Statement by Mario Oyarzábal*

on the First Report on Compensation for the Damage Caused by Internationally Wrongful Acts by Mārtiņš Paparinskis, Special Rapporteur (A/CN.4/793, 10 March 2026)

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Thank you, Mr. Chair, and good morning to all.

I would like to begin by welcoming the inclusion of this important topic in the Commission's programme of work, and by congratulating Special Rapporteur (SR) Paparinskis for a First Report that lays a solid foundation for our engagement in the years to come. The Report is meticulously researched and clearly presented, and it situates the topic with commendable care within the broader framework of the law of international responsibility in general, and within article 36 of the 2001 Articles on State Responsibility, in particular. Building on this strong basis, I would like to offer a number of substantive observations and suggestions for the consideration of the SR and the Commission.

Given that we are at an early stage of the topic, my statement will focus on some general ideas that I consider important for the organization of our work. It will be structured as follows. First, I will take up some of the questions posed by the SR in Chapter VII of his Report and offer several preliminary considerations, namely questions one, three, four and six. Second, and bearing in mind the chapter on the organization and schedule of work, I will present some proposals for the future work of the Commission. Finally, I will offer some concluding remarks.

Mr. Chair,

Question 1 posed by the SR is, to my mind, of manifest importance, since it goes to the very framing of our work: the relevance, if any, that the nature of the primary obligation should have for the rules on compensation we set out to prepare. The tension here is between advancing a generic regulation of the relevant secondary rules — as this Commission did in the Articles on State Responsibility — or, alternatively, working towards articles (or whatever form of output this Commission ultimately decides upon) that take into account the particular characteristics that compensation may present depending on the nature of the primary obligation breached.

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In this case, I am inclined towards the second path, as I believe it is the best, if not the only, way in which this Commission can add value beyond what article 36 and its commentary already provide. I find it difficult to conceive a generic regulation that could encompass compensation in contexts as varied as investment, human rights, environmental and humanitarian law, and be genuinely useful across all of them at once. This is so not only because the treatment of causation, quantum and damage varies across these regimes, but also because certain categories of primary obligations raise unique challenges regarding compensation for their breach.

The variation across regimes may be illustrated by the treatment of non-material or moral damages. As the SR correctly identifies in his Report, the general rule in the inter-State context is the exclusion of moral damage from compensation.[1] Human rights tribunals, by contrast, routinely award compensation for non-pecuniary damage, including the suffering and affliction caused by the violation and any alteration of the living conditions of the victim.[2] While our work on this topic will likely require us to evaluate what role moral damage plays in the reparation of an internationally wrongful act, we will likely fail to offer practical solutions to the international community if we provide a general response meant to apply without distinction to the breach of any primary international obligation.

The specific challenges raised by particular categories of primary obligations, on the other hand, may be illustrated by obligations *erga omnes* and *erga omnes partes*. These obligations owed to the international community as a whole[3] or to a group of States pursuing a common interest,[4] respectively, raise their own questions with respect to compensation for their breach. As Mr. Asada explains in the syllabus for the topic on these obligations, now in the long-term programme of work of the Commission, several questions remain open, such as whether a State that has not been directly injured may seek compensation on behalf of one that has,[5] or whether compensation remains available where another State has already invoked responsibility but confined its claim to cessation.[6] Whether these questions are taken up here or under the topic proposed by Mr.

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[1] Article 36.2 of ARSIWA indicates that "compensation shall cover any financially assessable damage…". In its commentary to the article, the Commission explained that "[t]he qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in Article 37". ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' in *Yearbook of the International Law Commission 2001*, vol II (Part Two), art. 36, commentary para. 1.

[2] First Report of the Special Rapporteur, para. 84.

[3] Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/RES/56/83, art. 48(1)(b) (hereinafter, "ARSIWA"); *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3, para. 33.

[4] ARSIWA, art. 48(1)(a); *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (Merits) [2012] ICJ Rep 422, para. 68; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Preliminary Objections) [2022] ICJ Rep. 477, para. 106.

[5] Annual Report of the International Law Commission in the work of its Seventy-sixth Session (2025), UN Doc A/80/10, Annex III, para. 36.

[6] Ibid., para. 38.

