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## Punitive Damages in Strasbourg

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## 1. Introduction

'Punitive damages' have long been a controversial topic of discussion in national as well as in international law.<sup>1</sup> This is no different for the European Court of Human Rights (ECtHR or the Court). 'Punitive damages' is the preferred expression in the United States, Canada, and continental Europe, while the term 'exemplary damages' is used in other Commonwealth countries; however, they both refer to the same concept, just as 'aggravated damages' do. Punitive or exemplary damages are understood as being established with the purpose of atoning for the deeds of the wrongdoer and preventing repetition of the wrongful act by the offender, or emulation by third parties, without being limited to mere compensation for the pecuniary and non-pecuniary losses caused to the claimant, including loss of profit.

The Court's Practice Directives of March 2007 and January 2016 on 'Just Satisfaction'<sup>2</sup> state that '[t]he purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, *until now*, considered it inappropriate to accept claims for damages with labels such as "punitive", "aggravated" or "exemplary"'. One would thus expect that punitive damages are not used by the Court. But is this really the case?

The purpose of this chapter is, first, to argue that this Practice Directive is no longer up to date<sup>3</sup> in that the Court uses punitive damages implicitly, and, second, that there are well-established social-science reasons why punitive damages should be used.

<sup>1</sup> Henry Brooke, 'A Brief Introduction: The Origins of Punitive Damages' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 2.

<sup>2</sup> Para 9, Practice Directive issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 and with the same wording, Para 9, *Practice Directive, Just Satisfaction* of 1 January 2016, available at <[http://www.echr.coe.int/Documents/PD\\_satisfaction\\_claims\\_ENG.pdf](http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf)> accessed 29 September 2017 (emphasis added).

<sup>3</sup> cf in the same vein Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 412–13.

The chapter proceeds as follows: The first part establishes that the Court has already changed its course and uses punitive damages, albeit rather implicitly (2). The second part shows that punitive damages are on the rise and not necessarily prohibited in international and European Law (3). The third part provides the social-science rationale why punitive damages should be used in certain cases. The idea of 'punitive damages' is strongly connected to the effectuation of law. Whenever enforcement might be weak, eg, because victims tend not to bring claims for different reasons, 'punitive damages' can set the correct incentives for following the law. This assumption has most explicitly been discussed in the economic analysis of law, on which we will draw (4). The last part concludes (5).

## 2. Establishing Punitive Damages in the ECtHR

'Just satisfaction' under Article 41 of the European Convention on Human Rights (ECHR or the Convention) means mostly monetary compensation for the damage suffered by the victim of a human rights violation. It may include pecuniary, as well as non-pecuniary (moral or immaterial), damage, as well as costs and expenses.<sup>4</sup> We argue that there are instances in which the damages awarded include, implicitly, punitive damages in its calculation.

Let's go step by step. The Court clearly endorsed a position in favour of punitive damages in the recent case of *Nagmetov v Russia*.<sup>5</sup> In view of the fact that it had found a double violation in respect of the fundamental right under Article 2 of the ECHR on account of the use of firearms by the police causing the death of the applicant's son, the shortcomings in the investigation, and that over nine years had passed after the events without any monetary award having been made at the domestic level, the Court considered that the applicant must have suffered anguish and distress which cannot be compensated for by a mere finding of a violation. Having regard to the above considerations, the Court found it appropriate and necessary in the particular circumstances of the case to award the applicant, on an equitable basis, a sum of 50,000 euros (EUR), in respect of non-pecuniary damage, plus any tax that may be chargeable to him, in spite of the fact that the applicant had not submitted a claim for just satisfaction on account of non-pecuniary damage, and the respondent government had acknowledged, before the Court, the violation under the material limb of Article 2 of the Convention. The Court could not have taken a more explicit position in favour of punitive damages.

<sup>4</sup> cf Szilvia Altwicker-Hámori, Tilman Altwicker, and Anne Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damages under the European Convention on Human Rights' (2016) 76 *Heidelberg Journal of International Law* 1 for an empirical assessment of the Court's awards in respect of non-pecuniary damages.

<sup>5</sup> *Nagmetov v Russia* App no 35589/08 (ECtHR, 5 November 2015) confirmed by the Grand Chamber on 30 March 2017, paras 69 and 73: '[D]amage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage'; para 81: 'Where the Court envisages of its own motion a just-satisfaction award on account of non-pecuniary damage, it is appropriate to take into account the particular gravity and the particular impact of the violation of the Convention (for instance, on account of its nature or degree)'.

