yrbk ILC* (2000) 3 [42]: ‘there is no history of orders for restitution in the narrow sense, or of the award of damages by way of satisfaction, which have threatened to deprive a people of its own means of subsistence.’

²⁴ See, Summary record of the 2615th meeting, 1 *Yrbk ILC* (2000) [55] (PS Rao). See, also, *ibid* [52] (R Goco).

²⁵ Statute of the International Court of Justice (ICJ Statute) (adopted 26 June 1945, entered into force 24 October 1945) UKTS 67, Art 38(1)(d). See, also, DD Caron, The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority, 96 *American J Intl L* (2002) 857; JK Cogan, Editorial: The Decline of ‘Drafts’, 11(1) *Intl Organizations L Rev* (2014).

²⁶ See, UNGA Res 56/83 (2001), 59/35 (2004), 62/61 (2007), 65/19 (2010), and 68/104 (2013).

²⁷ ICJ Statute, *supra* note 25, Art 38(1)(b), requires ‘a general practice accepted as law’ as evidence of an international custom. A UN General Assembly resolution could evidence acceptance as law, but not the actual practice of States.

²⁸ See, Crawford, *supra* note 1, 43.

²⁹ See, e.g., *LG&E v Argentine*, ICSID Case No ARB/02/1, Decision on liability, (3 October 2006) [245-261]; *Duke Energy Electroquil v Ecuador*, ICSID Case No ARB/04/19, Award, (18 August 2008) [468].

³⁰ See, however, Seabed Disputes Chamber, Advisory Opinion of 1 February 2011, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, [2011] ITLOS Rep 10 [194] (noting the existence of limitations provided by treaties on specific topics); and *Eritrea-Ethiopia Claims Commission (EECC)*, Final Award, 17 August 2009, XXVI RIAA 631, [18-22] (discussed below, *infra* note 48 ff and associated text).

even greater – though less visible – impediment in the vast majority of claims for reparations that are settled through diplomatic consultations. By fuelling expectations in situations where it would impose an excessive burden on the responsible State or is not generally accepted as law, the affirmation of full reparation as an unqualified rule is likely to impede more than it facilitates the peaceful settlement of international disputes and the development of friendly relations among nations.

In order not to fuel excessive expectations and to advance the peaceful settlement of international disputes, the doctrine of international law needs to comprehend situations where the obligation to make full reparation does not apply. But in order to address concerns for abusive claims and interminable haggling of reparations in many cases where full reparation does apply, this doctrinal endeavour needs to start with a clear delimitation of the circumstances where remedial obligations may be limited. Further studies, beyond the scope of this article, will need to consider the actual quantum and other modalities of less-than-full reparations in such circumstances.

To delimit situations where reparation may be diminished, this article looks at all circumstances where a State holds remedies against another because of a fault of the latter, whether such situations fall within the scope of the Articles on State Responsibility or not. As such, this article draws a parallel with the doctrine relating to the injurious consequences arising out of acts not prohibited by international law. Despite often being the object of separate doctrinal debates, the responsibility of States in relation to hazardous activities evidences considerations that lend support to a general limitation to the obligation to make full reparation. The exclusion of this field, where State practice is generally inconsistent with full reparation, facilitated the ILC's conclusion regarding the existence of an obligation to make full reparation. The broader analysis suggested by this article evidences the existence of general limitations to the obligation to make full reparation.

Likewise, the present article does not confine itself to what the ILC considered as *lex generalis*. Policy considerations underlying State practice in what has been described as 'self-contained regimes,' such as the WTO dispute settlement mechanism,³¹ are not necessarily unique to such regimes. The exclusion of such regimes from the debates before the ILC hindered a genuine engagement with inconsistencies between an idealized conception of the law of State responsibility and what States actually do – and advocate for – in many cases.³² This article submits that some of the considerations at play in "self-contained regimes" may extend across the *lex generalis* – *leges speciales* dichotomy and bear testimony of general limitations to the obligation to make full reparation.

The remainder of the article is structured as follows. Section II sheds light on States' general acceptance of less-than-full reparation as appropriate under certain circumstances. Section III argues that less-than-full reparation should be recognized in the doctrine of international law, despite the risk of abuses. Section IV suggests the prolegomena of a theory of less-than-full reparation by identifying necessary conditions for a limitation of reparation. Section V concludes.

³¹ See, for instance, *Yrbk ILC*, *supra* note 10, at Commentary under Art 55 [3].

³² A strong sense that reparations *should* be paid in full appears in the development of a prospective literature calling for the 'exceptions' to follow the 'rule,' that is, for full reparation to apply to self-contained regimes. See, e.g., M Bronckers and N van den Broek, Financial Compensation in the WTO Improving the Remedies of WTO Dispute Settlement, 8(1) *J Intl Economic L* (2005) 101, 122.

2. Less-than-full reparation in State practice

A study group of the International Law Association characterized the circumstances where full reparation could affect a State's means of subsistence as "extremely exceptional".³³ As mentioned above, similar considerations for the unlikelihood of circumstances warranting less-than-full reparation led the ILC not to define any general limitation to the obligation of a responsible State to make full reparation.³⁴ This section however shows that less-than-full reparation – whether justified by the limited financial capacity of the responsible State or on any other ground – is all but exceptional in State practice, including in relation to some of the most serious breaches of international law (such as breaches of *jus ad bellum* and *jus in bello*) and some of the gravest global concerns (such as global environmental changes). It suggests evidence that, in certain circumstances, States have regularly accepted less-than-full reparation as law. This consistent State practice cannot satisfactorily be explained by power relations or by voluntary waivers of a right to remedy. Rather, it appears to follow from States' acceptance that less-than-full reparation is indeed the norm applicable under certain circumstances.

2.1 Mass Atrocities

Any review of the practice of States with regard to mass atrocities – breaches of *jus ad bellum* and *jus in bello*, but also crimes against humanity and genocide – reveals systematic inconsistencies with the assumption that a responsible State should pay full reparation. The excessive reparations demanded from Germany under the 1919 Versailles treaty,³⁵ collectively remembered as one of the causes leading to World War II, have only the value of a negative example – the evidence that war reparations must *not* be based solely on the injury.³⁶ Following World War II, the devastation of Japan and Germany were taken into consideration and the victors only requested limited reparations.³⁷ Instead, West Germany soon received massive financial aid from the United States as part of the Marshall plan, which East Germany declined. West Germany later engaged in negotiations on further reparations with Israel and Jewish organizations under some pressure from the United States, but "full" reparation was apparently never claimed.³⁸ A decisive agreement signed in Luxembourg in 1952 only recognized the "determination" of the German government 'to make good the material damage' caused by the 'unspeakable criminal acts ... perpetrated against the Jewish people during the National-Socialist regime of terror.'³⁹

³³ First Report of the International Law Association (ILA) Study Group on the Law of State Responsibility, ILA, (2000), [36].

³⁴ See, Crawford, *supra* note 23, [42].

³⁵ Versailles treaty (adopted 28 June 1919, entered into force 20 January 1920) [1919] UKTS 4 (Cmd 153), Art 232.

³⁶ C Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 *RCADI* (2001) 293.

³⁷ See, in particular Treaty of Peace with Japan (San Francisco Peace Treaty) (adopted 8 September 1951, entered into force 5 August 1952) 136 UNTS 45, Art 14(1).

³⁸ See, M Sharett, 14 March 1951, cited, in, N Sagi, *German Reparations: A History of the Negotiations* (Magnes Press, The Hebrew University, Jerusalem, 1980) 55, requiring a sum estimated to represent a quarter of the property that was seized. See, generally, E Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Norton, New York, 2000).

³⁹ Agreement signed at Luxembourg (adopted 10 December 1952, entered into force 27 March 1953), 162 UNTS 206, 1st and 2nd recitals.

Throughout the development of modern international law over the following sixty years, the UN General Assembly and the Security Council adopted numerous resolutions to condemn mass atrocities. Few of these resolutions, however, mentioned any obligation to pay any form of reparation – partly because of uncertainties regarding the scope of remedial obligations and partly because of a more pragmatic emphasis on forward-looking measures of cessation and non-repetition rather than backward-looking reparation.⁴⁰ A unique case regards the compensation imposed upon Iraq for its aggression and invasion of Kuwait in 1990, administered by the UN Compensation Commission as provided by the Security Council. Yet, rather than the “example”⁴¹ then claimed by the supporters of an unqualified affirmation of the obligation to make full obligation, the UN Compensation Commission appears in retrospect as a historical oddity – an exception imposed by leading power rather than the reflection of a rule.⁴² Even in this case, however, the overall amount of reparation was limited to 30 per cent of the annual value of exports of petroleum and petroleum products from Iraq, allowing at least a significant delay for the payment of reparation.⁴³ This limitation was determined by the UN Secretary General, at the demand of the Security Council, on the basis of a rough assessment of ‘the requirements of the people of Iraq, Iraq’s payment capacity ... and the needs of the Iraqi economy.’⁴⁴ Following the invasion of Iraq in 2003, the Security Council adopted a stronger limitation to 5 per cent of the annual value of exports of petroleum and petroleum products.⁴⁵ Payments were suspended from October 2014 until at least 1 January 2018 on the ground of ‘the extraordinarily difficult security circumstances in Iraq and the unusual budgetary challenges associated with confronting this issue.’⁴⁶

More recently, the 2000 “Algiers” Agreement established the *Eritrea-Ethiopia Claims Commission*, an arbitral tribunal, in order to assess reciprocal reparation claims arising from an armed conflict.⁴⁷ The two States had by every account very limited payment capacities and they were claiming massive reparations from each other. In particular, Ethiopia’s initial claim against Eritrea – nearly USD 15 billion – was several folds higher than Eritrea’s yearly national product.⁴⁸ In this context, the arbitrators acknowledged the risk that massive UNSC Resolution 705 reparation awards could prevent States from fulfilling their obligation to protect the human rights of individuals within their jurisdiction. It noted that the ‘prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations.’⁴⁹ Accordingly, the tribunal contemplated

⁴⁰ In particular, see, CD Gray, *Judicial Remedies in International Law* (Clarendon, Oxford, 1987) 216-217.

⁴¹ Crawford, *supra* note 1, at 484.

