AEL 2024/02
Academy of European Law
European Society of International Law Paper

WORKING PAPER

Fair Compensation: Reality or Aspiration in International Law?

Ashley Barnes

European University Institute

Academy of European Law

European Society of International Law
Annual Conference, Aix-en-Provence, September 2023

Fair Compensation: Reality or Aspiration in International Law?

Ashley Barnes

ISSN 1831-4066

Published in March 2024 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Academy of European Law

The Academy of European Law coordinates several important research projects and offers advanced-level courses, including the annual summer courses in human rights law and the law of the EU, resulting in an extensive publications programme. The Academy also hosts the Secretariat of the European Society of International Law (ESIL), and assists in the organization of ESIL events.
Papers presented at ESIL events in 2011-2019 can be downloaded from SSRN. As of 2022, the papers are available in the EUI CADMUS Research Repository.

More information about the Academy of European Law

European Society of International Law

The European Society of International Law (ESIL) is a dynamic network of researchers, scholars and practitioners in the field of international law. The Society's goals are to encourage the study of international law, to foster inquiry, discussion and innovation in international law, and to promote a greater understanding of the role of international law in the world today. The Secretariat of the Society has been based at the Academy of European Law since 2004 when the Society was set up.

More information about ESIL

ESIL Paper Series

The ESIL Paper Series features papers presented at ESIL events (Annual Conferences, Research Forums, and Interest Groups events). Publication in the ESIL Paper Series enables authors to disseminate their work widely and reach broader audiences without the usual delays involved in more traditional means of publication. It does not prevent the subsequent publication of papers in academic journals or edited collections.

More information about the ESIL Paper Series

2023 ESIL Annual Conference, Aix-en-Provence, 31 August – 2 September 2023

The 18th Annual Conference of the European Society of International Law was held in Aix-en-Provence on 31 August-2 September 2023. The overall theme of the conference was 'Is International Law Fair?'. The 2023 Annual Conference was hosted by the Faculty of Law and Political Sciences of Aix-Marseille University.

More information about the 2023 ESIL Annual Conference

EUI ACADEMY OF EUROPEAN LAW

esil sedi EUROPEAN SOCIETY OF INTERNATIONAL LAW

Abstract

Calling for compensation under international law is now ubiquitous in unexpected areas. Comparatively little attention is paid to how compensation is awarded by international tribunals and whether it is done so fairly. Like many international legal remedies, compensation is normally treated as an afterthought or, at best, highly discretionary and case specific. The most common guidance is that there should be “full reparation.” Yet that principle leaves much uncertain. For its part, the International Court of Justice (ICJ) is increasingly engaged in awarding compensation. In February 2022, it awarded a total of $330 million (USD) in damages to the Democratic Republic of Congo (DRC) linked to Uganda’s violations of international law, after the parties were unable to reach a negotiated settlement. While a significant development, critics were quick to question how the ICJ arrived at that amount. Still others raised concerns that large compensation awards, even if warranted for serious violations, can pose an overwhelming burden on a state, potentially outstripping its resources. The current approach to awarding compensation therefore neglects many concerns that have a direct bearing on its perceived fairness. How is compensation assessed? To whom is it owed and under what circumstances? What purpose is it intended to serve? By engaging these questions, the article aspires to an ideal of “fair compensation” – weighing such factors as clarity, consistency and equity in international law. It acknowledges that fair compensation will always be imperfect, depending on certain trade-offs. Whether the result is unfair depends on one’s vantage point – for example, for the state ordered to pay or, conversely, individuals in the recipient state most affected by the legal violations unclear whether the sum paid will ultimately address their needs. Nevertheless, promoting fairness offers tribunals a means of balancing essential goals and interests in decides to award compensation, in what amount, or not at all.

Keywords

remedies, reparation, compensation, international courts, fairness

Author Information

Ashley Barnes, Assistant Professor, Faculty of Law, Thompson Rivers University.

Table of Contents

Introduction

Seeking different forms of compensation under international law is now commonplace in previously unexpected areas. Among recent and surprising examples, in November 2022, United Nations climate change talks (Conference of the Parties, COP27) nearly broke down over the creation of a controversial fund to address climate related loss and damage.[1] Since the early days of the invasion of Ukraine in February 2022, different proposals emerged on directing Russian resources towards reparations for damage caused by indiscriminate bombing of Ukrainian towns and cities.[2] Responding to such prominent calls, however, proves much more challenging in practice where political commitment, available procedures and financial resources may be lacking.

Comparatively little attention is paid to how compensation is awarded by international tribunals and whether it is done so fairly. Like many international legal remedies, compensation is normally treated as an afterthought or, at best, highly discretionary and case specific.[3] The preference is often to allow the parties to reach their own settlement on appropriate compensation reflecting state consent central to international law, rather than having a tribunal order it.[4] To the extent there is any common guidance on the suitability of such an award is that there should be "full reparation" – a principle dating back to *Chorzow Factory*[5] and

[1] See, e.g., Brad Plumer, Lisa Friedman, Max Bearak and Jenny Gross, "In a First, Rich Countries Agree to pay for Climate Damages in Poor Nations", The New York Times (19 November 2022); "Historic Compensation Fund Approved at UN Climate Talks", Associated Press (19 November 2022).

[2] See, e.g., Patrick Wintour, "Plan needed to make Russia pay reparations to Ukrainians, says report", The Guardian (16 June 2022) and more recently Yuliya Ziskina, "Multilateral Asset Transfer: A Proposal for Ensuring Reparations for Ukraine", New Lines Institute for Strategy and Policy (June 2023).

[3] Chester Brown, *A Common Law of International Adjudication* (Oxford: Oxford University Press, 2007) at 185.

[4] See, e.g., discussion in Pablo de Grieff, *The Handbook of Reparations* (Oxford: Oxford University Press, 2006) at 451.