Asada, they illustrate how the nature of the primary obligation breached bears on the rules governing compensation, and confirm that it cannot be ignored in our work.

In short, and in response to the first question, compensation should be tailored to the nature of the primary obligation breached. I shall elaborate on this further at other points in my presentation.

Moving to **Question 3**, I welcome the SR's invitation to express the causal nexus more concretely. The Commission's own 2001 commentary already identifies the criteria variously used to describe the nexus — directness, foreseeability, proximity — and notes that other factors may also be relevant, such as whether State organs deliberately caused the harm or whether the harm fell within the ambit and purpose of the rule breached, while declining to reduce the requirement to a single verbal formula.[7] Tribunals have described this nexus in different terms. The International Court of Justice (ICJ) requires a "sufficiently direct and certain" causal nexus between the wrongful act and the injury.[8] Investment tribunals, by contrast, have not followed a uniform formula, adopting a "sufficient causal link",[9] "foreseeability"[10] and "proximate cause"[11] criteria, among others. In the inter-American system, the standard varies with the head of damage — a more flexible, equitable approach governing non-material damage, which the Court will presume in serious cases.[12] Finally, the Eritrea-Ethiopia Claims Commission, in its 2007 Decision No. 7, having observed that the competing terminologies "often provide limited assistance", concluded that in many cases the choice of verbal formula makes no difference to the outcome.[13]

The useful step, therefore, may not be to choose a single label but to articulate how these factors relate, when each governs, and the standard of proof each demands.

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[7] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to article 31, paras. 9–10.

[8] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at para. 462; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice, Judgment, 9 February 2022, para. 93; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Judgment, 19 June 2012, para. 14; Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment, 2 February 2018, para. 32.

[9] See for example, *SD Myers v. Canada*, Second Partial Award of 21 October 2002, paras. 140, 159–160 (the Tribunal adopted a "sufficient causal link"; rejecting contractual foreseeability in favor of the tort concept of remoteness and declining the direct/indirect dichotomy).

[10] See for example, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, paras 584-585 (the Tribunal noted the existence of different causation tests under international law ["directness", "proximity", "foreseeability", "certainty"]. However, without making an explicit choice of one of these approaches, the Tribunal seemed to opt for the "foreseeability" test).

[11] See for example, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (Damages), 25 July 2007, para. 50 (the Tribunal treated the State's conduct, rather than the economic crisis, as the "proximate cause" of the loss).

[12] *Case of the Inhabitants of La Oroya v. Peru*, Inter-American Court of Human Rights, Judgment of 27 November 2023, Series C No. 511, para. 373.

[13] Eritrea-Ethiopia Claims Commission, *Decision No. 7: Guidance Regarding Jus ad Bellum Liability*, 27 July 2007, UNRIAA, vol. XXVI, pp. 1–8, at paras. 7, 13, 14.

Finally, I must respectfully differ from the SR on one point: causation cannot be set aside from the primary rules. In its Advisory Opinion on *Obligations of States in Respect of Climate Change*, the ICJ stated that causation is required not for responsibility in the abstract but for reparation, and that the "sufficiently direct and certain" standard may vary with the primary norm breached and the nature and extent of the damage.[14] Any formulation of causation should therefore consider whether, and to what extent, the primary rule breached bears on its operation.

Regarding **Question 4**, I would urge caution in how the Commission approaches the determination of methods to assess value. First, valuation cannot be detached from the primary rule. As the commentary to Article 36 recognizes, the heads of compensable damage and the principles of assessment vary with the content of the particular primary obligation, an evaluation of the parties' respective behavior, and the concern to reach an equitable and acceptable outcome.[15] If primary obligations are excluded from the topic, it is difficult to see how the Commission could go far in prescribing valuation methods.