⁴² See, e.g., H Wassrgen, The UN Compensation Commission: Lessons of Legitimacy, State Responsibility, and War Reparations, 11(3) *Leiden J Intl L* (1998) 473.

⁴³ UNSC, Resolution 705 (1991), 15 August 1991 [2].

⁴⁴ Report of the Secretary-General pursuant to paragraph 19 of Security Council Resolution 687 (1991) (Note of the Secretary-General), UN Doc. S/22559, [7].

⁴⁵ UNSC, Resolution 1483 (2003) [21].

⁴⁶ Decision concerning the Level of Iraq's oil proceeds to be deposited into the Compensation Fund in 2017, adopted by the United Nations Compensation Commission (UNCC) Governing Council on 2 November 2016 at its eighty-first session, UN Doc. S/AC.26/Dec.274 (2016), recital 8. See, also, Level of Iraq's oil proceeds to be deposited into the Compensation Fund in 2016, Adopted by the (UNCC) on 28 October 2015 at its Eightieth Session, UN Doc. S/AC.26/Dec.273 (2015).

⁴⁷ Agreement between the Eritrea and Ethiopia (adopted and entered into force 12 December 2000), 2138 UNTS 94, Art 5.

⁴⁸ EECC Final Award, *supra* note 30, [18].

⁴⁹ *Ibid*, [21].

to limit its compensation awards in some manner to ensure that the ultimate financial burden imposed on a Party would not be so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people's basic needs.⁵⁰

In their final award, however, the arbitrators did not consider the amount of compensation to be excessive, probably only because the reciprocal awards were limited and largely balanced each other (USD 163 million to Eritrea and USD 174 to Ethiopia, resulting in a net payment to Ethiopia of about USD 11 millions).

Other reparation programmes following mass atrocities were negotiated between the concerned parties.⁵¹ These negotiations have generally led to rather symbolic amounts of compensation. For instance, the German Forced Labour Compensation Programme, established in 2000 in order to address some of the atrocities committed by the Nazi regime, provided Euro 7,670 for each claimant victim of slave labour.⁵² Analogies can be drawn with the domestic context of transitional justice, where it is largely accepted that a State may engage in reparation programmes that offer only meagre individual compensation.⁵³ While offers for remedial measures have also been rejected, the expectation did not appear to be that “full” reparation should be provided, but merely that adequate measures should be taken in the view of relevant circumstances in order to reflect a sincere apologetic posture of the responsible State.

Thus, the President of Guinea declined the UN Security Council's offer to support negotiations toward reparations for the invasion of Portugal, arguing that only its immediate independence from Portugal would be an adequate measure of “compensation”.⁵⁴ Likewise, the victims of Japan's “comfort women” system rejected a compensation offer constituted by small sums raised through private funds in Japan on the ground that this process would only facilitate the denial of Japan's historical responsibility.⁵⁵ These examples suggest that the real measure of reparation in cases of mass atrocities, from the victims' perspective, is not the ambit of remedial measures *per se* but rather the ability of a set of negotiated remedies – including not only compensation, but also symbolic measures and guarantees of cessation and non-repetition – to allow for the resumption of more amicable relations between the peoples of the relevant States.⁵⁶

2.2 Economic Relations

The practice of international economic relations is also largely inconsistent with the assertion of a systematic obligation to make full reparation. The following recounts practices of less-than-full reparation in WTO dispute settlement (1) and in cases of takings of foreign properties,

⁵⁰ Ibid, [22].

⁵¹ See, generally, Barkan, *supra* note 38.

⁵² HM Holtzmann and E Kristjánssdóttir (eds) *International Mass Claims Processes Legal and Practical Perspectives* (OUP, New York, 2007) 31.

⁵³ See, e.g., T Antkowiak, Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond, 46 *Columbia J Transnatl L* (2008) 351, 399-400.

⁵⁴ Example cited in Gray, *supra* note 40, at 216-217.

⁵⁵ Barkan, *supra* note 38, at 57.

⁵⁶ Likewise, in numerous domestic instances of transition from authoritarian to democratic regimes, efforts were concentrated on truth, reconciliation and development rather than on reparation. See, PB Hsayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd edn (Routledge, New York, 2011).

in particular in the context of nationalisation programs (2), showing the existence of a trend beyond a particular “self-contained regime.”

2.2.1 WTO dispute settlement

In the pursuit of their international commercial relations, States have generally agreed that full reparation was neither their normal practice, nor even a desirable outcome. Upon finding that a measure is inconsistent with an international trade agreement, the WTO’s Dispute Settlement Understanding provides that a panel or an appellate body ‘shall recommend that the Member concerned bring the measure into conformity.’⁵⁷ This Understanding also establishes that ‘the first objective of the dispute settlement is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.’⁵⁸ Consequently, international trade law does not generally deal with loss and damage caused by an internationally wrongful act before the determination of such a breach by the Dispute Settlement Body. Under this regime, “compensation” is only defined as ‘temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time.’⁵⁹

A few isolated GATT panel decisions concerning cases of antidumping or countervailing duty have however recommended the restitution of the duties wrongfully levied.⁶⁰ Under the WTO, the *Australia – Automotive Leather II (Article 21.5 – United States)* decision seems to be the only one where a Panel recommended retroactive measures, also in a case of export subsidies (recalling a grant that had already been paid).⁶¹ The United States had not requested retrospective measures and its representatives, along with those of other States, argued vehemently against such remedies when the Panel report was submitted to the Dispute Settlement Body for adoption.⁶² States argued not only that retroactive remedies were inconsistent with relevant treaty provisions,⁶³ but also that they were ‘contrary to GATT/WTO custom and practice.’⁶⁴

Since the adoption of the Articles on State Responsibility in 2001, some scholars have argued that international trade law should be reformed in order to provide for retroactive remedies, in conformity with the general principle of full reparation posited by the ILC.⁶⁵ Yet, these scholars

⁵⁷ Understanding on rules and procedures governing the settlement of disputes (adopted 15 April 1994, entered into force 1 January 1995), 1869 UNTS 401 (DSU), Art 19(1). See, also, Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (adopted 28 November 1979), GATT Doc L/4907, 210.

⁵⁸ *Ibid*, Art 3(7).

⁵⁹ *Ibid*, Art 22(1).

⁶⁰ See, M Matsushita, T Schoenbaum and PC Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (OUP, Oxford, 2003) 78; P Grané, Remedies Under WTO Law, 4(4) *J Intl Economic L* (2001) 755.

⁶¹ WTO, *Australia – Automotive Leather II (Art 21.5)*, 21 January 2000, WT/DS126RW [6.42]. The Panel’s decision was not based on Art 19(1) of the Dispute Settlement Understanding, but on Art 4.7 of the Agreement on Subsidies and Countervailing Measure.

⁶² See, WTO Dispute Settlement Body (DSB), Minutes of Meeting on 11 February 2000, WT/DSB/M/75, 5. The report was criticized by representatives of the United States, Australia, Brazil, Canada, Japan, Malaysia and the European Union; Hong Kong was the only party supporting its conclusion.

⁶³ *Ibid*, 8 (Japan).

⁶⁴ *Ibid*, 7 (Canada).

⁶⁵ See, e.g., RR Babu, *Remedies under the WTO Legal System* (M Nijhoff, Leiden, 2012) 205.

have generally failed to account for the rationale underlying the current practice in international trade law and States' opposition to a reform. By contrast, scholars who strived to comprehend the context where international trade law developed have often come to a different conclusion according to which 'the political reality weighs heavily even in respect of such a limited approach'⁶⁶ of reparation. As the United States argued as a claimant in the *Australia – Automotive Leather II* case, there may be

a legitimate basis for not requiring the repayment of recurring subsidies that had been granted in the past. Among other things, termination of the recurring subsidies programme ha[s] an enforcement effect that [is] sufficient to accomplish the objective of the SCM Agreement with respect to prohibited subsidies.⁶⁷

2.2.2 Takings of foreign properties

Less-than-full compensation has also been accepted for the takings of foreign property as part of large programs of nationalisation. Concededly, unlike other instances discussed in this article, the illegality of such takings did not remain unchallenged. Without questioning that some compensation is due, some States have consistently claimed that:

there does not exist in international law any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character.⁶⁸

A similar position has also been supported by qualified publicists.⁶⁹ Long deliberations in the UN General Assembly went only slightly further by distinguishing in very general terms a duty to pay 'appropriate compensation ... in accordance with international law.'⁷⁰

Few would deny that taking of foreign property breaches individual rights. The core of the question, therefore, seemed to relate to the nature of the remedies due for such takings. The assumption that a wrongful act would necessarily require full compensation has significantly blurred the debate. Rather, it seems, the rights of foreign property-owners ought to be fairly taken into account as well as the limited payment capacity of the State and the possibility of reasonable justification for large nationalisation programmes. In this sense, the *Institut de Droit International* adopted a resolution calling for 'an appropriate balance ... between the interests of the investor and the public purposes of the State.'⁷¹ Likewise, the second restatement of the foreign relations law of the United States by the American Law Institute acknowledged the

⁶⁶ Grané, *supra* note 60, at 771. See, also, G Goh and AR Ziegler, Retrospective Remedies in the WTO after *Automotive Leather*, 6(3) *J Intl Economic L* (2003) 545.

⁶⁷ WTO DSB, *supra* note 62, at 9 (United States).

⁶⁸ Letter of the Mexican Minister for Foreign Affairs to the American Ambassador of 3 August 1938 (Letter of the Mexican Minister), in, 5 *Foreign Relations of the United States Diplomatic Papers* (1938) 679, 680.

⁶⁹ See, e.g., S Friedman, *Expropriation in International Law* (Stevens & Sons, London, 1953) 206-211. Cf LE Becker, Just Compensation in Expropriation Cases: Decline and Partial Recovery, 53 *ASIL Proceedings* (1959) 336, 338.

⁷⁰ Permanent sovereignty over natural resources, UNGA Res 1803 (XVII) (1962) part I [4].