[5] *Factory at Chorzow (Jurisdiction)*, Ser A, (No 9) 21 (PCIJ, 1927).

reiterated by the 2001 Draft Articles on State Responsibility.[6] Yet that principle leaves much uncertain.[7]

More broadly when it comes to awarding remedies, not solely compensation, scholars question whether any coherent approach exists among international tribunals.[8] Since these remedies are relatively under-developed internationally in comparison to domestic courts, international tribunals remain unsure not only on the authority given to award them but also their potential scope.[9] While it is possible to identify general agreement on the availability of different remedies, including compensation, whether it is appropriate to award them in different circumstances remains contested, casting further doubt on their consistency in interpretation and application.[10]

Despite these uncertainties, for its part, the International Court of Justice (ICJ) has nonetheless become increasingly engaged in awarding compensation. In February 2022, its Reparations Judgement in *Armed Activities (DRC v Uganda)* awarded a total of $330 million (USD) in damage to the Democratic Republic of Congo (DRC) linked to Uganda's violations of international law, after the parties were unable to reach a negotiated settlement.[11] While a significant development, critics were quick to question how the ICJ arrived at that amount.[12] Still others raised concerns that large compensation awards, even if warranted for serious violations, can pose an overwhelming burden on a state, potentially outstripping its resources.[13] Regardless of the instinct to more readily delve into the remedial consequences of international legal violations, almost any foray into compensating an aggrieved party generates some controversy.

The current approach to awarding compensation therefore neglects many concerns that have a direct bearing on its perceived fairness. How is compensation assessed? To whom is it owed and under what circumstances? What purpose is it intended to serve? By engaging with these questions, the paper aspires to an ideal of "fair compensation" – balancing such factors as

---

[6] James Crawford, *The ILC's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

[7] See, e.g., the discussion about the (re)statement of the principle of 'full reparation' and whether its application is truly followed in Dinah Shelton, "Righting Wrongs; Reparations in the Articles on State Responsibility" (2002) 96 AJIL 833 at 835.

[8] Christine Gray, "Remedies" in Cesare P Romano et al, *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014) at 871 [Gray, "Remedies"]. This updates Gray's earlier discussion of these issues in *Judicial Remedies in International Law* (Oxford: Oxford University Press, 1987) and "Is there an international law of remedies?" (1985) 65 BYIL 25.

[9] Dinah Shelton*, Remedies in International Human Rights Law*, 3d edn (Oxford: Oxford University Press, 2015) at 1 (while her observations were aimed at remedies specifically in the context of human rights tribunals, in this instance they can just as easily be applied more broadly to the approach of other international tribunals).

[10] Brown, *supra note* 3 at 194 where he notes that the absence of clear provisions on remedies has led international courts/ tribunals to look to one another's practices.

[11] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) – Reparations* (9 February 2022) [*Armed Activities (DRC v Uganda) – Reparations*].

[12] See, e.g., Diane Desierto, "The International Court of Justice's 2022 Reparations Judgment in DRC v Uganda: 'Global Sums' as the New Device for Human Rights-Based Inter-State Disputes", EJIL: Talk! (14 February 2022), online: https://www.ejiltalk.org/the-international-court-of-justices-2022-reparations-judgment-in-drc-v-uganda-a-new-methodology-for-human-rights-in-inter-state-disputes/; see also Sotirios-Ioannis Lekkas, Remarks, Remedies and Reparations for Individuals Under International Law, Personalizing International Law (2022) 116 Proceedings of the ASIL Annual Meeting 217.

[13] See, e.g., the discussion in Martins Paparinskis, "A Case Against Crippling Compensation in International Law of State Responsibility" (2020) 83:6 Modern Law Review 1246.

clarity, consistency, and equity in international law. To that end, the remainder of the article is structured in three parts. Part I critiques recent procedural and jurisprudential developments relating to compensation highlighting ongoing uncertainties in the approach of different tribunals. Supplementing that analysis, part II adapts comparative and theoretical perspectives, including corrective justice and deterrence, to awarding compensation in a distinct international legal context. Part III consolidates these insights into identifying the factors that should be weighed to promote a measure of fairness in compensation.

The article acknowledges that compensation will always be imperfect, depending on certain trade-offs. In many instances, whether the result is unfair depends on one's vantage point – for example, for the state ordered to pay or, conversely, individuals in the recipient state most affected by the legal violations unclear whether the sum paid will ultimately address their needs. Nevertheless, aspiring towards fairness offers a means of balancing essential goals and interests as a tribunal decides to award compensation, in what amount, or not at all. With growing calls to compensate serious international legal wrongs greater awareness is needed of the fairness challenges inherent to this remedy.

1. Recent Developments

The proliferation and diversity of international tribunals is mirrored in their handling of compensation through judicial and arbitral decisions. Most tribunals rely on the same basic starting point requiring "full compensation", coupled with general recognition in the ILC Draft Articles that "compensation shall cover any financially assessable damage including loss of profits."[14] Taken together these principles leave considerable room for interpretation. The result is a variety of different approaches from tribunals when it comes to methods of assessment for compensation – including consideration of what types of damages should reasonably be compensated and determining the appropriate quantum.[15] While the discretionary nature of compensation in each context or even individual case means inevitable variations, there remain questions about fairness when there is limited, if any, explanation provided on how a tribunal came up with a particular monetary outcome. For this reason, at least one commentator characterized the awarding of damages as almost "impressionistic"[16] with figures appearing without any clarity on their factual and legal underpinnings. This approach also poses ongoing challenges in managing expectations in the assessment of compensation in future cases or, more significantly, knowing what may give rise to monetary consequences so as to shape the conduct of international actors accordingly.

Adding further complexity is the existence of specialized tribunals that have adopted or varied their practices on compensation based on guidance in their constituent instruments or procedural rules. A prime example is the dispute settlement mechanism (panels and appellate body) of the World Trade Organization (WTO). Its Dispute Settlement Understanding (DSU) provides a distinct approach to remedies. The objective is the withdrawal of measures impugned under the agreements and, by way of a remedy, a panel or the appellate body will recommend the member state bring the measure into conformity with its trade obligations.[17] The purpose of compensation is therefore secondary and only temporary while the

[14] See Crawford, *Draft Articles on State Responsibility*, *supra* note 6 art 36.
[15] Brown, *supra* note 3 at 192.
[16] Gray, "Remedies", *supra* note 8 at 882.
[17] *Ibid* at 883.

recommendations are implemented.[18] Unlike compensation that may be ordered by other tribunals, it is not linked directly to remedying past harms or punitive in nature. The approach is forward-looking and focused primarily on compliance.[19] As in this example, specialized tribunals may have unique perspectives on the role of compensation and consequently their willingness to award it.