Second, valuation techniques vary markedly across legal regimes. Investment jurisprudence has developed an elaborate body of techniques for valuing commercial assets and future cash flows — fair market value and its metrics, such as the discounted cash flow (DCF), market comparables and comparable transactions — and operates, in effect, by its own rules. This degree of specificity has no counterpart in human-rights reparations, where financial compensation is not always the core of the remedy, and restitution, satisfaction and guarantees of non-repetition often carry important weight, especially in the Inter-American system. Where monetary compensation does arise, equity plays a significant role in the calculation of damages, particularly non-material ones.[16] Likewise, in his declaration in the *Diallo* case, Judge Yusuf held that equity should also govern the determination of material damage — in that case, loss of earnings — where the existence of the injury and the causal nexus had been established, even in the absence of exact proof of its amount, relying for that purpose on human-rights jurisprudence.[17] Rather than seeking to identify valuation methods capable of uniform application across legal regimes, it would therefore be more workable to articulate general principles governing valuation in international law.

Third, as highlighted by Mme. Mangklatanakul and Mr. Grossman, the DCF method should not be presented as the general or sole approach of the law of international responsibility to valuation. It is used mainly in one regime — investment arbitration — to calculate the fair market value of an investment. But fair market value is a measure of

[14] *Obligations of States in Respect of Climate Change*, Advisory Opinion, I.C.J., 23 July 2025, para. 433.
[15] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, commentary to article 36, para. 7.
[16] Ibid., para. 19. See, for example, Godínez Cruz Case (Compensatory Damages), Inter-American Court of Human Rights, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8 (1990), para. 25; Velásquez Rodríguez Case (Compensatory Damages), Inter-American Court of Human Rights, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989), para. 27; *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Case No. 2, Memorial submitted by Saint Vincent and the Grenadines, 19 June 1998, paras.185- 186.
[17] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 19 June 2012, Declaration of Judge Yusuf, paras. 11-13.

the asset, not of the injury: it leaves out heads that lie outside the asset's value, for instance, moral damage. It may also overstate the loss where future profitability is capitalized and then counted again through lost profits or interest — a risk of double recovery the SR himself identifies.[18]

To center the analysis on the DCF and on the fair market value of an asset would both blur the standard of compensation and confine valuation to the technique of a single one of the diverse regimes the SR intends to address. Moreover, the adoption of fair market value and DCF by a number of investment tribunals should not lead the Commission to consider this practice as settled law. On the contrary, in view of the concern increasingly voiced by States in the context of ISDS reform, and given the decentralized character of these awards, the Commission should critically assess whether it should be applied at all, and if so, in which exceptional circumstances.

Lastly, moving to **Question 6** and the role of interest, I would make three points. First, it should be emphasized in the future work of the Commission that interest is not automatic and depends on the circumstances of each case.[19] There is no rule in international law dictating that international courts and tribunals have to award interest in every instance.[20] Interest does not constitute an autonomous form of reparation. Rather, it is an accessory component of compensation that may be awarded where necessary to achieve full reparation. Accordingly, the mere existence of a compensable injury does not necessarily entail an award of interest.

Second, I would encourage the Commission to take up the situation — untouched by article 38 and its commentary — where accumulated interest equals or exceeds the principal, whether through prolonged proceedings or a State's delayed payment, since beyond a certain point interest may cease to serve reparation and instead distort it, producing a disproportionate outcome. In the context of investment arbitration, there are several precedents where tribunals have expressly noted that interest awarded exceeded the principal amount claimed, and others where this risk was debated or objected to as disproportionate. For instance, in *Santa Elena v. Costa Rica*, the expropriated asset was valued at USD 4.15 million at the time of the taking. However, by the time the award was rendered 22 years later, the Tribunal awarded approximately USD 16 million, of which roughly USD 11.85–12 million corresponded to interest (bringing the total award to almost four times the amount of the principal).[21] Furthermore, in *Total v. Argentina*, where interest would have nearly doubled the compensation, the tribunal imposed a lower rate to keep it proportional with the award.[22]

[18] First Report of the Special Rapporteur, para. 69.
[19] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, commentary to article 38, para. 7.
[20] John Gotanda, "Awarding Interest in International Arbitration", American Journal of International Law, 1996, vol. 90, p. 58.
[21] *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 107. See also, Mikhail Kalinin, Michael Peer, The lacking interest in interest rates: will the phase-out of LIBOR and negative rates go unnoticed by arbitration practitioners?, in *Arbitration International Vol. 37 Issue 3*, 01 September 2021, para. 736.
[22] *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/1, Award, 27 November 2013, paras. 249-261.