⁷¹ Institut de Droit International, Legal Aspects of Recourse to Arbitration by an Investor against the Authorities of the Host State under Inter-State Treaties, Tokyo Res 2013/1, Art 14(2).

existence of certain “special circumstances,” which it did not define, that could justify derogating to full compensation in cases of expropriation.⁷²

The practice of States in such circumstances certainly does not support the existence of an obligation to make full reparation in nationalisation programs. M. Sornarajah noted in blunt terms that ‘[t]here is no indication in modern practice of full compensation ever having been paid as compensation for nationalisation.’⁷³ A summary review of pre-20th Century arbitral litigation evidences a startling gap between claims for compensation and awards, suggesting that full compensation was not the practice.⁷⁴ Since the Second World War, most investment disputes have been settled through lump-sum agreements providing only partial compensation.⁷⁵ It is thus largely recognized that “broader equitable considerations,” including ‘the welfare of the State and its public finances,’ may be ‘taken into account when assessing the amount of compensation due.’⁷⁶

The significance of such lump-sum agreements as a development of international law was often discounted in a somewhat arbitrary way. Most famously, the ICJ stated in the *Barcelona Traction* case that ‘[f]ar from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case.’⁷⁷ This unfortunate oversight reflects a rather idealistic conception of the law, artificially divorced from the regular practice of States, as if the doctrine of international law was, to paraphrase Aldous Huxley’s critique of utopian scholars, ‘much too preoccupied with what ought to be to pay any serious attention to what is.’⁷⁸ The implications of States’ systematic agreement to quanta of compensation well below the full value of their injury should not be summarily rejected as the illegitimate outcome of power relations on the sole ground that it does not coincide with one’s ideal conception of what reparations ought to be. Rather, a cold analysis of State practice accepted as law in relation to the takings of foreign properties suggests the existence of a general limitation to the obligation to make full reparation.

2.3 Hazardous Activities

⁷² American Law Institute, Second Restatement of the Foreign Relations Law of the United States (1965) [188(2)]: ‘In the absence of the conditions specified in Subsection (1), compensation must nevertheless be equivalent to full value unless special circumstances make such requirement unreasonable’; and Explanatory Note (c): ‘The law is not settled as to what special circumstances may make the requirement of full value unreasonable.’

⁷³ M Sornarajah, *The International Law on Foreign Investment*, 3rd edn (CUP, Cambridge, 2010) 417.

⁷⁴ JM Sweeney, The Restatement of the Foreign Relations Law of the United States and the Responsibility of States for Injury to Aliens, 16 *Syracuse L Rev* (1964) 762, 766.

⁷⁵ See, generally, RB Lillich and BH Weston, *International Claims: Their Settlement by Lump Sum Agreements*, vol 12 (UP Virginia, Charlottesville, 1975); BH Weston, DJ Bederman & RB Lillich, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995* (M Nijhoff, Leiden, 1999).

⁷⁶ UN Conference on Trade and Development, *Expropriation* (UNCTAD Series on Issues in International Investment Agreements, Geneva, 2012) 115.

⁷⁷ *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain), (New Application: 1962), Judgment of 5 February 1970, [1970] ICJ Rep 3 [61]. See, also, *Aminoil*, *supra* note 2 [146] (‘there is no room for rules of compensation that would make nonsense of foreign investment’), [157-185].

⁷⁸ A Huxley, *Proper Studies* (Chatto and Windus, London, 1929), ix-xi, cited in A Cassese, ‘Introduction’, in A Cassese (ed) *Realizing Utopia: The Future of International Law* (OUP, Oxford, 2012) i, xvii.

Like mass atrocities and economic relations, injuries arising out of hazardous activities have rarely led to a practice of full reparation – or even to claims for full reparation. Here again, most cases remain little visible to international lawyers simply because no proceedings are initiated and no negotiations are pursued.⁷⁹ No reparations were claimed, for instance, following the 1986 Chernobyl nuclear accident, although a few States reserved their right to make such claim.⁸⁰ The general feeling was certainly that ‘priority should be given, in the wake [of this accident], to endeavors of another nature’⁸¹ – in particular, of course, mitigating harm in Ukraine and elsewhere. Yet, specific treaties were adopted before and after the Chernobyl accident to define a ceiling to the liability of States in case of a nuclear accident, along with risk-sharing mechanisms.⁸² A few other cases of injuries arising out of hazardous activities have been settled through negotiated agreements similar to those established to settle claims for war reparations or following nationalisation programs, or sometimes through litigation, including before domestic courts. These instances regarded among others industrial accidents involving particularly gross negligence⁸³ and injuries caused by activities such as nuclear tests where a State acted with full knowledge of foreseeable environmental consequences.⁸⁴

In the early 1970s, the ILC took the view that it should distinguish between the responsibility of States for internationally wrongful acts and their liability for the injurious consequences arising out of the performance of other activities (“responsibility for risk”).⁸⁵ Its work on the latter topic was initiated in 1977 and, in 1992, it was decided that the Commission would study the preventive as well as remedial obligations of States.⁸⁶ This work programme soon came to delineate what it constructed as a limited regime of strict liability for transboundary harms caused by hazardous activities.⁸⁷ Yet, the distinction between a regime of “responsibility” for internationally wrongful act and a regime of “liability” for the harmful consequences of other activities is difficult to sustain, since wrongful acts are precisely approached as those from which remedial obligations arise. The ILC could alternatively and perhaps more convincingly have constructed the obligation of States to prevent transboundary harms from arising from hazardous activities within their territory as an obligation of result, thus situating the discussion

⁷⁹ See, PM Dupuy, L’État et la reparation des dommages catastrophiques, in, F Francioni and T Scovazzi (eds) *International Responsibility for Environmental Harm* (Kluwer, Norwell MA, 1991) 125, 138, noting ‘le décalage presque vertigineux existant entre les propositions normatives et les réalités de la pratique internationale.’

⁸⁰ See, generally, P Sands, *Chernobyl: Transboundary Nuclear Air Pollution – The Legal Materials* (CUP, Cambridge, 1988) 28.

⁸¹ Correspondence with the Swedish Embassy in London, 10 December 1987, cited in *ibid.*, 27. See, also, A Kiss, L’accident de Tchernobyl et ses conséquences au point de vue du droit international, 32 *Annuaire Français de Droit International* (1986) 139, 151-152.

⁸² See, in particular, Brussels Supplementary Convention on Nuclear Third Party Liability, Nuclear Energy Agency (1963), Art 8; Protocol to Amend the Brussels Supplementary Convention on Nuclear Third Party Liability, Nuclear Energy Agency (2004), Art 3.

⁸³ See, for instance, *Union Carbide Corporation v Union of India*, (1991) 4 SCC 584, relating to the industrial accident that occurred in Bhopal in 1984.

⁸⁴ See, e.g., Compact of Free Association between the United States and the Marshall Islands (adopted 14 January 1986, entered into force 21 October 1986), 99 Stat 1770, sect 177, and its discussion in D Pevec, The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People, 35 *Denver J Intl L & Policy* (2007) 221.

⁸⁵ 2 *Yrbk ILC* (1973) 169 [39].

⁸⁶ 2(2) *Yrbk ILC* (1992) 51 [344-348].

⁸⁷ Report of the working group on international liability for injurious consequences arising out of acts not prohibited by international law (1996 Report of the working group on international liability), 2(2) *Yrbk ILC* (1996) 100 (Annex I), Art 5.

of remedial obligations for such harms within the general regime on the responsibility of States for internationally wrongful acts.⁸⁸ The confusion is reflected by the analysis of foreseeable transboundary harms alternatively and often indistinctly as an example of responsibility for the breach of the preventive principle or as liability for hazardous activities.⁸⁹ This artificial distinction between “responsibility” and “liability” has hindered a genuine scholarly engagement with less-than-full reparation in relation to transboundary harms caused by hazardous activities by excluding it from most examination of international law remedies.

From the preliminary reviews discussed by the ILC, it already appeared clearly that States had not recognized a general obligation to make full reparation in all cases of loss arising out of hazardous activities. Some treaty provisions established that, following a transboundary harm caused by such activity, States had an obligation to consult with the States affected ‘with a view to arriving at an expeditious and mutually acceptable disposition of such claim.’⁹⁰ Other treaty provisions suggested a balancing of interest in the determination of an “adequate and equitable” compensation,⁹¹ ‘limiting in a reasonable manner the extent of the liabilities incurred for such damage.’⁹²

On these bases, the set of Draft Articles proposed to the General Assembly in 1996 only provided that ‘[t]he State of origin and the affected State shall negotiate at the request of either party on the nature and extent of compensation or other relief ..., in accordance with the principle that the victim of harm should not be left to bear the entire loss.’⁹³ The Commentary clarified that ‘such negotiations should provide effective remedies for the individual injured parties.’⁹⁴ No doubt could be had that “effective” remedies did not mean *full* reparation, as the Commentary also affirmed

[t]he principle that the victim of harm should not be left to bear the entire loss, implies that compensation or other relief may not always be full. There may be circumstances in which the victim of significant transboundary harm may have to bear some loss.⁹⁵

In their comments on these Draft Articles, States generally approached their liability for transboundary environmental harm caused by hazardous activities as entailing less than an

⁸⁸ See, e.g., 2(2) *Yrbk ILC* (1995) 88 [401]; Summary record of the 2414th meeting, *Yrbk ILC* (1995) [36] (Fomba); Summary record of the 2450th meeting, *Yrbk ILC* (1996), [28-29] (Bennouna) [33] (Bennouna). See, also, I Brownlie, *State Responsibility* (Clarendon Press, Oxford, 1983) 50.

⁸⁹ For instance, the International Law Commission analysed the *Trail Smelter* award both as a breach of an obligation and as the archetypical case of international liability of injurious consequences arising out of acts not prohibited by international law. Regarding the former, see, *Yrbk ILC*, *supra* note 10, Commentary under Art. 14 [14]. Concerning the latter, see, e.g., 1996 Report of the working group on international liability, *supra* note 87, 103 (General Commentary [2]); Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2(2) *Yrbk ILC* (2006) 110, 122 (commentary under Art 2[1]).

⁹⁰ Exchange of notes of 31 December 1974 between the United States of America and Canada constituting an agreement relating to liability for loss or damage from certain rocket launches, note 1, para 3, cited in, 2(1) *Yrbk ILC* (1985) addendum, 83 [392].