In fact, punitive damages had already been established previously by the Grand Chamber in the case of *Cyprus v Turkey* (Just Satisfaction).<sup>6</sup> According to the claimant State, just satisfaction should be provided to the lawful heirs of 1,456 missing persons and to all the Greek Cypriots living in the Karpas region between 1974 and the date of the Grand Chamber judgment on the merits in May 2001. The respondent State disputed these figures as merely 'hypothetical', maintaining that the number of missing persons may have varied over time, some of them might have left no lawful heirs, and it was simply impossible to identify all the residents of the Karpas region since 1974. The Grand Chamber found that it was not necessary to establish the exact number of individual victims of human rights violations, and fixed two lump sums for the benefit of each of these groups of persons, with the obligation for the claimant State to distribute the monetary amounts to the victims or their lawful heirs. In fact, the number of missing persons has decreased in view of the exhumations carried out in recent years, and the victims in the Karpas region are neither identified nor identifiable solely on the basis of the evidence in the file. The Court did not even require, as the claimant State had proposed, that the number of Karpas residents be agreed between the parties or, in the absence of agreement, established by the President of the Court 'on the basis of written evidence and submissions as to the number and location of residents and their heirs'. Furthermore, the Court did not establish any criteria, practical arrangements, or rates governing the distribution of the compensation among the victims or their lawful heirs according to their individually differing circumstances (eg, wives, mothers, children), and most importantly it did not impose any condition regarding the devolution of the compensation in cases where the victims and their lawful heirs are not found. In this event, the claimant State will be the final beneficiary of the amounts paid by the respondent State.

The punitive nature of this compensation is flagrant. In spite of the fact that the identity of the victims of the respondent State's actions and omissions and the ensuing massive and gross human rights violations committed in the Karpas enclave could not be established, that the missing-persons claims would have been time-barred if lodged individually by their respective families, and that there can be no certainty that the indemnities obtained will devolve to the individuals concerned, the Court punished the respondent State for its unlawful actions and omissions and their harmful consequences.

There is nothing new about this procedure. As a matter of fact, the practice of the Court shows that punitive damages have been applied in seven types of cases. First, the Court has ordered compensation without any claim for just satisfaction being lodged by the applicant at all. On the basis of the 'absolute character' of the violated right,<sup>7</sup> the 'particularly serious character of the

<sup>6</sup> *Cyprus v Turkey* (Just Satisfaction) [GC] App no 25781/94 (ECtHR, 12 May 2014).

<sup>7</sup> *Chember v Russia* App no 7188/03 (ECtHR, 3 July 2008) para 77 (10,000 euros); *X v Croatia* App no 11223/04 (ECtHR, 17 July 2008) para 63 (8,000 euros); *Igor Ivanov v Russia* App no 34000/02 (ECtHR, 7 June 2007) para 50 (5,000 euros); *Mayzit v Russia* App no 63378/00 (ECtHR, 20 January 2005) paras 87–88 (3,000 euros); and *Nazarenko v Ukraine* App no 39483/98 (ECtHR, 29 April 2003) para 172 (2,000 euros).

violations',<sup>8</sup> the 'gravity of the violations',<sup>9</sup> or the 'fundamental importance of that right',<sup>10</sup> the Court is ready to order compensation for violations of Articles 3 and 5 without any claim being made for specific damages. In other cases, the applicant asks the Court to be compensated but does not specify the amount, and the Court orders what it finds to be fair in the particular case.<sup>11</sup> We submit that in those cases 'fairness' includes the same considerations as described above. There are also cases in which the applicant makes a claim for just satisfaction specifying a particular amount for non-pecuniary damage, but in which the Court awards a higher amount.<sup>12</sup> When the Court awards compensation for an amount higher than the alleged damage, or even independently of any allegation of damage, the nature of the just satisfaction is no longer compensatory; instead, we deem it punitive since it surpasses the amount claimed, ie, the harm suffered by the victim. The inherent purpose of that remedy is not to place the injured party in the position in which he or she would have been had the violation not taken place, since the injured party claims to have suffered lesser damage or does not even claim to have sustained any damage. The fundamental purpose of that remedy is, hence, to punish the wrongdoing State and prevent a repetition of the same pattern of wrongful action or omission by the respondent State and other Contracting Parties to the Convention.

Secondly, the Court has in some cases established a 'symbolic' or 'token indemnity',<sup>13</sup> with the obvious purpose of blaming and shaming the respondent State, thus making the punishment an example for other States.

Thirdly, the Court has also awarded just satisfaction in cases in which the applicant complained about the domestic law without indicating any personal specific damage other than the distress caused by the existence of the law itself.<sup>14</sup> It is clear that the just satisfaction award is then an exemplary punishment of the respondent State for having legislated in a way incompatible with the Convention.