International human rights tribunals, notably the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR), also have distinct frameworks relevant to any award of compensation and have been active in issuing them, though not without considerable debate. The ECtHR provides for reparations in "just satisfaction" to an injured party that includes greater flexibility in awarding compensation. The focus is on ensuring equity in the circumstances of the case.[20] The IACtHR has even broader powers in awarding remedies and has proven relatively innovative in exercising its discretion.[21] While the IACrHR emphasizes that financial compensation alone is insufficient for human rights violations, it has still provided such compensation.[22] Both courts are nonetheless criticized for ongoing inconsistencies and vagueness in their approach to calculating compensation.[23] Equally scholars have critiqued their attempts to reconcile the goal of compensation for those individuals directly harmed against other alternatives that encourage states to alter their practices or acknowledge wrongdoing, such as an apology or declaration.[24] An important issue for international human rights tribunals then becomes whether it is fair to prioritize compensating an individual as opposed to other remedial measures aimed at state action going forward.

Apart from specialized tribunals, there are recent developments in the jurisprudence of the ICJ worthy of closer examination. Writing in 2013, Christine Gray suggested that although the ICJ's experience in awarding remedies, such as compensation, was limited there were some signs of a relatively bolder approach.[25] Coupled with the most recent case law on reparations in the last eighteen months, this boldness is even more apparent but still too infrequent to solidify new directions or principles. That boldness also comes with added responsibilities linked to the aspiration of fair compensation. This responsibility is highlighted by two of the ICJ's most significant and progressive decisions in this area and the challenges they further demonstrate in ensuring fairness.

The first decision of interest is *Diallo (Guinea v DRC) - Compensation*.[26] Guinea initially brought an application based on diplomatic protection for serious violations of international law against one of its citizens, Ahmadou Sadio Diallo. The Court subsequently found that the DRC violated

---

[18] *Ibid* at 884.

[19] Brown, *supra* note 3 at 217.

[20] Gray, "Remedies", *supra* note 8 at 891. Interestingly, Shelton, supra note 9 at 3 references the use of confidential recommended standards for compensation within the ECtHR but since they are not made public relate to concerns that will be discussed later regarding the provision of justifications and a lack of transparency as a matter of unfairness.

[21] Ibid at 895.

[22] *Ibid*.

[23] Shelton, *supra* note 9 at 3.

[24] See, e.g. discussion of this tension in Veronika Fikfak, "Non-pecuniary damages before the European Court of Human Rights: Forget the victim, it's all about the state" (2010) 33 Leiden Journal of International Law 335.

[25] Gray, "Remedies', *supra* note 8 at 875.

[26] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Compensation Judgment, [2012] ICJ Rep 324 [*Diallo – Compensation*].

Diallo's human rights with his arrest, detention and expulsion.[27] Even more extraordinarily, the Court found that the DRC was obligated to make reparation in the form of compensation.[28] Absent agreement between the parties, the Court awarded compensation in a separate judgment. The Court awarded a total of $85,000 (USD) in compensation including a portion for non-material injury, material injury (including loss of personal property and income) as well as post-judgment interest.[29] The judgment was notable as the first time the ICJ awarded compensation since the 1940s.[30] It was also striking for the way it naturally veered into a role normally reserved for human rights tribunals ordering compensation for individual rights violations.[31]

It is surprising, however, despite the novelty of the decision that the Court still left much unclear in its overall approach to compensation. The conclusion was that the amount was "appropriate" given "equitable considerations" in the "circumstances outlined", though there is no elaboration on what those considerations were in the circumstances or how they led to the final figure.[32] Even more confusing, the Court noted that Guinea had failed to provide adequate evidence to support claims for Diallo's loss of earnings and material injury. Yet, somehow, the Court proceeded to award $10,000 (USD) for these losses based on equitable considerations, which is difficult to reconcile with its conclusion on the absence of evidence.[33] There was also some disparity among the judges in calculating the actual amount – notably whether moral damages were too high relative to what would be expected based on other courts, or conversely should have been higher.[34] The decision for the Court to award compensation for human rights violations in these circumstances was undoubtedly ground-breaking. Simultaneously, however, the Court did little to make clear its approach to doing so or how that approach would apply in determining when and how much compensation would be appropriate in future cases.

The next evolution in the ICJ's approach to compensation, addressing wide-ranging human rights and humanitarian violations, came as recently as February 2022 in *Armed Activities (DRC v Uganda) – Reparations*.[35] Back in 2005 the Court found Uganda had violated international law, notably international human rights and humanitarian law, through its military activities in the DRC. These activities included the use of force, providing support for irregular forces, inhumane treatment of civilians and exploitation of natural resources.[36] Unable to reach an agreement on a reparations settlement, the DRC asked the Court to reopen proceedings in 2015 to decide on appropriate compensation. The DRC sought over 11 billion (USD) in compensation for personal injury, damage to property and natural resources, as well as macroeconomic damage, non-material damage, the creation of a reconciliation fund for ethnic

---

[27] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo*), Merits, Judgment, [2010] ICJ Rep 639.

[28] *Ibid*.

[29] *Diallo – Reparations*, *supra* note 26.

[30] Gray, "Remedies", *supra* note 8 at 882; Geir Ulfstein, "Awarding Compensation in a Fragmented Legal System: The *Diallo* Case" (2013) 4:3 Journal of International Dispute Settlement 477 at 480.

[31] Ulfstein, *ibid* at 478.

[32] *Diallo – Compensation*, *supra* note 26 at para 13.

[33] *Ibid* at para 55; also noted in Gray, "Remedies", *supra* note 8 at 882.

[34] A more detailed comparison of the separate opinions of Judge Greenwood and ad hoc Judge Mampuya in *Diallo – Compensation*, *supra* note 26 is provided in Ulfstein, *supra* note 30 at 483.

[35] *Supra* note 11.

[36] *Armed Activities on Territory of the Congo (Democratic Republic of Congo v Uganda)*, Merits, Judgment, [2005] ICJ Rep 168; the specific claims were also outlined by Veronica Fikfak, "Establishing Damages for Mass Human Rights Violations" (2022) 81:2 Cambridge Law Journal 221 at 222 [Fikfak, "Mass Human Rights Violations"].

groups in the region and further criminal investigation and prosecution.[37] The Court awarded the DRC only a small portion of the amount originally claimed only assessing compensation for damage to persons, property and natural resources.[38] The still substantial settlement has rightly attracted considerable interest for what insight it can provide into the developing approach of international courts to compensating large-scale international humanitarian and human rights violations.