⁹¹ Convention on Third Party Liability in the field of Nuclear Energy, as amended by the Additional Protocol of 1964 and the Protocol of 1982, Nuclear Energy Agency (1960), preamble, third recital.

⁹² 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (adopted 7 October 1952, entered into force 4 February 1958), second recital.

⁹³ 1996 Report of the working group on international liability, *supra* note 87, at Art 21.

⁹⁴ *Ibid*, commentary on Art 21 [2].

⁹⁵ *Ibid*, [4].

obligation to make full reparation. They agreed to ‘the principle that victims of injury ... should be compensated and on criteria for equitable distribution of loss.’⁹⁶ All States recognized, at least, that certain circumstances should warrant an adjustment in remedial obligations.⁹⁷ The Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, adopted by the ILC in 2006, requires that ‘prompt and adequate compensation’⁹⁸ be provided without discrimination.⁹⁹ The Commentary to this document clarifies that compensation can be considered as adequate as long as it is not ‘grossly disproportionate to the damage actually suffered, even if it is less than full.’¹⁰⁰ In particular, lump-sum agreements are mentioned as valid forms of compensation.¹⁰¹

Technological advance makes it increasingly likely that minor negligence result in large-scale injuries or irreversible environmental harms. Cases where full reparation would certainly have excessive consequences can easily be imagined, in particular when the existence or the extent of a possible injury was not foreseeable at the time when the conduct was carried out or when the injury is otherwise out of proportion with the payment capacity of the responsible State.¹⁰² The law of remedial obligations should arguably give certain consideration to the need not to hinder the development of certain technologies, especially hazardous technologies that could replace more dangerous ones (such as, perhaps, nuclear energy as an alternative to fossil fuel combustion).¹⁰³ On the other hand, no reparation at all would encourage risky conducts and let injured parties uncompensated.

Overall, the accent is likely to turn away from retrospective reparations in the face of continuing transboundary – and particularly global – harms caused by hazardous activities. The most urgent remedy to a creeping crisis such as climate change is arguably the cessation of the hazardous conduct through the reduction of greenhouse gas emissions rather than reparation for the harm which is increasingly being caused; reparation could however play an important role as a political signal for the harm caused elsewhere by relatively anodyne conducts. Remedies taking place in the symbolic sphere, ranging from an apologetic posture to education policies¹⁰⁴ and public commemoration, could contribute to raise awareness and spur public

⁹⁶ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session, Report of the International Law Commission on the work of its forty-seventh session, UN Doc A/CN.4/472/Add.1 [125].

⁹⁷ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-first session, Report of the International Law Commission on the work of its forty-eighth session, UN Doc A/CN.4/479 [56].

⁹⁸ Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *supra* note 89, at principle 4.

⁹⁹ *Ibid*, principle 6.

¹⁰⁰ *Ibid*, commentary under principle 4 [8].

¹⁰¹ *Ibid*, and commentary under principle 6 [10].

¹⁰² See, Tomuschat, *supra* note 36, at 296-7; Summary record of the 2399th meeting, Yrbk ILC, (1995), [24] (PS Rao).

¹⁰³ See, in particular, Institut de Droit International, Responsibility and Liability under International Law for Environmental Damage, Res 1997/3, Art 9: ‘In accordance with the evolving rules of international law it is appropriate for environmental regimes to permit for reasonable limits to the amount of compensation resulting from responsibility for harm alone and civil liability, bearing in mind both the objective of achieving effective environmental protection and ensuring adequate reparation of damage and the need to avoid discouragement of investments. Limits so established should be periodically reviewed.’

¹⁰⁴ See, e.g., UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994), 1771 UNTS 107, Art 6(a)(i); Kyoto Protocol to the United Nation Framework

support for necessary reforms by questioning, in the case of climate change, the general acceptance of an unsustainable model of development. Such symbolic measures will unquestionably fuel demands for compensation or other forms of North-South finance, and, indeed, an admission of wrongdoing could not appear sincere unless it comes along with certain measures of amends. These measures, however, would certainly stop short from full reparation.

3. Toward a doctrine of less-than-full reparation

Despite the existence of consistent State practice, the doctrine of international law has remained generally hostile to a recognition of customary limitations to the obligation to make full reparation. This section addresses two likely objections. One is that the State practice outlined above is not constitutive of customary international law because it is not accepted as law (3.1). The second objection, from a policy perspective, relates to the risks that recognizing limitation to remedial obligations would entail for the effectiveness of a peaceful settlement of international disputes (3.2).

3.1 Acceptance of less-than-full reparation as law

It is well established that the parties to a dispute can agree to derogate to the general law of State responsibility.¹⁰⁵ In this sense, cases where States agreed to less-than-full reparation have often been disregarded by international lawyers as simply ‘a compromise in a given situation’¹⁰⁶ or *sui generis* “arrangements.”¹⁰⁷ It was understood that injured States could voluntarily waive all or part of their right to reparation, at the condition, naturally, that their consent be valid under international law.¹⁰⁸ The Supreme Court of India held that such consent only needs to be sufficiently informed.¹⁰⁹ The Commentary of the ILC on the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities further suggested that such negotiated reparations should not be ‘grossly disproportionate to the damage actually suffered.’¹¹⁰

Yet, the practice of less-than-full reparation in the specific situations described in the previous section – mass atrocities, economic relations and hazardous activities – appears sufficiently

Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005), 2303 UNTS 148, Art 10(e); and The Lima Ministerial Declaration on Education and Awareness-raising, Adopted by the Conference of Parties on 12 December 2014 at its Twentieth session, FCCC/CP/2014/L.1/Rev.1.

¹⁰⁵ *Yrbk ILC*, *supra* note 10, at Art 55.

¹⁰⁶ M Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 *American J Intl L* (1961) 585, 609.

¹⁰⁷ See, *Barcelona Traction*, *supra* note 77, at [61], using the word ‘arrangement’ to describe lump-sum agreement. Yet, such ‘arrangements’ certainly fulfil the definition of a treaty as ‘an international agreement concluded between States in written form and governed by international law.’ See, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, Art 2(1)(a).

¹⁰⁸ See, *ibid*, Art 48-52; Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties, Final Act of the United Nations Conference on the Law of Treaties, Annex, 285; and O Corten, Article 52, in, O Corten and P Klein, *The Vienna Convention on the Law of Treaties: A Commentary*, vol II (OUP, Oxford, 2011), 1201-1223 [8-23].

¹⁰⁹ See, *Union Carbide Corporation v Union of India*, *supra* note 83, at [137], noting that the lump-sum settlement between a State and an investor ‘must, of course, be an informed one.’

¹¹⁰ See, e.g., Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *supra* note 89, commentary under principle 4 [8].

consistent, widespread and representative to qualify as general practice rather than a set of agreed-upon derogations.¹¹¹ Richard Lillich and Burns Weston's compilation of more than a hundred lump-sum agreements, for instance, evidences a practice which, far from exceptional, reflects general limitations of reparations in certain circumstances.¹¹² As these authors concluded,

when claimant States, however grudgingly, accept lump sum settlements providing for less than "full" compensation, and when this pattern of behaviour is established over many years in many Settlement Agreements concluded by many States, it becomes increasingly difficult to treat such practice as exceptional.¹¹³

As illustrated by Lillich's and Weston's study, it seems likely that most international disputes settled through either litigation or negotiations result in significantly less than full reparation, often without raising objections on the part of the injured State.

Consistent State practice, however, does not suffice to establish the existence of a norm of international law.¹¹⁴ By contrast to "mere usage or habit,"¹¹⁵ a customary rule of international law is a general practice that is accepted as law.¹¹⁶ The demonstration that general practice is accepted as law is notoriously difficult and even logically problematic.¹¹⁷

As mentioned before, however, States have repeatedly taken an explicit position in favour of a limitation of reparations. When discussing the first draft of the Articles on State Responsibility of the ILC, for instance, several State representatives to the Sixth Committee of the General Assembly supported the notion of general limitations to the obligation to make full reparation; none disagreed with such limitation of reparation as a matter of principle.¹¹⁸ In relation to losses arising out of hazardous activities, discussions in the same Committee provided active support for an "equitable distribution of loss"¹¹⁹ rather than full reparation. States also opposed retroactive remedies within international trade and investment law.

Even more conclusive than such active support is the systematic tacit acceptance of less-than-full reparation by States – including by the injured States themselves. The draft conclusions provisionally adopted by the work programme of the ILC on the identification of customary international law assert that acceptance of a general practice as law can be evidenced not only by States' actions (such as statements, publications or correspondence), but also by their 'failure to react over time to a practice' when 'the circumstances called for some reaction.'¹²⁰

¹¹¹ The general practice constitutive of an international custom consists in a practice is 'sufficiently widespread and presentative, as well as consistent.' See, ILC, Identification of customary international law: draft conclusions provisionally adopted by the Drafting Committee, Adopted by the ILC on 14 July 2015 at its Sixty-seventh session, UN Doc. A/CN.4/L.869, draft conclusion 8.

¹¹² For a definition of 'general' State practice, see, *Ibid.*, [8].

¹¹³ Lillich and Weston, *supra* note 75, at 251.

¹¹⁴ See, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 1969, 3 [77].

¹¹⁵ ILC (2015), *supra* note 111, conclusion 9.2.

¹¹⁶ Statute of the International Court of Justice, Art. 38.1.b.

¹¹⁷ How could a norm be accepted as law before being identified as custom? See, e.g., J Kunz, *The Nature of Customary International Law*, 47 *American J Intl L* (1953) 662, 667.

¹¹⁸ See, *supra* note 21.

¹¹⁹ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session, *supra* note 96, at [125].

¹²⁰ ILC (2015), *supra* note 111, at conclusion 10.3.

The systematic absence of claims for full reparation in relation to mass atrocities, commercial or investment disputes or in cases involving transboundary harms for hazardous activities all suggest something more than a mere usage or habit. It seems rather implausible that states would systematically renounce to large quanta of compensation without questioning usage or habit if they considered themselves entitled to them. The absence of contrary claims surely suggests a general acceptance of certain limitations to the obligation to make full reparation as law.