<sup>8</sup> *Bursuc v Romania* App no 42066/98 (ECtHR, 12 October 2004) para 124 (10,000 euros). This criterion is also coded by Altwickler et al (n 4) 25–40 finding that violations of 'life, physical and mental integrity' receive the highest amount of damages.

<sup>9</sup> *Gorodnitchev v Russia* App no 52058/99 (ECtHR, 24 May 2007) para 143 (10,000 euros).

<sup>10</sup> *Rusu v Austria* App no 34082/02 (ECtHR, 2 October 2008) para 62 (3,000 euros); *Crabtree v The Czech Republic* App no 41116/04 (ECtHR, 25 February 2010) para 60 (2,000 euros); and *Khudyakova v Russia* App no 13476/04 (ECtHR, 8 January 2009) para 107 (5,000 euros).

<sup>11</sup> For example, *Celik and Yildiz v Turkey*, App no 51479/99 (ECtHR, 10 November 2005) paras 30–31, and *Davrian v Georgia* App no 73241/01 (ECtHR, 27 July 2006) para 70.

<sup>12</sup> For instance, *Stradovnik v Slovenia* App no 24784/02 (ECtHR, 13 April 2006), paras 23–25, in which the Court awarded 6,400 euros for the excessive length of the proceedings, when the applicant had asked for 5,000 euros.

<sup>13</sup> For example, *Engel and Others v The Netherlands* (Article 50) App nos 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72 (ECtHR, 23 November 1976) para 10 (100 Dutch guilders); and *Vaney v France* App no 53946/00 (ECtHR, 30 November 2004) para 57 (one euro).

<sup>14</sup> For instance, in *SL v Austria* App no 45330/99 (ECtHR, 9 January 2003), the Court made an award for non-pecuniary damage, even though the impugned provision of the Austrian Criminal Code had already been repealed and the applicant had therefore 'achieved in part the objective of his application'.

Fourthly, the Court has ordered just satisfaction for a 'potential violation' of the Convention.<sup>15</sup> Here again, the purpose of just satisfaction is to censure and punish the respondent State's conduct rather than to compensate for damage, which has not yet occurred.

Fifthly, the Court has not even excluded the possibility that the applicant suffered, as a result of the 'potential effects of the violation found', a loss of real opportunities of which account must be taken 'notwithstanding the fact that the prospects of realisation would have been questionable'.<sup>16</sup> In these particular cases, just satisfaction does not even remedy a virtual harm done to the applicant, since it is doubtful that it would ever have materialized. It is the fault-based conduct of the respondent State that the Court wants to punish.

Sixthly, the Court sometimes even awards compensation in spite of the lack of supporting documents, and contradictions in the statements made by the applicants regarding the losses claimed.<sup>17</sup> When no evidence of the alleged damage is produced, the award of damages lies entirely at the discretion of the Court. In these circumstances of total lack of evidence and discretionary award of damages, just satisfaction has an inherent element of punishment, since it does not remedy a proven damage, which remains speculative, but instead punishes the respondent State's wrongful conduct.

Seventhly, in cases of general interest, the Court determines just satisfaction taking into account its exemplary effect.<sup>18</sup>

In other words, the existence of punitive or exemplary damages under the Convention is an indisputable fact in the Court's practice, with the Court, both in its Grand Chamber and Chamber formations, having overcome step by step the classical paradigm of the Draft Articles on State Responsibility which indicate that the purpose and scope of reparation are limited to remedial measures, thus excluding punitive damages.<sup>19</sup>

As Shelton holds, the Court 'has a stronger textual basis for awarding punitive damages, as there is clear precedent for punitive damages in the arbitral decisions on state responsibility for injury to aliens. The term "satisfaction" has a broader meaning than is reflected in the judgments of the European Court'.<sup>20</sup> Since just satisfaction is only to be awarded when the domestic legal order has not provided full reparation, Article 41 ECHR excludes any compensation exceeding

<sup>15</sup> For example, *Mokvani v France* App no 52206/99 (ECtHR, 15 July 2003) para 43, and *Gürbüz v Turkey* App no 26050/04 (ECtHR, 10 November 2005) para 75 (see the critical opinion of Judges Cafisch and Türmen).

<sup>16</sup> *Sporrong and Lönnroth v Sweden* (Article 50) (1984) Series A no 88, para 25; *Bönisch v Austria* (Article 50) (1986) Series A no 103, para 11 App no. 8658/79; and *Sara Lind Eggerisdóttir v Iceland* App no 31930/04 (ECtHR, 5 July 2007) para 59.