For current purposes, however, it also brings to the fore various concerns relating to fairness in awarding compensation. The first relates to the length of time that has passed since the violations occurred over twenty years ago and the original judgment was issued in 2005.[39] On its own, the significant gap in time between the findings on the violations that occurred on their merits and the judgment on compensation ultimately owed creates an initial disconnect – severing the clear link as to what is being compensated under the circumstances. To those injured within the DRC, for example, the significance of an award of compensation may be diminished nearly two decades later, especially where it is less clear how that compensation relates to harms recognized separately in a much earlier decision. Does compensation in that context still serve its intended purpose? It may neither be fair to those injured waiting for concrete redress nor the party asked to pay for actions that occurred long ago and are now being revisited yet again at a later reparations phase.

The impact of the timing also presented a practical problem for the Court in its assessment of compensation – the availability of evidence to establish the DRC's claims. Some of that evidence is inevitably lost with time as it is lost or destroyed. The Court seemingly recognized this problem noting the need for flexibility in its consideration of evidence.[40] Yet, critics of the decision point out that key claims relating to, for example, evidence of civilian victims in the DRC were denied specifically for a lack of evidence where the DRC's surveys and victims forms were considered unreliable.[41] They also point by contrast to the heavy weight given to United Nations reports on the assessment of victims.[42] Leaving aside the specific weighting of evidence in this case, it points to a larger problem of what an injured party should be expected to provide by way of evidence supporting claims for compensation from decades earlier. In addition, how does the Court assess that evidence fairly? Any assessment will necessarily assign greater weight to certain evidence over others. It also needs to balance flexibility in what evidence is reasonably available with the need to make some link between the damage caused warranting compensation.

A more concerning aspect of *Armed Activities (DRC v Uganda) – Reparations* is how the Court determines the quantum of compensation. It relies on its own notion of the need for global sums. The Court made clear that exceptionally it was able to "award compensation in the form of a global sum within a range of possibilities indicated by the evidence and taking into account equitable considerations."[43] This approach might be required where it was not possible to

[37] See *Armed Activities (DRC v Uganda) – Reparations*, *supra* note 11at 132.

[38] Desierto, *supra* note 12 notes that the compensation awarded amounted to about 3% of what the DRC initially requested as part of its claims.

[39] Some problems associated with the time gap between the violations and merits and reparations determinations was also discussed in Fikfak, "Mass Human Rights Violations", *supra* note 36 at 224.

[40] *Armed Activities (DRC v Congo) – Reparations*, *supra* note 11at 107.

[41] Discussed with slightly different emphasis in Desierto, *supra* note 12 and Fikfak, "Mass Human Rights Violations", *supra* note 36 at 223.

[42] *Ibid*.

[43] *Armed Activities (DRC v Uganda) – Reparations*, *supra* note 11 at 106.

provide "a precise evaluation of the extent or scale of such injury."[44] When reviewing the decision, it becomes clearer how the global sums approach operates in practice and why it is potentially problematic. For example, the Court surveys relevant evidence on damage to persons and ultimately concludes, seemingly out of the nowhere, that this leads to a global sum of $225 million.[45] It is not clear how this figure suddenly emerges as the final result. As more than one critic has pointed out, the reliance on a new assessment of 'global sums' allows the Court to completely sidestep almost any explanation for how it arrived at a particular figure.[46] This leaves unresolved what considerations went into this assessment based on the harm caused *en masse* to the civilian population – was this a reasonable proximation based on an allotment for civilian deaths or an intuition of what is just under the circumstances?

The larger problem, of course, may well be how the global sums analysis can be interpreted and applied elsewhere. The risk is that it opens the door to unpredictable awards of compensation without explanation.[47] Global sums could be used as a catch-all or blanket approach to justify whatever compensation is awarded. Yet, at the same time, there is a need to give a certain amount of discretion to judges and arbitrators in assessing compensation. The challenge is to balance their role in attempting to reach what will be a fair determination on quantum in a particular case with the need to know as an injured party, as a matter of fairness, what went into justifying a specific amount.

What emerges from this brief consideration of recent developments, with examples from the ICJ, is that awarding compensation presents a complex, and often underappreciated, web of challenges related to fairness. These challenges range from inconsistencies in the approach, to a lack of explanation in considering evidence, to the unclear assessment of or justification for the quantum of compensation. Indeed, recognizing them as central to the real and perceived fairness of an award, as opposed to mere technical matters after a conclusion on the merits, demonstrates just how intricate the question of who, when, and how much to compensate has the potential to become under international law. Stepping back from the specific jurisprudence, the next section examines relevant theoretical perspectives that inform the role and goals of international tribunals in awarding compensation. To critique whether compensation is fair further assistance comes from an appreciation of its intended purpose.

2. Theoretical Perspectives

There are theoretical perspectives on the functions of remedies, normally applied in the context of domestic law, that have some application to international tribunals aiming to award fair compensation. The most obvious link is to corrective or reparative justice.[48] The widely recognized term of 'reparations' in international law alone as encompassing not just compensation but also restitution and rehabilitation obviously reflects this perspective.[49] As

[44] *Ibid*.

[45] *Ibid* at 226; the court's approach to suddenly announcing its awards under different heads of damage is implied in Fikfak, "Mass Human Rights Violation", *supra* note 36 224.

[46] Fikfak, *ibid* at 224.

[47] The potential for the 'global sums' approach to lead to arbitrary damage assessment is discussed, for example, in Lekkas, *supra* note 12.

[48] See e.g. discussion in Shelton, *supra* note 9 at 10; for a domestic law treatment see Jason Varuhas, *Damages and Human Rights* (Oxford: Hart Publishing, 2016).

[49] Reparations is seen as the "umbrella concept" under which restitution, compensation and rehabilitation are possible, see comments in Brown, *supra* note 3 at 187 and the language of the ILC Draft Articles themselves in Crawford, s*upra* note 6, art 73.

does the common understanding that there will be 'full reparation.'[50] Corrective justice focuses on rectifying the harm suffered. Compensation therefore makes up for the harms suffered by quantifying that loss – everything from physical or mental injuries, economic losses or even moral injury.[51] Applying this perspective, the goal in assessing compensation is to determine the value of all relevant losses and come to a total amount of an award.