International courts and tribunals as well as the doctrine have often disregarded the practice of less-than-full reparation on the ground that it resulted from “economic pressures”¹²¹ or, more specifically, was ‘largely the result of political circumstances, as well as the relative financial abilities and bargaining strengths of the parties.’¹²² This illustrates the difficulty of distinguishing *opinio juris* from the individual opinion of jurists about what the law ought to be.¹²³ Acceptance as law certainly does not require acceptance that a rule is “just” by either legal scholars or State leaders themselves, and the possible role of political considerations does not, on its own, exclude the acceptance of a practice as law.¹²⁴ Moreover, less-than-full reparations cannot always be reduced to political constraints: it often rests on considerations of adequateness, for instance in relation to the capacity to pay or to the need for reparation. In many circumstances, less-than-full reparation appeared as a reasonable and adequate remedy, one able to reconcile remedial needs with objectives such as the development of international law,¹²⁵ the promotion of investment in key sectors,¹²⁶ the protection of the ability of a State to advance the rights and welfare of its population, or, more generally, the maintenance of international peace and security and the development of friendly relations between nations.

3.2 The expediency of recognizing limitations to the obligation to make full reparation

Admitting the existence of customary limitations to the obligation to make full reparation, an objection could question the possibility of, or the need for a systematic doctrinal theory of less-than-full reparation. An alternative could be for courts or diplomats to take equitable conditions into account on a case-by-case basis. As mentioned, the reception of the Draft Article on State Responsibility adopted by the ILC in its first reading led several States, without denying the existence of limitations to the obligation to make full reparation, to express fears that recognizing such limitations could foster abusive claims or constant haggling of remedial obligations.¹²⁷

Such an objection was defended by Special Rapporteur James Crawford with a reference to the nature of the cases decided by international courts and tribunals.¹²⁸ Even the award in excess of \$50 billion that an arbitral tribunal recently granted against Russia to former shareholders

¹²¹ *Aminoil*, *supra* note 2, at [157(ii)].

¹²² Holtzmann and Kristjánisdóttir, *supra* note 52, at 356-357.

¹²³ Considerations of expediency have thus often played a role in the identification of international customs. See, for instance, *Continental Shelf*, *supra* note 114, at [24].

¹²⁴ See, J Kunz, The Nature of Customary International Law, 47 *American J Intl L* (1953) 662, 666.

¹²⁵ Thus, the absence of retroactive remedies in international trade law was sometimes justified by the consideration that full reparation would risk to ‘deter members from remaining in the WTO or from accepting new commitments.’ Broncker and Broek, *supra* note 32, 122.

¹²⁶ Institut de Droit International, *supra* note 103.

¹²⁷ See, Comments and observations received by Governments, *supra* note 19, at 108 and 146.

¹²⁸ Crawford’s third report, *supra* note 23.

of Yukos only represented a fraction of that State's economy.¹²⁹ Yet, this argument omits the relevance of international law to extra-jurisdictional dispute settlement and the possibility that cases of a different nature be brought before international jurisdictions. As international courts and tribunals are becoming more widely accepted as a mechanism of international dispute settlement, larger claims for reparation are more likely to be brought before international jurisdictions. Already, reparation clearly exceeding the capacity to pay of the respondent State were claimed before the *Eritrea-Ethiopia Claims Commission*.¹³⁰ An eventual advisory opinion of the ICJ on States' obligations in relation to climate change could likewise call an international jurisdiction to take position on compensation claims that could be extremely large.

In some cases, the desire to justify an equitable settlement without denying the general obligation of full reparation have apparently pushed international jurisdictions to adopt inconsistent judgments. A case in point is the judgment of the ICJ in the case on the *Application of the Genocide Convention* brought by Bosnia, where, in the eyes of Marko Milanović, the Court 'basically treated the ILC Articles on State Responsibility as holy scripture.'¹³¹ In this judgment, the Court found Serbia responsible for failing to take measures to prevent the genocide of Srebrenica and the death of more than 7.000 men. Yet, the Court rejected claims for compensation on the ground that Bosnia had not established the ability of Serbia to effectively prevent the genocide, if it had taken appropriate measures;¹³² but it nevertheless provided for measures of satisfaction as "the most appropriate form" of reparation.¹³³ It was inconsistent for the Court to reject compensation on causal grounds and yet indicate measures of satisfaction as a remedy: the same causal requirements should apply to all modes of reparations.¹³⁴ This inconsistent reasoning was possibly influenced by the Court's desire not to affect a difficult peace process. As Milanović suggests, it would have been 'far better for the Court to provide no explanation at all as to why it was not awarding compensation in this concrete case than for it to give the particular justification that it did.'¹³⁵ It may have been even better for the Court to recognize political obstacles to full reparation in the context of a difficult peace process and to outline the prolegomena of a more pragmatic approach to remedies as a tool for reconciliation.

The case of the *Application of the Genocide Convention* is only the tip of the iceberg: the affirmation of a general principle of full reparation may have far greater, though less visible repercussions in the extra-jurisdictional settlement of international disputes. Even though Special Rapporteur James Crawford focused on the typical cases decided by international courts and tribunals,¹³⁶ the codification of the law of State responsibility has also provided guidance to diplomatic means of settling international disputes. An exchange of letters between the United States and Mexico following Mexico's nationalisation program in the 1930s is a classical illustration of the capacity of different conceptions of reparation in international law to hinder diplomatic negotiations: while the United States demanded full compensation for its nationals in application of what it considered a 'universally recognized rule ... under

¹²⁹ See, *Hulley Enterprises et al. v Russia*, PCA Case No. AA 226, Final Award, (18 July 2014).

¹³⁰ See, EECC Final Award, *supra* note 48.

¹³¹ M Milanovic, State Responsibility for Genocide: A Follow-Up, 18 *Euro J Intl L* (2007) 669, 693.

¹³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)*, Judgment of 26 February 2007, [2007] ICJ Rep 43 [462].

¹³³ *Ibid*, [465].

¹³⁴ Milanovic, *supra* note 131, at 690.

¹³⁵ *Ibid*, 691.

¹³⁶ See, e.g., Crawford's third report, *supra* note 23, at [42].

international law,¹³⁷ Mexico was confident that such rule did not exist.¹³⁸ In this case like in many others, inconsistent assessments of legitimacy, based on a different understanding of applicable general international law principles, prevented an effective settlement of the dispute. One of the functions of the law of State responsibility is to help States to agree on what they can legitimately expect other States to do. In this sense, the affirmation of a general principle of full reparation without the simultaneous development of a doctrine of less-than-full reparation has created a dangerous gap between two different sources of legitimate expectations – between Article 31 of the Articles on State Responsibility and the consistent practice of States in agreeing to less-than-full reparation under certain circumstances. This rendered a peaceful settlement of international disputes less likely.

Recognizing limitations to the obligation to make full reparation could facilitate abusive claims, but so could the unqualified affirmation of an obligation to make full reparation. In order to make international law a more efficient tool to reconcile the parties to international disputes, the doctrine should assist international courts and tribunals in demarcating the obligation to make full reparations. The discussion of the particular circumstances where such limitations have been identified (section 2) can be useful to this, but a more systematic reflection is needed to define the relevant general criteria that may justify less-than-full reparation in different situations and, in principle, in any field of international law. To this end, next section suggests three alternative grounds for less-than-full reparation.

4. Relevant criteria for less-than-full reparation

This section suggests that less-than-full reparation is accepted as a matter of law only in particular circumstances. Three alternative conditions are identified: a lack of capacity of the responsible State to pay full reparation (4.1), a gross disproportion between the injury and the cause of responsibility (4.2), and the inherent limitation of the principle of sovereignty (4.3). These conditions are necessary, although perhaps not sufficient, to justify a diminution of reparation.

4.1 The Capacity of the Responsible State to Make Full Reparation

The first and most intuitive criterion which could justify less-than-full reparation relates to the inability of the responsible State to make full reparation. It is not productive, possibly counterproductive, and hence undesirable for a court to ‘grant vain and useless relief or render a judgment incapable of execution.’¹³⁹ Incapacity to pay may be absolute in rare cases, but it is most likely to be relative to other financial needs of the responsible State, in particular its duty to protect the rights and well-being of its population. The relevance of the capacity of the responsible State was once clearly acknowledged by the ILC which posited, in the first reading of its Draft Articles on State responsibility, a general principle of law in application of which remedial obligations should not ‘result in depriving the population of a State of its own means of subsistence.’¹⁴⁰ This disposition was withdrawn in the second reading, as mentioned, not because it was considered an inadequate reflection of existing law, but merely because it was considered as unlikely to apply in any concrete case before an international jurisdiction.

¹³⁷ Letter of the US Secretary of State to the Mexican Ambassador of 22 August 1938, in 5 *Foreign Relations of the United States* (1938) 685, 685.

¹³⁸ Letter of the Mexican Minister, *supra* note 68, at 680.

¹³⁹ *Williams v Garner*, 268 So 2d 56 (La App 1st Cir 1972) (USA) 61.

¹⁴⁰ Draft Articles on State Responsibility with Commentaries, *supra* note 16, at Art 42(3) and Commentary under Art 42 [8(a)].

The ILC's assessment of full reparation as unlikely to deprive the population of a State of its own means of subsistence was based on an observation of past cases decided by international jurisdictions.¹⁴¹ This reasoning is problematic for two reasons. Firstly, future cases before international jurisdictions may substantially differ from past ones. A few years after the adoption of the Articles on State Responsibility, the dispute between Eritrea and Ethiopia came to illustrate the possibility that larger injuries could be brought before international jurisdictions,¹⁴² while some States attempted to bring to the International Court of Justice some questions relating to the responsibility of industrial States in relation to climate change.¹⁴³ A progressive codification of international law should arguably go beyond a compilation of judicial precedents – it should seek to develop a systematic theory of the general principles that have been and will continue to be guiding States' conduct.

Furthermore, the role of international law is not confined to jurisdictional cases, which only represent a limited share of State practice relating to peaceful dispute settlement. While focusing on past jurisdictional decisions, the majority of the members of the ILC gave little consideration as to whether, as Christian Tomuschat argued in his course at the Hague Academy of International Law in 2001, 'large-scale damage require other rules than individual cases of wrongdoing.'¹⁴⁴ As a consequence of this orientation, the Articles on State Responsibility came to reflect the law typically applicable to cases before international jurisdictions, in particular the ICJ, rather than the law that – to paraphrase Louis Henkin – almost all nations observe almost all the time in their mutual relations.¹⁴⁵ Yet, there is little doubt that the Articles on State Responsibility were of some influence on diplomatic negotiations.