<sup>17</sup> For example, *Barbenà, Messegué and Jabardo v Spain* (Article 50) (1994) Series A no 285-C, paras 18–20, App no 10588/83; 10589/83; 10590/83 (leave in Art. 50); despite the fact that the decisions of the Spanish courts subsequent to the principal judgment had already afforded the applicants reparation for non-pecuniary damage.

<sup>18</sup> For example, *Xenides-Arestis v Turkey* (Just Satisfaction) App no 46347/99 (ECtHR, 7 December 2006) and *Ananyev and Others v Russia* App nos 42525/07 and 60800/08 (ECtHR, 10 January 2012).

<sup>19</sup> See the Commentary to Articles 36 and 37 of the Draft Articles on State Responsibility.

<sup>20</sup> Shelton (n 3) 417.

full reparation, but 'full' reparation can only be achieved if and when the need for prevention and punishment in the specific circumstances of the case has also been satisfied. Only then is satisfaction 'just'.<sup>21</sup> Compensation for quantifiable losses may not be sufficient and the obligation of full reparation may include punitive damages that go beyond remedying the pecuniary and non-pecuniary damage caused to identified persons.

### 3. Punitive Damages in International and European Law

Punitive damages are still controversial in international law. In the following, we will analyse punitive damages in treaty and case law in general international law (3.1), in European Union Law (3.2), by the Council of Europe (3.3), and other human rights bodies<sup>22</sup> (3.4). This will show that the use of punitive damages is gaining ground.

#### 3.1 General public and private international law

The Court's case law is not isolated within the framework of international law. Early cases in international law were qualified as rewarding punitive damages, especially for wrongdoing against foreigners.<sup>23</sup> As Whiteman holds: 'At times, the excess in the amount of damages awarded over the actual loss or injury may [...] be accounted for in part by the fact that the [...] persons making the award were influenced by the seriousness of the part taken by the respondent state in the incident out of which the claim arose. Such damages might well be considered punitive in their nature, although they are not so denominated.'<sup>24</sup> Nevertheless, it is impossible to say that they were generally accepted,<sup>25</sup> not even in cases of international crimes and human rights violations.<sup>26</sup>

The International Law Commission (ILC) also discussed punitive damages. In the First Report on State Responsibility of 1956 the then-Special Rapporteur, Garcia-Amador, stated: 'The purpose of reparation is not necessarily solely restitution or compensation for material damage. "Reparation" measures may also have a punitive function. In such cases the measures in question should be regarded as a penalty, applicable to the party guilty of the act giving rise to responsibility.' He continued

<sup>21</sup> The question of how damages should be measured is still unclear, but financial just satisfaction can be made under three headings: pecuniary loss, non-pecuniary loss, and costs and expenses. Robin CA White and Clare Ovey, *The European Convention on Human Rights* (5th edn, OUP 2010) 44.

<sup>22</sup> UN Treaty bodies have not discussed punitive damages—the issue has arisen mostly in regional human rights courts.

<sup>23</sup> For a discussion of the cases, see Nina HB Jørgensen, *The Responsibility of States for International Crimes* (OUP 2000) 187 et seq.

<sup>24</sup> Marjorie M Whiteman, *Damages in International Law* (US Government Printing Office 1937) 628.

<sup>25</sup> Jørgensen (n 23) 200 et seq; 'Despite the fact that none of the tribunals in these cases spoke of punitive damages, most commentators at the time agreed that the idea of punishment could be part of the concept of damages.'

<sup>26</sup> Eg, *Corfu Channel case (UK v Albania)* [1949] ICJ Rep 4, 23.

by saying that: 'The character and measure of reparation should be determined by reference to the extent of the damage caused and to the seriousness of the act giving rise to responsibility, and also by reference to the purpose which the reparation is to serve.'<sup>27</sup> The second Report on State Responsibility of 1989 by Special Rapporteur Arangio-Ruiz also referred to punitive damages:

To confine the consequences of any international delict (let alone an international crime) to restitution in kind and pecuniary compensation would mean to overlook the necessity of providing some specific remedy—having a preventive as well as a punitive function—for the moral, political and juridical wrong suffered by the offended state or states in addition to, or instead of, any amount of material damage.<sup>28</sup>

In contrast, the final Articles on State Responsibility (ARSIWA)<sup>29</sup> hold in the commentary to Article 36 that '[c]ompensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.'<sup>30</sup> The ILC also states that 'just satisfaction' under Article 37 is 'not intended to be punitive in character, nor does it include punitive damages'.<sup>31</sup>