Of course, this analogy has its limitations. Is it fair to expect that all losses will be compensated thereby returning the injured party to their original position or is that even realistically possible? International lawyers when assessing compensation are not engaged in a purely mathematical exercise and will place some restrictions on what losses are included and how they are quantified. Along these lines, it is not surprising that when it comes to addressing state responsibility international tribunals have waffled in their language subsequently interpreting the *Chorzow Factory* view that reparation should "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[52] There are practical limits on what can be compensated and no quantifiable amount may be enough. As discussed in the context of international human rights violations, there is concern that compensation can never truly repair all associated losses, leading to focus instead on the provision of "adequate compensation."[53] Is adequate compensation sufficient to ensure repair and what will that mean as a portion of potential losses? Corrective justice does provide some insights into the prevailing approach to compensation at the international level but its application in practice still has the potential for unfairness for the injured party experiencing the loss (that does not cover enough) or wrongdoer being asked to compensate (potentially far too much than feasible if it is to make the other whole again).

Another view on remedies is that their aim is deterrence – seeking to influence the behaviour of, for present purposes, not only those parties appearing before an international tribunal in a particular case but also other international actors.[54] Where corrective justice looks backwards to ameliorate the immediate harms caused, deterrence projects forward to address similar future conduct that is undesirable or prohibited within the international legal community.[55] Their distinct goals may exist in competition with one another. Compensation for harms that have already occurred may be at odds with larger considerations in addressing how an international actor, typically a state, conducts itself going forward. These tensions were already seen when international human rights tribunals wrestled with making declarations related to impugned legislation over compensating those afflicted or WTO panels emphasized compliance.[56] For those parties seeking compensatory damages for the wrongs experienced they may see their

[50] See Crawford, *ibid* for the text of the ILC Draft Articles and commentary but equally discussion in, for example, Gray,"Remedies", *supra* note 8 at 873.

[51] See, e.g., De Greiff, *supra* note 4 at 452; note that Brown, *supra* note 10 at 191 suggests in many instances moral damages are particularly contentious in practice are ultimately best addressed through the alternative remedy of satisfaction.

[52] See commentary in the ILC Draft articles on the variation in language from 'full reparation' that has occasionally been used in the jurisprudence of international tribunals in Crawford, *supra* note 6.

[53] See, e.g., De Greiff, *supra* note 4 at 34.

[54] See, e.g., Shelton, *supra* note 9 at 14 for deterrence in the context of human rights violations.

[55] Lewis Kornhauser, "Incentives, Compensation and Irreparable Harm" in Andre Nollkaemper & Dov Jacobs (eds) *Distribution of Responsibilities in International Law* (Cambridge: Cambridge University Press, 2015) at 121; we can also see the priority afforded to compliance over remedies in assessing judicial effectivenenss in Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford: Oxford University Press, 2014) at 309.

[56] *Infra*, section 1.

personal interests sacrificed in favour of others, such as those of the wider international legal community, when it comes to decisions on remedy, perhaps even overlooking compensation for them entirely.

Yet, compensation is not necessarily precluded by the aims of deterrence. Quite the opposite may prove true – understanding there are monetary consequences for breaching an international obligation could in its own way serve to dissuade international actors from harmful behaviour. It does not, however, mean that such forms of compensation will aim to directly address the injured party or reflect their specific losses in the same way as reparative justice. Compensation will look and be assessed rather differently in these circumstances to serve another purpose. Also, the related focus of deterrence is that wrongful behaviour is punished. This is at odds with how compensation is typically understood in international law where the focus is on the full reparation standard, or compensatory as opposed to punitive damages.[57] There is a general reluctance to have compensation be viewed as punitive in nature in spite of its direct link to what are deemed internationally wrongful acts.[58]

Regardless, there are those scholars who argue that international legal liability should prefer deterrence as its objective to compensation.[59] This is not an entirely unappealing approach in the context of international tribunals that typically see few cases and still require the consent and participation of the states on whom they are asked to render a decision. In that way, the tribunals can focus more on clarifying international legal obligations for the future. However appealing, it underestimates the ever-increasing interest in and pressure to provide remedies in some form, to which the tribunals themselves have attempted to respond, albeit imperfectly. Working towards some fairness in the approach to compensation in appropriate circumstances may equally be what is demanded of tribunals in the current international legal landscape. Goals of compensation may nonetheless be downplayed at times in favour of deterrence or used to compliment it in others, with no fewer disputes over whether the approach is fair.

Law and economics perspectives are similarly used to conceive of and evaluate remedies. As a starting point, they may reinforce the rationale behind deterrence, as already discussed, by disincentivizing behaviour that, while otherwise in a state's self-interest, will result in legal sanctioning, including monetary consequences.[60] Law and economic perspectives, however, are perhaps more interesting in the context of compensation for how they emphasize maximizing efficiency.[61] Being efficient in awarding compensation, either in the approach or amount itself, will necessarily involve certain trade-offs. Compensation, from this view, should not aim for full repair but balance that need in a way that remains cost-efficient. A relevant example in this regard comes from the United Nations Compensation Commission (UNCC) following the first Gulf War tasked with responding directly to over 2 million claims, many from individuals.[62] The UNCC's answer to the otherwise impossible task of assessing so many

[57] See, e.g., Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility" (2022) 96 AJIL 833 at 837; see also commentary in Crawford, *supra* note 6.

[58] *Ibid*; see also similar sentiments in Paparinskis, *supra* note 13 at 1251.

[59] Kornhauser, *supra* note 55; for a contrary view of the limitations of state responsibility that would inform this approach see Katja Cretuz, State Responsibility in the International Legal Order: A Critical Appraisal (Cambridge: Cambridge university Press, 2020).

[60] See, e.g., Richard Posner, *Economic Analysis of Law* (Aspen Publishing, 1977); Steven Shavell, *Foundations of Economic Analysis of Law* (Boston: Harvard University Press, 2004).

[61] *Ibid*; see also discussion of the application of the efficiency approach in Shelton, *supra* note 9 at 17.