Beyond the courtroom, there are numerous cases where the capacity of the responsible State to pay full reparation was recognized as a legitimate justification for less than full reparation.¹⁴⁶ In particular, the spectre of the Versailles treaty fostered a flexible approach of war reparations whereby 'account was always taken of the actual capacity to pay.'¹⁴⁷ As mentioned, the relevance of the ability of pay was acknowledged by the UN Security Council when it created

¹⁴¹ See, in particular, Crawford's third report, *supra* note 23, at 21 [41] note 79: 'In dealing with compensation claims, courts have often contented themselves with quite modest awards, or even with suggestions for a zero-sum solution embodying other elements of restoration of the legal relationship.' See also, in the same vein: First Report of the International Law Association (ILA) Study Group on the Law of State Responsibility, *supra* note 33, noting that provisions limiting reparation 'appear to presuppose extremely exceptional situations and the Study Group would support the deletion of at least Article 43 (d).'

¹⁴² EECC Final Award, *supra* note 30, [18].

¹⁴³ See, e.g., S Beck and E Bursleson, Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations, 3 *Transnational Environmental L* (2014) 17; A Korman and G Barcia, Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion, 37 *Yale J Intl L Online* (2012) 35.

¹⁴⁴ Tomuschat, *supra* note 36, at 293. See, also, *Yrbk ILC*, *supra* note 88, at 88 [399] – noting a reference to the 'prospects of catastrophic harm which might require a different approach to compensation.'

¹⁴⁵ See, L Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, New York, 1979) 43: 'Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'

¹⁴⁶ On the disconnection between cases decided by international jurisdictions and the broader practice of international relations, see, in particular, C Gray, Is There an International Law of Remedies? 56 *British Yrbk Intl L* (1985) 25, 29.

¹⁴⁷ Tomuschat, *supra* note 36, at 293.

the UN Claims Commission.¹⁴⁸ Similar considerations are instrumental in cases of responsibility for hazardous activities. The concept of an “equitable distribution of loss,”¹⁴⁹ for instance, reflects the understanding that an industrial disaster with extraterritorial consequences generally causes significant damage within the territory of the responsible State, thus reducing its ability to pay full reparation, and that this should be taken into consideration when assessing its remedial obligations.

Some members of the ILC suggested that the ‘problem of States unable for the time being to make large compensation payments is sufficiently addressed by the recognition that the circumstances precluding wrongfulness ... apply equally to [secondary] obligations.’¹⁵⁰ One might thus ‘envisage the plea of necessity or force majeure as a basis for delaying payments which have become due,’¹⁵¹ as the arbitral tribunal in the *Russian Indemnity* case appeared ready to do.¹⁵² Yet, the dominant view is that necessity and force majeure suspend the obligation without terminating it,¹⁵³ and that, accordingly, ‘neither of these considerations can affect the quantum of compensation due.’¹⁵⁴ For this reason, necessity or *force majeure* – as generally construed – do not explain the practice of States where the ambit of reparation is diminished rather than its payment being postponed. It would generally be problematic to assume that the inability of a State to pay full reparation is necessarily transient. In cases such as war reparations or major industrial accidents, injuries may exceed what a State could possibly pay without depriving its own population from its means of subsistence, even through instalments within any reasonable period of time.¹⁵⁵ As noted earlier, Iraq has not yet been able to fulfil entirely its obligations under the exceptionally harsh reparation regime imposed onto it a quarter of century ago.¹⁵⁶

Instead, less-than-full reparation can be approached through analogies with cases of sovereign default and domestic laws on insolvency.¹⁵⁷ Default of payment in such situations is not generally total, but partial and negotiated. The analogy helps to explain why less-than-full reparation does not necessarily mean no reparation at all, and how some types of injuries are given priority in such circumstances. The inability of a State to make full reparation invites a balancing of interests, taking into account the interests of the responsible State, those of the

¹⁴⁸ Note of the Secretary-General, *supra* note 44, at [2].

¹⁴⁹ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session, *supra* note 96, at [125].

¹⁵⁰ Crawford’s third report, *supra* note 23, at [42].

¹⁵¹ *Ibid*, [41]. See, also, Summary record of the 2614th meeting, 2 *Yrbk ILC* (2000) [55] (A Pellet); Summary record of the 2615th meeting, *Yrbk ILC*, *supra* note 24, at [44] (C Yamada).

¹⁵² *Russian Indemnity Case, Russia v Turkey*, Arbitral Decision, 11 November 1912, XI RIAA 421, 443.

¹⁵³ See, e.g., *Yrbk ILC*, *supra* note 10, at Commentary under chapter V [2], stating that the circumstances precluding wrongfulness ‘do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.’ See, also, *Gabčíkovo-Nagymaros Project* (Hungary v Slovakia), Judgment, [1997] ICJ Rep 7, 39 [48]. See, however, in application of a particular bilateral investment treaty: *LG&E v Argentine*, *supra* note 29, at [260].

¹⁵⁴ Crawford, *supra* note 1, at 483.

¹⁵⁵ Instalments over decades or centuries could be politically unrealistic or even politically toxic. They may fall against the four criteria discussed below, regarding the justifiability of collective responsibility, if they resulted in imposing reparations to future generations that draw no benefit from the wrongful act.

¹⁵⁶ See, UNCC, *supra* note 46.

¹⁵⁷ There is also anecdotal evidence of the ability to pay of a responsible party being taken into account by domestic courts in awarding reparation. See, RB McDaniel, *The Ability to Pay Doctrine in Louisiana*, 36 *Louisiana L Rev* (1975) 248.

injured State, and perhaps the interest of the international community that a breach of an international obligation does not remain unsanctioned. An important consideration is the need of the responsible State to keep sufficient resources available in order to fulfil its constitutive obligation to protect the human rights of the population within its jurisdiction. The need for protection resources is virtually unlimited,¹⁵⁸ but these resources have a diminishing marginal utility: the first resources are most needed in order to protect the most basic needs while further resources are arguably less essential.

The balancing of interests, in the situation of incomplete reparations, relates not only to the capacity of the responsible State to pay, but also to the need of the injured State to receive reparation. Considerations of distributive justice may thus play a role within the determination of remedial obligations. A comprehensive survey of International Mass Claims Processes showed the tendency of these processes to give preference to individuals who are deemed the “neediest claimants.”¹⁵⁹ The UN Compensation Commission, for instance, decided to give priority to smaller individual claims, including claims of departure and serious personal injury or death, over larger claims by individuals, corporations or governments.¹⁶⁰ Likewise, the German Forced Labour Compensation Programme gave priority to surviving victims over the heirs of deceased victims,¹⁶¹ whereas the objective of ‘addressing the socio-economic impact of the crisis on the civilian population’¹⁶² was explicitly spelled out by the Algiers agreement establishing the *Eritrea-Ethiopia Claims Commission*. On the other hand, while individuals are given priority, mass claim processes rarely allow States to recover the injuries they suffered directly through for instance losses of public properties and welfare expenditures.¹⁶³ Often, to the contrary, various tax exemptions may be established in receiving States in order to maximize the benefit of limited amounts of compensation to the claimants.¹⁶⁴ This form of informal risk-sharing among States is an important factor of stability in international relations as it seeks to solve disagreements and reconcile populations despite the inability of the responsible State to pay full reparation.

Beyond the existence of a limitation to the obligation to make full reparation, the modalities of less-than-full reparation in situations where a State is not realistically able to make full reparation without disproportionately affecting the well-being of its own population are yet to be established. Important doctrinal questions regard the determination of the threshold beyond which reparations would be deemed to exceed a State’s ability to pay and the measure of the diminution of reparations in such circumstances.¹⁶⁵ The notion of a balance of interests may only provide a very abstract response to such questions. On the other hand, the diminution of

¹⁵⁸ See, in particular, ICESCR, *supra* note 18, at Art 2.1.

¹⁵⁹ Holtzmann and Kristjánsdóttir, *supra* note 52, at 133.

¹⁶⁰ See, Priority of Payment and Payment Mechanism: Guiding Principles, Adopted by the UNCC on 23 March 1994 at its forty-first meeting, UN Doc. S/AC.26/Dec.17 (1994).

¹⁶¹ Agreement between the United States and Germany concerning the Foundation “Remembrance, Responsibility and the Future” (US-Germany Agreement) (adopted 17 July 2000, entered into force 19 October 2000) 2130 UNTS 249. See, generally Holtzmann and Kristjánsdóttir, *supra* note 52, at 79.

¹⁶² Algiers Agreement between Eritrea and Ethiopia, 12 December 2000, Art 5.1. See, also, EECC Final Award, *supra* note 30, at [25], emphasizing the ‘humanitarian character’ of reparation.

¹⁶³ See, e.g., G Vidigal, Re-Assessing WTO Remedies: The Prospective and the Retrospective, 16 *J Intl Economic L* (2013) 505, 510.

¹⁶⁴ See, for instance, US-Germany Agreement, *supra* note 161.

¹⁶⁵ See, in the context of the taking of foreign properties, FG Dawson and BH Weston, Prompt, Adequate and Effective: A Universal Standard of Compensation, 30 *Fordham L Rev* (1961) 727, 731-732.

remedial obligations does not affect other obligations, such as the obligation of a State responsible for an internationally wrongful act to cease a continuing wrongful act or to take measures of non-repetition. Additional obligations may arise to mitigate the actual injury or reduce the risk of re-occurrence. Some members of the International Law Association insisted that, under cases such as a breach of the *jus ad bellum* or possibly in relation to massive pollution, ‘the rules on State responsibility should rather tend towards mitigation.’¹⁶⁶ Prevention has also taken a central place in the ILC’s project on hazardous activities.¹⁶⁷

4.2 Injuries Out of All Proportion to the Cause of Responsibility

Remedies, in international law, appear to serve two distinct functions.¹⁶⁸ On the one hand, as reparation, they aim to address the loss and damage suffered by a State (or persons represented by the State) as a result of the conduct of another State. On the other hand, as sanction, remedies impose a cost that contributes to the deterrence of the wrongful conduct and to the reaffirmation of the norm breached. Yet, the harm caused by a particular conduct of a State is not necessarily commensurate to the blameworthiness of its conduct or, so to say, to the “culpability” of the State. In some situations, what many would consider as particularly grievous conducts may cause only little material damages, although there may be greater moral damages. In such cases, even full reparation may appear as somewhat trivial compared to the gravity of the conduct. In other situations, less culpable conducts may have disastrous consequences on the rights or interests of other States. Conducts such as trade or industrial policies, for instance, may conceivably cause significant harms to other nations, even though they are not generally considered as particularly blameworthy on their own.