To sum up: It seems that, currently, punitive damages are awarded rather covertly so that they are indistinguishable from compensation in its narrow sense, although the degree of wrongfulness of the act in question is likely to be a relevant factor in determining the quantum of damages.<sup>32</sup> As Jørgensen holds: '[T]he idea that pecuniary reparation can exceed the limits of restitution, and in some instances go beyond even moral damages and amount to punishment, would seem to be a general principle of law, and it could be that practice is simply lagging behind principle.'<sup>33</sup> This would be in line with taking a more public law approach to international responsibility, and moving away from the private law, purely inter-state paradigm.<sup>34</sup>

<sup>27</sup> (1956) II ILC Yearbook, 220. <sup>28</sup> (1989) II(1) ILC Yearbook, 41.

<sup>29</sup> Articles on the Responsibility of States for Internationally Wrongful Acts, (2001) II(2) ILC Yearbook.

<sup>30</sup> *ibid* para 4.

<sup>31</sup> *ibid*, para 8. Similarly, Stephan Wittich, 'Compensation', *Max Planck Encyclopedia of Public International Law* (online edn, 2008) para 10 <[http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)> accessed 11 July 2018: 'In particular, compensation does not have the purpose of punishing the responsible State, nor does it have an expressive, vindictive, or exemplary character by deterring blameworthy conduct.' See also para 44 for an assessment of punitive damages in international law. Nevertheless, he states that for the calculation of compensatory damages several factors can be taken into account, including 'the conduct of the parties before, during, and even after the breach [which] may have a significant influence on the amount of compensation [...] Finally, all the (other) circumstances of the breach will have to be taken into account when assessing the amount of compensation due—eg whether the breach is a continuing one, whether the wrongdoing State has repeatedly acted unlawfully, the gravity of the breach, or the concern to reach an equitable and acceptable outcome' (para 13).

<sup>32</sup> Jørgensen (n 23) 206. <sup>33</sup> *ibid*.

<sup>34</sup> See for a discussion, André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359, 401 et seq. They hold that international 'responsibility traditionally has served the interests of individual states (rather than the public interest)'. Under a public law concept as followed in ARSIWA, responsibility 'thus is not contingent upon a showing that a disputed act has caused injury to a state or other person to

In the field of private international law,<sup>35</sup> neither the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, nor the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1 February 1971, make reference to punitive damages as a ground for refusing recognition and enforcement of an arbitral award or a foreign judgment. Furthermore, Article 29 of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999 provides that punitive damages shall not be recoverable. Article 11(1) of the Hague Convention on Choice of Court Agreements of 30 June 2005<sup>36</sup> provides that recognition or enforcement of a judgment may be refused if, and to the extent that, it awards punitive damages. This provision is not linked to the *ordre public* clause contained in Article 9(e), which prohibits the use of this clause to deny recognition of punitive damages awards. Article 74 of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 also provides that damages for breach of contract by one party may not exceed the loss, which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract. Nonetheless, the United Nations Commission on International Trade Law (UNCITRAL) Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods affirms that '[d]omestic law may also apply to issues such as punitive damages. In one case a court seemingly accepted the validity of a claim for punitive damages in the context of a CISG damages claim, although the determination of the amount of damages was left open'.<sup>37</sup> Punitive damages are *inter alia* allowed in England, South Africa, and the United States and common law systems are generally more open to them. They are neither new nor limited to a few countries only; on the contrary, they are found in legal systems throughout the world.<sup>38</sup> Even those systems which do not expressly allow them, and even deny them, sometimes covertly use them.<sup>39</sup> Whereas they are still rare in international commercial arbitration, there are legal developments, especially concerning the enforcement of awards under the New York Convention, leading to their rise.<sup>40</sup>

whom an international obligation is owed, but rather is premised on the notion of an illegal act. In this construction, the law of international responsibility does not only protect the rights of injured parties but protects the international legal order as such against acts that violate international law' (footnotes omitted).

<sup>35</sup> For an overview, see Marta Requejo Isidro, 'Punitive Damages From a Private International Law Perspective' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 237–55.

<sup>36</sup> Entry into force 1 October 2015; 44 ILM 1294 (2005).

<sup>37</sup> 2012 edn, 346.

<sup>38</sup> Shelton (n 3) 403.

<sup>39</sup> For an overview, see Koziol and Wilcox (n 35); Shelton (n 3) 403–4; and Melvin M Belli, Sr, 'Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society' (1980) 49 *UMKCLR* 1.