[62] Timothy Feighery, Christopher Gibson & Trevor Rajah, eds, *War Reparations and the UN Compensation Commission: Designing Compensation After Conflict* (Oxford: Oxford University Press, 2015).

claims was to develop distinct compensation categories for different types of humanitarian harms and prescribe a predetermined amount for such losses.[63] David Caron famously likened this approach to a form of 'practical justice.'[64] Though in no sense an opportunity to have one's individual claim heard or receive full compensation for loss, it was nonetheless of measure of justice. The trade-off for efficient compensation meant some sacrifices from full procedural fairness and in the remedial outcome for those harmed. Applying this thinking to the approach of the jurisprudence already discussed the global sums analysis of the ICJ[65] might similarly be viewed as a shorthand way of achieving efficiency without sacrificing too much in fairness by still compensating core losses without a more fulsome accounting. Law and economics, then, illuminates the sacrifices that might necessarily be made to offer an efficient outcome.

While each useful in their own right, no perspective fully captures all of the goals that necessarily come into play when seeking compensation. The most helpful strategy may be to treat an award of compensation from an international tribunal as only one aspect of the remedy. One branch of remedies scholars argue that the remedial process runs on two-tracks.[66] The first track involves the intervention of the court in, for example, awarding some form of compensation, but the second track might flow from it to something broader, including restorative justice approaches to rebuilding and coming to terms with the past in the aftermath of legal violations.[67] Both tracks compliment and reinforce one another. The value of a compensation award in this light is not necessarily to fully repair harms caused but rather something more tangible initially – recognition beyond mere symbolism – to be reinforced with other creative forms of remedy later on that can achieve additional goals.[68] International tribunals can consequently have more modest ambitions with an initial order of compensation – with its fairness judged not solely by the immediate consequences but what it generates in recurring efforts to remedy violations over the longer-term. Having considered relevant developments and theoretical perspectives in understanding compensation, in the final substantive section, this discussion is consolidated into an approach for international tribunals using the lens of fairness.

3. Factors to Weigh in Promoting Fairness

As shown, questions relevant to whether compensation is fair inevitably arise in the decisions of international tribunals, irrespective of which theory best informs one's initial perspective on its purpose. How can we better account for fairness in compensating parties at international

[63] *Ibid*.

[64] The term first emerged in David Caron & Brian Morris, "The UN Compensation Commission: Practical Justice, not Retribution" (2002) 13 EJIL 183 but is now more broadly a key descriptor for the UNCC and mass claims in general. Treatment of mass claims and efficiency is also addressed in Howard Holtzmann & Edda Kristjansdottir, eds, *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford: Oxford University Press, 2007); Friedrich Rosenfeld, "Mass Claims in International Law" (2013) 4:1 Journal of International Dispute Settlement 159.

[65] *Infra*, section 1; *Armed Activities (DRC v Uganda) – Reparations*, *supra* note 11.

[66] Kent Roach, *Remedies for human rights violations: a two-track approach to supranational and national law* (Cambridge: Cambridge University Press, 2021) While the approach focuses on human rights and is most readily applicable in those contexts, it still has potential resonance for a broader consideration of the operation of remedies. He also highlights the ways in which cycles of remedial failure often occur, or failure to address all issues relevant to remedies thereby necessitating different remedial tracks or iterations (at 14) .

[67] *Ibid*.

[68] *Ibid*; see also discussions in de Grieff, *supra* note 4 at 453.

tribunals or at least do a more effective job at recognizing its implications? Jonathan Bonnitcha recently opined that the entire "full reparation" standard should be completely re-thought from the bottom up to address the uncertainties surrounding compensation by international tribunals.[69] A reader of the preceding of sections of this paper might well be attracted to this as a solution. There are certainly reasons to question whether much of the problem stems from a foundational starting point that no longer relates to most modern concerns relevant to the breach of international legal obligations or expectations of a need to compensate those harmed in a more diverse array of circumstances. Practically speaking, however, such a wholesale change is unlikely for a long-standing and widely accepted principle, reaffirmed with much debate as recently as 2002.[70] For the time being those basic principles are what me must work with, however constraining. We can still find a way to achieve balance in reinterpreting some of the challenges faced as factors that undermine the perceived fairness of a compensation award.

It is possible to adopt an approach that emphasizes the weighing of different factors to prioritize clarity, equity and consistency. This weighing and balancing shares much in common with proponents of 'proportionality' as a watchword in managing the discretionary nature of remedies, such as compensation.[71] It is also not so far afield from what is proposed in determining economically assessable damage in the context of the *United Nations Basic Principles on the Right to a Remedy*.[72] Where the *Basic Principles* focus solely on listing potential forms of compensable loss for gross violations of international humanitarian or human rights law though, the interests considered here are much broader. Not only are the factors addressed relevant to losses in other international legal contexts confronted by tribunals but also address considerations beyond the losses themselves. International tribunals are likely already engaged to some degree in this analysis when they make reference, as some awards have done, to "equitable considerations."[73] The problem is that as it currently stands the resort to "equitable considerations" tends to follow an assertion of a particular quantum without any clarity as to what considerations were weighed in coming to that conclusion. We do not know the scope of the analysis or what may have gone into it. While there are specific categories of equitable remedies in many domestic legal systems, there is no formally identifiable

[69] Jonathan Bonnitcha, 'Rethink the Rule, Not the Exception" (2020) 83:6 Modern Law Review (Symposium); Related considerations are expressed by Andrea Gattini, "Crippling Compensation in International Investment Disputes: Is the Time Ripe for a Change of Paradigm? (2020) 83:6 Modern Law Review (Symposium).

[70] *Infra*, introduction, see Crawford, *supra* note 6.

[71] Roach, *supra* note 66 at 15.

[72] *UN Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UNGAOR, 60th session, UN Doc A/RES/60/147 (21 March 2006).

[73] Recall, e.g., the approach evidenced in *Diallo – Compensation*, *supra* note 26; see also Catharine Titi*, The Function of Equity in International Law* (Oxford: Oxford University Press, 2021) at 193 where she discusses how equitable considerations have informed determinations on compensation, notably when quantum is difficult to calculate; see also even more recently Yang Liu, "Compensation in the jurisprudence of the International Court of Justice: towards an equitable approach" (2023) Journal of International Dispute Settlement at 22 discussed an emerging equitable approach to compensation in recent ICJ jurisprudence using equity as a useful analytical tool to consider a variety of factors in awarding compensation, particularly where there was a lack of evidence to support the precise amounts requested.

international legal remedy of this kind – it is merely a consideration.[74] Something as simple as a list of some of those considerations would provide greater clarity as to what proved central to that analysis and subsequently whether it will be recognized as fair. Justifying what was weighed in determining compensation can and should be more transparent.