On the international plane, remedies are not generally accepted by States unless they can be viewed at the same time as the reparation of an injury *and* the sanction of a harmful conduct. Thus, claims for “punitive damages” – whereby remedies would be established as punishment when reparation is not sufficient¹⁶⁹ – have generally been rejected in international law.¹⁷⁰ Likewise, this article suggests, full reparation is not indicated when it would largely exceed what is required to ensure an adequate sanction of the harmful conduct. In other terms, remedies are limited to the quantum justified *concurrently* as reparation and sanction, rather than extended to the higher instance.

¹⁶⁶ First Report of the International Law Association (ILA) Study Group on the Law of State Responsibility, *supra* note 33, at [37].

¹⁶⁷ See, in particular, Prevention of Transboundary Harm from Hazardous Activities, 2(2) *Yrbk ILC*, (2001) 146, at 148, General Commentary [2].

¹⁶⁸ See, *Yrbk ILC*, *supra* note 10, Commentary under Art 1 [3]: ‘the consequences of an internationally wrongful act cannot be limited either to reparation or to a “sanction”.’ See, also, R Ago, *Le délit international*, 68(2) *RCADI* (1939) 417, 430-440; H Lauterpacht, *Oppenheim’s International Law*, 8th edn, vol. 1 (Longmans, London, 1955) 352-354.

¹⁶⁹ See, discussion in S Wittich, *Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility*, 3 *Austrian Rev Intl & Eur L* (1998) 101. See, also, the multiple historical references to State practice cited in Sixth Report on International Responsibility by FV Garcia Amador, Special Rapporteur, 2(1) *Yrbk ILC* (1961) 36 [142].

¹⁷⁰ See, in particular, *Yrbk ILC*, *supra* note 10, Commentary under Art 36 [4]; Crawford, *supra* note 1, 523-526; *Velásquez Rodríguez Case, Compensatory Damages, Judgment of 21 July 1989*, Inter-American Court of Human Rights Series C No 7, [38]. Considerations for punishment in the assessment of remedial obligations could however be found in a few decisions, for instance *Janes v. Mexico*, 16 November 1925, IV RIAA 82 [25].

In support for this theory, there are indications in State practice and in the doctrine that less-than-full reparation could be justified when relatively minor wrongs (in particular mere negligence) cause substantial injuries. During the debates of the ILC on the responsibility of States for internationally wrongful acts, for instance, Sreenivasa Rao argued that ‘intentional wrongs and other aspects’ needed to be factored into the determination of reparation in each particular case.¹⁷¹ In trade law, States’ opposition to retroactive remedies relates in part to the limited moral significance attached to breaches of international obligations in this field of law, compared for instance with breaches of human rights obligations.¹⁷² There is relatively little demand for opprobrium for breaches of trade commitments – each State is largely expected to promote its trade interests against those of other States and the regulation of “excessive” trade policies is viewed as conventional (*malum prohibitum*) rather than necessary (*malum in se*).¹⁷³ By contrast, the exceptionally harsh disposition on war reparations through the UN Compensation Commission reflected a strong condemnation of Iraq for what the Security Council viewed as ‘breaches of international law of unusual seriousness and extent.’¹⁷⁴ These breaches were deemed of a sufficient gravity to partly balance other considerations relating to the limited capacity of Iraq to pay and to impose a relatively strict regime of reparation.

Likewise, in many situations of large-scale industrial damages, the injury could appear disproportionate to the degree of “culpability” of the act from which it originates – often pure inadvertence rather than a willful action. Nobody wants an industrial disasters to occur. In her authoritative study on State responsibility for transboundary air pollution, Phoebe Okowa noted that ‘pecuniary compensation should in addition to repairing the harm done take into account the gravity of the wrongful act, the importance of the obligation breached, and the degree of fault or willful intent of the wrongdoer.’¹⁷⁵ Accordingly, Okowa suggests that ‘inadvertent or accidental pollution should not necessarily attract the same consequences as pollution arising out of willful or negligent violation of commonly accepted safety standards.’¹⁷⁶ Similar considerations were instrumental in the decision of the ILC to single out the question of State ‘liability for injurious consequences arising out of acts not prohibited by international law,’ rather than considering these questions as an obligation of result not to cause harm from which State responsibility from internationally wrongful act could arise. In such circumstances, the International Law Association also admitted that the reparation ‘may not always be full.’¹⁷⁷ It also proposed a list of relevant elements on the basis of which the nature and extent of remedial measures could be negotiated. Several of these criteria were more or less directly related to the “culpability” of the responsible State, more particularly to whether this State had taken appropriate prevention measures and measures to minimize the harm, including through

¹⁷¹ See, Summary record of the 2615th meeting, *supra* note 24.

¹⁷² See, EU Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer, London, 1997) 81.

¹⁷³ Furthermore, deterrence in this field is largely fulfilled by the sole declaration of a breach, given in particular the interest of each State to maintain its credibility as a trade partner and to preserve the integrity of the system. See, Grané, *supra* note 60, 771, concluding stating that, within the WTO dispute settlement mechanism, ‘it is questionable whether a more stringent system of corrective justice would bring with it a true deterrence effect.’

¹⁷⁴ EECC, Decision 7: Guidance relating *jus ad bellum* liability, 27 July 2007, XXVI RIAA 10, 19 [29].

¹⁷⁵ Eleventh report on international liability for injurious consequences arising out of acts not prohibited by international law, by J Barboza, Special Rapporteur, 2(1) *Yrbk ILC*, (1995) 51 [24].

¹⁷⁶ *Ibid.*

¹⁷⁷ 1996 Report of the working group on international liability, *supra* note 87, at Art 21 [4].

providing assistance to the affected State, as well as whether it had shared the benefits drawn from the hazardous activity with other States.¹⁷⁸

Thus, from trade law to international environmental law and beyond, consideration is often given to the limited “culpability” of the responsible State in circumstances where the injury could be out of all proportion to the wrongfulness of the conduct from which it arises. These considerations are not limited to a particular self-contained regime; spanning over doctrinal demarcations, they form a general limitation to remedies in international law. The practical incentive for questioning the obligation to make full reparation largely comes from cases whereby inadvertence could result in large-scale loss and damage. In principle, however, such considerations could also apply to other types of fault, as long as the injury is out of all proportion to the wrongfulness. Crucially, recognizing the *degree* of “culpability” as a criterion to assess the scope of remedial obligations suggests that responsibility cannot always be dealt with in an all-or-nothing manner. This implies less determinate but more balanced and arguably fairer ways of producing mutually acceptable settlements of international disputes in cases where the cause of responsibility is insufficient to justify full reparation.

4.3 The Inherent Limitation of the Principle of Sovereignty

Instances of large reparations, in particular resulting from mass atrocities, also raise questions relating to a possible limitation of the liability of a State – and the price that a people would be made to pay – for internationally wrongful acts. The actions and omissions attributed to a State are always really those of individuals acting on its behalf; it is to these individuals that it belongs, *in fine*, to ensure that “the State” respects “its” obligations under international law.¹⁷⁹ International law is based on the legal fiction of the personality of the State – a nearly absolute presumption that the conduct of State organs or agents can be attributed to the State. Neither the international criminal responsibility of a State agent,¹⁸⁰ nor an excess of the authority delegated to an agent or organ under domestic laws¹⁸¹ *per se* suffices to rebut this “Westphalian” presumption.

This fiction, however, is necessarily limited in order to prevent an excessive burden of reparations from falling on a people as a result of serious crimes committed by its government, especially when this people suffered more than any other. In circumstances such as a breach of the *jus ad bellum*, for instance, the war-waging State’s own population often endures great harms as a result of a course of action to which some inevitably opposed.¹⁸² The international

¹⁷⁸ *Ibid.*, Art 22

¹⁷⁹ As Allott put it, ‘[t]he wrongful act of a State is the wrongful act of one set of human beings in relation to another set of human beings.’ P Allott, *State Responsibility and the Unmaking of International Law*, 29 *Harvard Intl L J* (1988) 1, 14. See, also, Judgment of the International Military Tribunal, Trial of the Major War Criminals, (1947) Vol 1, 223, noting that ‘[c]rimes against humanity are committed by men, not by abstract entities.’

¹⁸⁰ See, in particular Rome Statute of the International Criminal Court (Rome Statute), 2187 UNTS 3 (1998), Art 25(4); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 132, at 43 [173]. See, also, A Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case, 13 *Euro J Intl L* (2002) 853, 864; A Nollkaemper, Concurrence between Individual Responsibility and State Responsibility in International Law, 52 *Intl & Comp L Quarterly* (2003) 615.

¹⁸¹ *Yrbk ILC*, *supra* note 10, at Art 7.

¹⁸² This applies in particular to cases where reparations could be imposed, often following the defeat of the aggressor state.

human rights movement¹⁸³ and the doctrines of “sovereignty as responsibility”¹⁸⁴ and of a “sustainable development”¹⁸⁵ all come to suggest that the mandate of the government of a sovereign State is not unlimited;¹⁸⁶ rather, sovereignty should be used in ways compatible with individual rights, collective welfare or environmental sustainability. A government which systematically and grossly forfeits the rights and welfare of its own and other peoples progressively loses its legitimacy and, with it, its claim to act on behalf of a sovereign State. In extreme cases, this may go as far as to erode the nearly absolute presumption that the conduct of the government can be attributed to the State.