<sup>40</sup> Markus A Petsche, 'Punitive Damages in International Commercial Arbitration: Much Ado about Nothing?' (2013) 29 *Arbitration International* 89.

### 3.2 Punitive damages in European Union law

The 'position of the European Union regarding punitive damages is not only ambivalent, but also clearly self-contradictory', according to Gerhard Wagner.<sup>41</sup> While punitive damages may not be required, it nevertheless seems clear that they may be acceptable in some instances.<sup>42</sup> In some legal areas of the European Union, like the regulation of the agricultural and the securities markets, there has been a policy of punitive civil claims being allowed. Article 18 of Regulation No 1768/95 refers to 'special civil law claims' and Article 28 of Directive 2004/109/EC refers to 'civil and/or administrative penalties'.<sup>43</sup> This trend has been endorsed by the Court of Justice in both *Von Colson and Kamann v Land Nordrhein Westfalen*<sup>44</sup> and *Harz v Deutsche Tradax GmbH*,<sup>45</sup> in which the Court of Justice considered that compensation must be sufficient to act as a deterrent against sex discrimination in employment. In *Manfredi v Lloyd Adriatico et al*,<sup>46</sup> the Court of Justice went even further, establishing that, in accordance with the principle of equivalence, national courts could award punitive damages for breaches of then-EC competition law if, and when, such damages were also available for breaches of national law. Punitive damages somehow sneaked into the concept of 'effective, proportionate and dissuasive' sanctions.<sup>47</sup> In particular, the 'dissuasive' aspect hints to the possibility of sanctions, including damages, which deter future undesired behaviour. We will discuss the rationale for this in section 4.

Furthermore, it can be argued that, within the European Union, there has been an acknowledgment of the extra-compensatory purposes of civil liability and, consequently, of the legitimacy of punitive damages when they are not excessive. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)<sup>48</sup> states that:

The application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum.<sup>49</sup>

<sup>41</sup> Gerhard Wagner, 'Neue Perspektiven im Schadensersatzrecht—Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten für den 66. Deutschen Juristentag' in *Verhandlungen des 66. Deutschen Juristentages* (Vol 1, Part A Stuttgart 2006) A 71.

<sup>42</sup> cf Shelton (n 3) 418.

<sup>43</sup> See for further issue areas and an overview, Bernhard A Koch, 'Punitive Damages in European Law' in Koziol and Wilcox (n 35) 197–209.

<sup>44</sup> Case 14/83 *Von Colson and Kamann v Land Nordrhein Westfalen* [1984] ECR 1892.

<sup>45</sup> Case C-79/83 *Dorit Harz v Deutsche Tradax GmbH* [1984] ECR 1922.

<sup>46</sup> Joined cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico et al* [2006] ECR I-6641.

<sup>47</sup> This 'boiler-plate' language has since then often been used. It first appeared in Case C-68/88 *Commission v Hellenic Republic* [1989] ECR 2965 (no 24). The matter concerned measures member States have to take in order to respond to Community law infringements.

<sup>48</sup> OJ C 289/3, 28 November 2006.

<sup>49</sup> Recital 32 of the preamble to the Rome II Regulation.

Yet it is relevant to note that the provision of Article 24 of the proposal for the Rome II Regulation<sup>50</sup> stated that 'application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy'. With the new wording, proportionate punitive damages were incorporated into European Union law.

In addition, neither Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, nor Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility refer to punitive damages as a ground for refusing recognition and enforcement of a foreign judgment.

Furthermore, the question of deterrence was clearly incorporated into the primary law of the EU in Article 260(2) and (3) of the Treaty on the Functioning of the European Union (TFEU). The provisions provide for imposing financial sanctions on member States for non-compliance with the judgments of the EU Court of Justice or the failure to transpose directives.

### 3.3 The Council of Europe view on punitive damages

In the Council of Europe, the Committee of Ministers noted that:

the setting up of a merely compensatory or acceleratory remedy may not suffice to ensure rapid and full compliance with obligations under the Convention, and [...] further avenues must be explored, e.g. through the combined pressure of various domestic remedies (punitive damages, default interest, adequate possibility of seizure of state assets, etc), provided that their accessibility, sufficiency and effectiveness in practice are convincingly established.<sup>51</sup>

This clear stance in favour of punitive damages taken by the highest political body of the Council of Europe was not an isolated statement. In 2000, the Parliamentary Assembly of the Council also considered the introduction of fines to be imposed on States that persistently fail to execute the judgments of the Court, with a view to introduce more effective measures in the face of non-compliance.<sup>52</sup> As Shelton holds: 'Article 46 may give the Court the implied competence to condemn the state to pay exemplary damages when the state refuses to abide by a judgment.'<sup>53</sup> Furthermore, the Explanatory Report to the Civil Law Convention on Corruption notes that State Parties whose domestic law provides for punitive damages are not required to exclude their application in addition to full compensation.<sup>54</sup> In the field of social rights, the European Committee of Social Rights monitors the requirement for the damages awarded in practice to be sufficiently dissuasive to prevent future infringements.<sup>55</sup>

<sup>50</sup> COM (2003) 427.