The notion of fair compensation is more aspirational than real. The factors highlighted promote fairness but do not guarantee it. Weighing these factors is imperfect as it entails certain trade-offs between essential goals and interests. The nature of those interests is also intimately linked to one's point of view. Fairness in awarding compensation varies based on the balancing of potentially competing interests of the injured party, the party ordered to pay, and the international judicial system more broadly.

One of the first considerations is to weigh how the factors of clarity, consistency and equity relate to the injured party. The injured party's interests in pursuing litigation in the first place generally favour some form of compensation. Corrective justice and the full reparation standard assume that the harms suffered will be rectified so as to wipe out all the consequences of international legal violations.[75] Where trade-offs are made for something less than fully compensating those harms, it would relate to competing interests of the aggrieved party or other practical considerations. Given the starting point of most international legal principles to address wrongful acts, the injured party's interest generally leans more heavily in favour of the level at which they are compensated, depending on other compelling interests at stake.

There are equally complications in understanding who the 'injured party' being referred to is and consequently their respective interests. In international law, the injured party is normally assumed to be the state. For the most part that is true before international tribunals, with human rights courts and investment arbitral tribunals being notable exceptions. Yet, in situations where a party is formally the state seeking relief for wrongdoing from the tribunal, that does not necessarily mean the sole concern is the state's interest in compensation. In the examples examined at the primary inter-state court, the ICJ, the states were pursuing relief for an individual citizen in the case of *Diallo – Compensation* and for harms on a wide scale to the civilian population with *Armed Activities (DRC v Uganda) – Reparations*.[76] There is potential for the interests of the state in what amounts to sufficient compensation to diverge from those directly impacted by the wrongdoing in its population. Despite its recognized legal status, the state as an entity, practically speaking, will not have homogenous interests. An award of compensation may not directly address the needs of those impacted where they question whether the benefits of such compensation will go directly to repairing their harms. It is also quite appropriate in weighing what is fair for an injured party to address whether their interests are even best served by an entirely different remedy than monetary compensation. Other forms of satisfaction acknowledging wrongdoing may in certain circumstances address the injured

[74] Acknowledging that there are possibilities to instinctually borrow from domestic law, note variability on the nature of these remedies also present at that level, see, e.g., Ruth Sefton-Green, "Remedies" (2020) 66 McGill LJ 153.

[75] Recall the language of the ILC Draft Articles, Crawford, *supra* note 6 alongside understandings of corrective justice.

[76] For the ways in which state responsibility notions of reparations are similarly impacted by intimations of an individual right to reparation see, e.g., Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Oxford: Oxford University Press, 2012).

party's more immediate goals while nonetheless also being less intrusive for the violating state and relevant to broader international community interests.[77]

Now flipping the vantage point, there are factors relevant to fairness to consider from the perspective of the party found in violation and ordered to pay compensation in some form. Given that the impulse for any proceeding is wrongdoing and the drive for a remedy, the complexities for this opposite party are often either overlooked completely or heavily minimized. The quantum of compensation may well prove unfair under the circumstances highlighting why it is so important to have clarity and consistency in its calculation. Reparative justice, which is the most obvious international law analogy given the full reparation standard, looks solely to making the injured party whole, while deterrence would suggest the primary focus is future state conduct at the international level. Admittedly, one can position this particular party solely as the offender in these instances justifiably being required to pay compensation. Their perception about the fairness of the award, however, and ultimately willingness to pay in an international legal system lacking enforcement mechanisms remains an important consideration.[78]

The point, then, is to understand what amounts to fair compensation contextually and avoid situations where it becomes a burdensome punishment for the violating party.[79] Relatively recently scholarship has brought renewed attention to the increased potential for overwhelming billion dollar awards of compensation notably in international investment arbitration.[80] The problem of these substantial awards was not fully appreciated through the conclusion of the ILC Draft Articles that seemingly permit them regardless of relative disparities in ability to pay across countries that may well be facing financial difficulties.[81] Is it fair to demand too much in compensation given the consequences to a party who nonetheless violated its international legal obligations? The Eritrea-Ethiopia Claims Commission acknowledged that compensating violations of international law governing the use of force and humanitarian law in the circumstances involved some of the poorest countries in the world. Despite the ultimate issuing of what are now considered relatively authoritative decisions, no compensation was ever paid.[82] An investment tribunal in *Abaclat* ultimately led to a negotiated settlement of a novel yet overwhelming mass claim from individual Italian bondholders against an Argentinian state struggling to recover from financial crisis.[83] These disparities in ability to pay are not merely

---

[77] An example of this reasoning comes from Photini Pazartzis, "The Future-Oriented Function of Remedies" (2020) 83:6 Modern Law Review (Symposium).

[78] Along similar lines one might also find useful the discussion of international courts more broadly, not limited to any remedial phase, assessed in terms of their goals and the need for political support to promote judicial effectiveness, see Shany, *supra* note 55 at 311.

[79] See, e.g., Shelton, *supra* note 57.

[80] Martins Paparinskis, "Crippling Compensation in the International Law Commission in the International Law Commission and Investor-State Arbitration" (2022) 37 ICSID Review 289 (though his argument is aimed at a particular exception in the context of the ILC Articles on this point, the overall reasoning as regards burdensome compensation awards is both timely and instructive).

[81] *Ibid*.

[82] As discussed in Sean Murphy, Won Kidane & Thomas Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (Oxford: Oxford University Press, 2013).