Third, an issue of particular concern for States that the Commission may decide to address in this regard is the application of compound interest,[23] which investment tribunals have imported from commercial practice into international decisions. I wonder whether in the context of international responsibility and compensation for wrongful acts, this practice is coherent with the nature of acts and obligations breached, whether it should be maintained at all, and if so, in which specific/exceptional circumstances.

As UNCITRAL Working Group III itself has acknowledged, the practice of awarding compound interest is not prevalent in other areas of international dispute settlement.[24] This suggests that the shift towards compound interest is a feature of a particular field rather than evidence of a general secondary rule.

Mr. Chair,

Moving to the second part of my presentation, I would like to offer some proposals in relation to the future work of the Commission on the topic.

First, on the general approach to the topic, I share the view stated by Mme. Mangklatanakul that our central aim should be to offer meaningful and practical guidance responsive to the realities faced by States, courts and tribunals.

To that end, I would suggest that the Commission's work be organized as a clear analytical roadmap, distinguishing four levels that current practice too often conflates. First, the standard: what full reparation requires, kept distinct from the measures of value used to quantify it — fair market value in investment law being one example — which capture the worth of an asset but not the injury the standard requires. Second, the parameters that delimit compensation whatever the regime, such as causation, certainty of damage, mitigation, concurrence of causes and contribution to the injury. Third, the methodology: the principles that govern any valuation in international law, rather than the specific methods themselves. Fourth, interest, as an accessory component of compensation rather than an autonomous form of reparation. Structuring the work in this way would give States and tribunals a usable framework of general application, while keeping method subordinate to principle. Our work on this topic would be of real significance if we were able to identify the standards applicable under existing international law, so that courts and tribunals are equipped with practical tools to determine compensation arising in relation to international wrongful acts.

Second, and as a corollary of my earlier point that compensation cannot be divorced from the primary obligation breached, I would invite the SR to consider that the particularities of the various regimes are, in truth, the reflection of different primary rules — the

[23] First Report, para. 70.

[24] A/CN.9/WG.III/WP.255 (24 June 2025), para. 73 (compound interest, though prevalent in investment arbitration, is not prevalent in other areas of international dispute resolution, including international commercial arbitration), citing PwC, Damages awards in international commercial arbitration: A Study of ICC awards (2020), p. 20.

equitable assessment characteristic of human-rights reparations, or the asset-based valuation prevalent in investment law, being cases in point. The content of the primary rules inevitably bears on the application of compensation in any event; on that basis, it may be appropriate to examine these regimes with a degree of differentiation — whether by dividing the final outcome of the work, as was done with the draft guidelines on the settlement of disputes to which international organizations are parties, or otherwise — provided this serves to refine the common standard rather than to fragment it.

Third, in accordance with Mr. Galindo and Mr. Reinisch's statement yesterday, I welcome Chile's proposal to include article 27(b) within the topic. The provision preserves "the question of compensation for any material loss" where a circumstance precluding wrongfulness is invoked, and the commentary confirms the duty to compensate may remain[25] — yet it deliberately declined to specify when, leaving the matter to agreement between the States concerned.[26] That solution presupposed an inter-State setting. In investment arbitration, however, the affected party is a private investor and there is no agreement to be reached but a determination imposed by a tribunal — and, precisely because no regime exists, tribunals have divided on whether, and how much, compensation remains due where a State invokes circumstances precluding wrongfulness such as state of necessity to protect an essential interest.[27] I would therefore invite the SR to revisit the matter, clarifying the conditions under which a duty to compensate arises and the applicable standard.

Fourth, I support the SR's proposal of introducing within the topic a safeguard against crippling compensation, and I would suggest examining it in light of the specific difficulties that high awards raise in investment arbitration, in particular, the "regulatory chill" effect: the risk that exposure to large awards discourages States from adopting legitimate measures in the public interest.[28] UNCITRAL Working Group III has treated this as a central motivation for reform of investor-State dispute settlement, noting that

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[25] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, commentary to article 27 (b), para. 5.

[26] Ibid., para. 6.