<sup>51</sup> Interim Resolution CM/ResDH (2008) 1 of 6 March 2008.

<sup>52</sup> For a discussion, see Shelton (n 3) 414. <sup>53</sup> *ibid.* <sup>54</sup> ETS No 174, para 36.

<sup>55</sup> Second Report submitted by the Government of Hungary, covering the period from 1 January 2007 until 31 December 2010, 83.

### 3.4 Punitive damages in the Inter-American system of human rights

In the Inter-American human rights protection system, opinions are still divided.<sup>56</sup> Article 63(1) of the American Convention on Human Rights<sup>57</sup> refers to the award of 'fair compensation'. While the Inter-American Commission has expressed itself in favour of punitive damages, or at least of a punitive aim to compensation,<sup>58</sup> the Inter-American Court initially had a more reserved position.<sup>59</sup> More recently, in the *Myrna Mack Chang* case, the Inter-American Court came close to the Commission's position by ordering the payment of aggravated damages based on the extreme seriousness of the respondent State agents' conduct.<sup>60</sup> It held that it 'must order payment of a compensation for non-pecuniary damages, in fairness'.<sup>61</sup> Since the Inter-American Court in its majority was not that explicit, it is worth quoting from the separate opinion of Judge Cançado-Trindade to a fuller extent:

The viewpoint, espoused by the Inter-American Court of Human Rights in the past, according to which compensations "with exemplarizing or dissuasive purposes" have no place in international law, has been completely surpassed. It is in accordance with a reactionary vision, shaped by the precepts of juridical positivism, that until recently (whether consciously or not) held back development regarding this matter, and which no longer reflects [...] the current stage of evolution of international law in this regard. Furthermore, in my view, realization of the exemplarizing or dissuasive purposes can—and must—be sought not only through compensations, but also through other (non-pecuniary) forms of reparation. Irrespective of the civil or criminal elements of the international responsibility of the State, I believe it is undeniable that reparations can adopt a punitive or repressive nature, to ensure the realization of justice and to put an end to impunity. It is also necessary to bear in mind that, while reparations (both pecuniary and moral) benefit the injured party directly, punishment (or repressive action against the State found in violation), in turn, benefits the human community itself as a whole; not to admit this would be to allow the State found in violation to remove itself from the Law.<sup>62</sup>

As held by Shelton: "The idea of "aggravated" violations is now accepted by the Inter-American Court and can be the avenue for various forms of non-pecuniary

damages.<sup>63</sup> As again held by Cançado Trindade: 'Once aggravated responsibility has been accepted, its juridical consequences must be established'<sup>64</sup>—be they monetary or not.

### 4. A Social-Science Rationale for Using Punitive Damages

The primary purpose of a damages award is certainly to compensate the claimant for the harm done to her or him. The rationale of punitive damages goes further: deterrence of others and the defendant, including punishment for especially outrageous behaviour.<sup>65</sup> Whenever a purpose of a norm is stated, a need for a social analysis arises in order to verify whether the purpose will be fulfilled in reality. This induces analysis of the effects of law in order to put it on a better evidential base. This analysis can be based on theoretical assumptions or—even better—on empirical research. Given that there are, to our knowledge, no empirical studies in international law concerning punitive damages,<sup>66</sup> we base our analysis on social-science theory only. We will use the economic analysis of law concerning punitive damages as a first step and extend the analysis to behavioural economics.<sup>67</sup>

The classical economic analysis of law, as well as huge parts of international-relations scholarship, assume rational actors. Legal scholarship often uses this assumption implicitly. Thus, it is assumed that actors, including States, pursue their goals rationally under constraints (eg, law).<sup>68</sup> This means that the primary incentives are set by external constraints and behaviour adjusts accordingly. Human rights law, in this view, is an instrument that can provide behavioural incentives for the State not to engage in human rights violations. The threat of being held liable induces the State to incorporate the losses for the victims into their decision on whether, and how, to engage in certain activities. This line of reasoning implies that damages should be high enough for the State to internalize the externalities it has caused. In the case that the probability of being held liable is 100 per cent, full compensation of the harm done would, in principle,<sup>69</sup> be enough to deter a State from engaging in

<sup>63</sup> Shelton (n 3) 417.