This theory may appear counterintuitive. To the contrary, some proponents of the concept of “State crime” have advocated for a stronger emphasis on States’ remedial obligations in such circumstances. It was for instance contended that the limited payment capacities of the responsible State would not be taken into consideration when determining its remedial obligations in cases of “State crimes”¹⁸⁷ and that punitive damages may be awarded.¹⁸⁸ It is however paradoxical that the two examples often mentioned by the proponents of “State crimes” – “Nazi Germany” and “Saddam Hussein’s Iraq”¹⁸⁹ – were largely attributed to a particular leadership of these States – the Nazi regime and Saddam Hussein, precisely. No systematic reparations were imposed over Germany for the crimes committed by the Nazi government, partly for historical reasons – the spectre of the Versailles treaty – but also partly because of the general understanding that the Nazi crimes were, precisely, the crimes of the Nazis rather than the crimes of Germany. Likewise, while reparations were imposed over Saddam Hussein’s Iraq, the limit rate of payment was reduced six fold (from 30 to 5 per cent of the proceedings of Iraq’s oil trade) following the fall of Saddam Hussein’s regime,¹⁹⁰ and then postponed,¹⁹¹ an indication that the reparations were directed towards that regime rather than towards Iraq as a sovereign State.

The rejection of the concept of “State crimes” recognized the likely disconnection between the systematic, wanton breach of international obligations by a government and the population of the “State.” Conceptually, it is difficult to accept the idea that a whole nation can be responsible for mass atrocities from which, often, they suffered more than any other nation. More pragmatically, attributing responsibility for a crime to a State rather than to a particular regime may ostracize a whole nation, hindering the development of friendly relations among nations, and it may appear politically more astute to disconnect the wrongs of the government from the State’s responsibility. Thus, as Georg Nolte noted, ‘it is certainly not arbitrary if the international legal system limits the consequences of a wrong and the available sanctions in

¹⁸³ See, e.g., Universal Declaration of Human Rights, Adopted by the UNGA on 10 December 1948 at its third session, UNGA Res 217 A(III); ICESCR, *supra* note 18; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

¹⁸⁴ F Deng, *Sovereignty as responsibility: conflict management in Africa* (The Brookings Institution, Washington DC, 1996).

¹⁸⁵ See, e.g., Rio Declaration on Environment and Development (12 August 1992), UN Doc. A/Conf.151/26; UN Framework Convention on Climate Change, *supra* note 104.

¹⁸⁶ See, generally, E Criddle and E Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (OUP, New York, 2016).

¹⁸⁷ See, Draft Articles on State Responsibility with Commentaries, *supra* note 16, at Art. 52(a).

¹⁸⁸ A Pellet, Can a State Commit a Crime? Definitely, Yes! 10 *Euro J Intl L* (1999) 425, 431.

¹⁸⁹ See, *ibid*, 433.

¹⁹⁰ See, UNSC, *supra* note 43; UNSC, *supra* note 45.

¹⁹¹ See, UNCC, *supra* note 46.

order to preserve an equilibrium, or peace, among its subjects.’¹⁹² But there is perhaps a more profound rationale to renounce to or reduce reparations that could be ‘repugnant to the whole notion of an international legal system based on sovereign equality’¹⁹³ in circumstances where reparations would impose a heavy burden on populations on whom the crimes already took their toll, or in circumstances where a prolonged reparation program would oblige future generations to make substantial sacrifices without any associated benefits simply because of being born in that particular State.

Thus, while State responsibility and full reparations are an acceptable form of “rough” justice when the stakes are small or when the population of the responsible State substantially benefits from the internationally wrongful acts, its stretching to systematic breaches of international obligations could result in conclusions that are too patently unfair to be reasonably acceptable. Like serious crimes committed by a government, current debates on States’ responsibilities in relation to climate change suggest the existence of limitations to collective responsibilities. Some developed States have added large amounts of greenhouse gas continuously since the industrial revolution; their accumulation results in great harms to many nations around the world. Assuming that a breach of an international obligation and a substantial injury can be identified, are developed States under an obligation to make full reparation for the injury resulting from their greenhouse gas emissions? Full reparations may have a great impact on the current and future generations of industrial nations, whereas most of the wrongful greenhouse gas emissions arguably originated from previous generations.¹⁹⁴ The broad, indirect benefits of past development – technological advance, for instance – have largely spread across international borders. In such circumstances involving a great discordance between the wrongful act and the payment of reparation, a limitation of reparation is the only way to avoid a conclusion repugnant to the objective of an effective settlement of international disputes. Even the reparations indicated by the Versailles treaty were, *in fine*, reduced, partly for geopolitical reasons but also perhaps in order not to put a disproportionate strain on new generations.¹⁹⁵

These considerations suggest some inherent limitations to the principle of State responsibility, for instance when a government systematically and grossly forfeits the rights and welfare of populations within or beyond its territory, or in relation to the wrongs of previous generations which could result in substantial future injuries without corresponding benefits. Certain advocates of the concept of “State crimes” actually did not envision it as a system of punishment, but rather as a way to displace emphasis from punishment to prevention, cessation (including through a particular regime of counter-measures) and non-repetition.¹⁹⁶ In the last decades, the development of international criminal responsibility of individuals¹⁹⁷ and of a regime of “smart” sanctions that seek to pressure a regime without disproportionately affecting its civilian populations¹⁹⁸ reflects the understanding that the State cannot always be approached

¹⁹² G Nolte, From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations, 13 *Euro J Intl L* (2002) 1083, 1092.

¹⁹³ Crawford, *supra* note 1, at 393.

¹⁹⁴ E Posner and D Weisbach, *Climate Change Justice* (Princeton University Press, Princeton, 2010) 99.

¹⁹⁵ See, R Henig, *Versailles and After: 1919-1933*, 2nd edn (Routledge, London, 1984).

¹⁹⁶ See, discussion in Nolte, *supra* note 192, at 1093.

¹⁹⁷ See, in particular, *Yrbk ILC*, *supra* note 10, at Art 58; and generally Rome Statute, *supra* note 180.

¹⁹⁸ See, e.g., D Drezner, Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice, 13 *Intl Stud Rev* (2011) 96.

as a “black box.” A government which engages in gross and systematic violations of international law affecting the human rights and welfare of both its and other populations, for instance, can no longer simply send the bill to its people: it is their own criminal responsibility that these political leaders engage before all.¹⁹⁹

Naturally, the concerned people retains *some* responsibility, in part because of what has been done on its name²⁰⁰ and possibly in part on the basis of certain benefits drawn from these violations. The consistent practice of reparations following mass atrocities suggests a regime of remedial reparations which is quite different from full reparation – a responsibility perhaps best understood as an obligation to negotiate in good faith toward a fair balancing of interests. A basic principle in determining remedial obligations should be that the people of the responsible State should draw no benefit whatsoever from the wrongful act. Consideration should be given to the urgency of addressing the loss and damage incurred by all concerned peoples – within and without the responsible State – and to restore constructive relations between peoples. In addition of restitution and perhaps some compensation, adequate symbolic remedies can be considered, including when appropriate through criminal proceedings and guarantees of non-repetition.

It is striking, however, that nations that bear a heavy historical responsibility have often taken the initiative of providing reparations to their victims. The 1952 Luxembourg agreement between Germany and Israel is a strong example of such practice, whereby the former offered some measures of reparation to Israel and Jewish non-governmental organizations.²⁰¹ These processes should interrogate us not because they constitute less than full reparation, but because they provide any reparation at all, free from any constraint, where the direct material interests of a State were not to pay any reparations. Such reparation can only be properly understood by unveiling domestic social and political processes through which a people, through its new government, comes to denounce the action of its previous government. It is in the interest of the development of international law, in such situations, that the denunciation of the wrongful conduct of a past government should not be discouraged by unrealistic demands for full reparation.

5. Conclusion

Less-than-full reparation is not limited to *lex specialis* or politically-motivated “arrangements”. Instead, this article has shown that it is a general practice accepted as law in certain circumstances. It argued, in particular, that less than full reparation could apply in cases of State responsibility when the responsible State is unable to make full reparation, when the injuries are out of all proportion to the wrong committed, or when a government breaches international law in such gross and systematic ways that the conduct cannot straightforwardly

¹⁹⁹ Thus, the Rome Statute of the International Criminal Court seeks to provide for the reparation to victims. See, Rome Statute, *supra* note 180, at [75], [79].

²⁰⁰ See, Statement of Chancellor Adenauer to the Bundestag on 27 September 1951 concerning the attitude of the German Federal Republic toward the Jews, reproduced in CC Schweitzer (ed) *Politics and Government in Germany, 1944-1994: Basic Documents* (Berghahn, Oxford, 1995) 123: ‘The unmentionable crimes committed *in the name of* the German people demand a moral and material restitution’ (emphasis added). Adenauer insisted that these crimes were committed despite the opposition from the majority of the German people.

²⁰¹ While Germany had been under some pressure from the United States to negotiate with Israel, this does not appear to have been instrumental in the rapprochement initiated by German Chancellor Konrad Adenauer. See, Barkan, *supra* note 38, at 3-29.

be attributed to the people. Yet, while these elements should be taken into consideration at the stage of assessing whether reparation should be full or less-than-full, a more systematic study would be necessary to determine the extent of less-than-full reparation and, possibly, the nature of particular remedial obligations in this context (eg the reinforcement of obligations of non-repetition following mass atrocities). Without denying that a recognition of less-than-full reparation could be utilized in support of abusive claims, this article suggested that much greater risks stem from the affirmation of an unqualified obligation to make full reparation in spite of well-established limitations.

The discussion of this article reflects a dilemma between two diverging objectives: the demand for clear and determinate legal rules that leave no space for abusive claims and the flexibility of these rules to allow for more equitable considerations. It is a natural disciplinary inclination for international lawyers to give great weight to determinacy – a preference which was reflected, for instance, in the rejection of any vague limitation of full reparation in the second reading of the Articles on State Responsibility. However one ought to question up to what point remedial obligations can be described in abstract and general terms, through a single formula, without betraying the general practice of States or complex yet relevant normative considerations. Like sentencing, reparations arguably require some fine-tuned balancing of interests and expediency that cannot fully be determined by abstract rules, and certainly not in isolation on the sole basis of the injury. A doctrine of less-than-full reparation need to be developed in order to guide reflections on whether full reparation should be provided in particular cases and, if not, the relevant considerations to determine remedial reparations on a case-by-case basis.