[27] For instance, in the cases arising from Argentina's 2001–2002 financial crisis, tribunals were sharply divided: most rejected the necessity defense and awarded full compensation (*El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 665; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 331; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 388), while a minority accepted it but left open the question of whether some form of compensation remained due (*LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 258–259; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 266). See also, UNCITRAL, Working Group III (A/CN.9/WG.III/WP.255), para. 46; S Ripinsky and K Williams, Damages in International Investment Law (BIICL, 2008), pp. 338–352 (section 8.4), concluding that customary international law does not offer a determinative solution to the question of compensation in cases where the defense of necessity is successfully invoked.

[28] UNCTAD, IIA Issues Note: Compensation and Damages in Investor-State Dispute Settlement Proceedings (September 2024), identifying the chilling effect of high compensation awards on States' regulatory capacity as a key policy concern motivating reform of international investment agreements.

disproportionate awards affect "the capacity of States to regulate and provide public goods and public services".[29]

Against that background, it may be worth considering whether, and if so to what extent, the legitimate public purpose pursued by a State — particularly the protection of human rights or the environment — should have any bearing on the assessment of compensation. The recent Advisory Opinion of the Inter-American Court of Human Rights on Climate Emergency and Human Rights reinforces the importance of ensuring that States are not deterred from adopting measures necessary to protect human rights and the environment.[30]

Mr. Chair,

Before closing, I would like to offer a few concluding remarks.

First, I agree with Ms. Ridings that a degree of caution is warranted so as not to over-rely on investor-State dispute settlement awards for the topic of compensation. Given their highly decentralized nature, these awards vary significantly on questions of quantum, interest, causation and compensable damage, and should therefore be approached with care. I also share her view that the SR should draw on the work of UNCITRAL Working Group III and avoid overlapping, contradicting or duplicating it.

Second, as a number of delegations in the Sixth Committee have encouraged,[31] I support the adoption of a broad scope *ratione personae* as Mr. Galindo and Mr. Reinisch pointed out yesterday, departing from the exclusive inter-State approach of the Draft Articles on State Responsibility, so as to encompass the responsibility of International Organizations (IOs), as well as compensation owed to individuals or entities other than a State or an international organization.[32]

Finally, on the form of the outcome, and while I remain open to other alternatives, I consider that an instrument in the form of draft principles, guidelines or conclusions would be more appropriate than draft articles. Although the topic is closely connected to the framework of the Articles on State Responsibility, the practice on the quantification of compensation remains diverse and varies significantly across legal regimes. In these circumstances, the Commission's task appears to be directed less at formulating uniform

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[29] UNCITRAL, Working Group III (A/CN.9/WG.III/WP.255), para. 1, identifying "the capacity of States to regulate and provide public goods and public services" as a central concern motivating reform of the investor-State dispute settlement system.

[30] Inter-American Court of Human Rights. Advisory Opinion OC-32/25, Requested by the Republics of Chile and Colombia on Climate Emergency and Human Rights, 2025.

[31] First Report, para. 11; A/C.6/80/SR.26, para. 62 (European Union) ("encouraged the Commission to further explore the question of whether the right to reparation was vested exclusively in an injured State, or whether individual victims also enjoyed a direct and enforceable right to compensation under international law. In carrying out that work, the Commission should not be constrained by limitation established by paragraph 2 of article 33 of the articles on responsibility of States for internationally wrongful acts"); A/C.6/79/SR.20, paras. 102 (Austria) and 137 (Romania); A/C.6/79/SR.24, para. 83 (Argentina); A/CN.4/788, para. 11.

[32] First Report, paras. 3(b) and 61.

rules than at identifying the common principles that should guide the determination of compensation in different contexts. Likewise, as Mr. Nesi observed, if the exercise is essentially one of clarifying the content and scope of article 36, draft principles, guidelines or conclusions would provide the more appropriate vehicle. This approach would also accord with the Commission's recent practice on the protection of the environment in relation to armed conflicts, where questions of reparation and compensation were addressed through draft principles.

Mr. Chair,

Allow me, before closing, to thank Mr. Paparinskis once again for an excellent First Report, which sets a solid basis for the work ahead. I look forward to following this work as it progresses, and to the discussions it will prompt among colleagues.

Thank you, Mr. Chair.