[83] *Abaclat v and others Argentine Republic* ICSID, Case No. ARB-07-5, The Argentine Republic, *Decision on Jurisdiction and Admissibility*, 4 August 2011 [*Abaclat*]; for general enthusiasm for the advent of mass claims in this context seemingly ignoring the procedural fairness dimension in light of the political dynamics in investment arbitration, see, e.g, Jessica Bess und Chrostin, "Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID, The *Abaclat* Case" (2012) 53 Harv. Int'l LJ 505 (note that a settlement arose and there was no tribunal award of compensation).

practical matters but have real consequences in how compensation awards are viewed as legitimate from the point of view of those directly ordered to pay them, as well as other onlookers within the international legal system that may one day struggle to do the same in other circumstances.[84]

Another factor to weigh in the interests of fairness is the degree of consistency in handling compensation from one international tribunal to the next. This moves beyond the perspectives and interests of the different parties before a tribunal to the broader international judicial system and international community. Consistency is a high bar in this context. Even scholars such as Chester Brown who stress commonalities over fragmentation in international adjudication recognize that there is less common ground when it comes to remedies than in other areas, on top of their already discretionary nature.[85] The specialized regimes with their own constituent and procedural guidance on remedies, including the WTO and human rights courts, make this even more challenging. They use distinctive legal language and recognize different goals in awarding compensation, limiting how much those decisions can readily be reference by other courts.[86]

That does not necessarily mean there are no prospects for cross-pollination in the approach beyond the initial "full reparation" standard. Where decisions regarding compensation are based heavily on the text of a particular convention, an international tribunal may regard its reasoning as less persuasive but can still cautiously learn from the overall approach when trying to achieve similar goals. Interestingly, the ICJ engaged rather extensively with the practices of international human rights courts to support its reasoning in *Diallo – Compensation*.[87] It was even praised for doing this as a means of supporting innovation in its own approach to redress for international human rights violations – something routinely outside its inter-state purview.[88] The ability to build on the approach of human rights courts in handling compensation is an example of the potential possibilities for referencing within and across tribunals despite differences to improve upon consistency.

There will necessarily always be some unevenness in considering, or even adopting, another tribunal's reasoning in compensation awards. The significance of *Diallo – Compensation*'s treatment of human rights courts could just as easily be minimized for its uniqueness due to the contextual similarities in compensation for individual human rights violations unlikely to regularly arise before the ICJ. Despite its willingness to readily consider the practices of other relevant courts in compensation in that decision, the ICJ's subsequent approach is much narrower. In *Armed Activities (DRC v Uganda) – Reparations*, the Court relies almost exclusively on method of assessments for compensation developed by the Eritrea-Ethiopia

[84] In this vein, recognition of diversity in judicial function generally and the role of international courts in exercising different forms of public authority could also be instructive at the remedial phase, see Armin von Bogdandy & Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014), similarly in Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014) at 379 we are reminded that delegating additional functions to international courts, in this context remedial, should not be done so as to "induce cynicism or undermine the legitimacy of international law."

[85] Brown, *supra* note 15 , introduction. Interestingly, Bonnitcha, *supra* note 69 argues that despite fears of fragmentation the problem is the insistence on a single standard, he would stress the alternative view of a distinct standard for each context/ type of tribunal.

[86] Gray, "Remedies", *supra* note 8.

[87] Ulfstein, *supra* note 30.

[88] Ibid.

Claims Commission (EECC)[89] for violations of international humanitarian law during inter-state conflict. Though no doubt relevant, there are other potential post-war models for compensation that could similarly inform its approach.

Though at least attentive to the practices of other international tribunals, such selectivity presents other problems. Is it fair to be singularly focused on one approach when others are accessible and widely used? How will any aggrieved party reasonably know what method of assessment will emerge as the preference in its case before seeking a remedy? If one court subsequently becomes associated with greater latitude in awarding remedies, there is equally potential for forum shopping, as it is often known[90], to become remedy shopping – seeking out the tribunal offering the most favourable remedy. It would be wrong to overstate this potentiality given that the ability to seek remedies will necessarily be limited in the context of the case. Nevertheless, it does serve to highlight that where enhanced consistency across different tribunals in understanding compensation is possible, thus avoiding selectivity, it can lessen perceived unfairness.

The factors weighed here, along with the differing interests at stake, are by no means intended to be exhaustive. The analysis offers a mere starting point. Its purpose is to generate a greater appreciation of the multitude of potential issues that arise for international tribunals in striving for fair compensation.

4. Conclusion

This article sought to bring new attention to unfairness in the current approach to compensation by international tribunals. Recent developments, for example, provide little explanation for the assessment of global sums. Theoretical perspectives – corrective justice, deterrence, economic analysis of law, and the two-track approach – offer distinct insights into the potential function of compensation as a remedy. When applied independently to the role of international tribunals, however, they generate yet more concerns about the resulting outcomes. Drawing on these insights, the analysis stressed that appreciating what is fair entails weighing and balancing factors such as clarity, consistency and equity. Those factors also vary against the potentially competing goals and interests of the injured parties, wrongful parties, and the international judicial system. Aspiring to fair compensation as an ideal is imperfect. Whether an award of compensation is fair depends in large part on one's vantage point – an outcome seen as vindication for those injured may equally be overwhelming for the state ordered to pay an exorbitant amount. Perceptions of unfairness given the interests sacrificed from differing points of view may matter more than the objective reality in this context.

An initial impulse may consequently be for international tribunals to eschew compensation, and remedies in general, altogether. Yet that impulse is precisely at odds with what is being asked of them. As evidenced by their own actions, international courts themselves seem compelled to be more active in addressing compensation.

Recalling the examples that served to launch this article, there are no shortage of new calls for compensation in different forms – from climate change and wartime damage to ever-increasing emphasis on historical injustices. Indeed, such calls are now ubiquitous for

[89] Fikfak, *supra* note 45 at 223.

[90] See, e.g., Payam Akhavan, "Forum Shopping and Human Rights: Staring at the Empty Shelves" in Martin Scheinin (ed), *Human Rights Norms in 'Other' international Courts* (Cambridge: Cambridge University Press, 2019).

international tribunals, even if they are not particularly well-equipped to handle them. Karen Alter in work on the expanding roles of international courts reminds us that delegating functions to such courts do not provide a "silver bullet" as they "are in the business of trying to deliver justice, but it is a messy business that almost always falls short of our impossibly high hopes and aspirations."[91] Perhaps nowhere messier than the expanding and still relatively underappreciated forays into awarding compensation. If international tribunals intend to embrace that messiness, it begins by honestly wrestling with and explaining the appropriateness of compensation and its potential for unfairness.

[91] Alter, *supra* note 84 at 382.