<sup>64</sup> *Myrna Mack Chang* (n 60) separate opinion of Judge Cançado Trindade, para 41.

<sup>65</sup> For a legal theoretical discussion, see Dorsey D Ellis, Jr, 'Fairness and Efficiency in the Law of Punitive Damages' (1982–83) 56 California Law Review 1.

<sup>66</sup> But see for international law generally: Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 American Journal of International Law 1.

<sup>67</sup> A similar approach is taken by Shelton (n 3) 406, when she says: 'Punitive damages may also deter, influencing the behavior of the particular wrongdoer and all others who might be tempted to act in the same way in the future, because rational actors are assumed to weigh the anticipated costs of wrongdoing against the anticipated prospective benefit.' See also *ibid* 403.

<sup>68</sup> For international law, see Andrew Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008) and Joel P Trachtman, *The Economic Structure of International Law* (Harvard University Press 2008) as well as Anne van Aaken and Joel Trachtman, 'Political Economy of International Law: Towards a Holistic Model of State Behavior' in Alberta Fabricotti (ed), *The Political Economy of International Law: A European Perspective* (Edward Elgar 2016) 9–43.

<sup>69</sup> It might though be the case that compensation does not equal the 'gain' from the violation for the State. In that case, in order to have optimal incentives, the sanction needs to be higher than the amount of compensation.

<sup>56</sup> See for an overview that is critical of punitive damages, Agostina Noelia Chichero and Sebastián A Green Martínez, 'Punitive Damages and the Principle of Full Reparation in the Case Law of the Inter-American Court of Human Rights' in Yves Haeck, Oswaldo Ruiz-Chiriboga, and Clara Burbano Herrera (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 337–54.

<sup>57</sup> OAS Treaty Series no 36, 1144 UNTS 123 entered into force 18 July 1978.

<sup>58</sup> See Scott Davidson, *The Inter-American Human Rights System* (Dartmouth Publishing Company 1997) 217. See also the request for punitive damages in *Velasquez Rodriguez v Honduras* (Reparations and costs) judgment of 21 July 1989, para 37.

<sup>59</sup> *Velasquez Rodriguez* (n 58) para 38; *Godínez Cruz v Honduras* (Reparations and costs) judgment of 21 July 1989, para 36; and *Garrido and Baigorria v Argentina* (Reparations and costs) judgment of 27 August 1998, paras 43–44.

<sup>60</sup> *Myrna Mack Chang v Guatemala* (Merits, reparations and costs) judgment of 25 November 2003, para 246–86, and especially the separate opinion of Judge Cançado Trindade. See also Shelton, *Remedies* (n 3) 411–13 for a discussion of the case.

<sup>61</sup> *Myrna Mack Chang* (n 60) para 260.

<sup>62</sup> *ibid* (n 60) separate opinion of Judge Cançado Trindade, paras 36–38 (footnotes omitted).

the harmful activity.<sup>70</sup> There are two basic reasons in the economic analysis of law to have damages equal harm (under a strict liability rule).<sup>71</sup> The first is the level of precaution<sup>72</sup> taken by the potential violator. The second is the level of activity of a potentially harmful activity.<sup>73</sup> In both cases, if damage equals harm, the socially correct incentives are set.

However, there are many reasons why the probability of being held liable falls below 100 per cent and, thus, the socially desired level of precaution and level of activity is not achieved, since damages do not equal harm.<sup>74</sup> First, it might be difficult and costly for victims to reach the Court; many victims will never bring a case for reasons of access to justice. Secondly, victims may suffer from what is known in economic analysis of law as 'rational apathy'. Even if they might have a meritorious claim, they might find it too costly to bring a complaint when comparing the costs (not only legal costs) to the expected compensation.<sup>75</sup> This reasoning may apply especially if there are widespread violations which are not too grave and victims may wait for others to bring a claim (especially if a decision has a *de facto inter omnes* effect). Here, the total losses might be substantial overall, so that it would be socially advantageous if the State were to be held liable. Systemic and widespread violations are a case at hand. The idea of punitive damages, thus, also serves to overcome the problem of rational apathy. Victims who claim damages serve the social goal of deterrence.<sup>76</sup> Since, however, bringing a claim is costly and those costs are borne privately, not enough claims might be brought. Increasing the expected damages may solve this problem.<sup>77</sup> Thirdly, there might be especially

<sup>70</sup> The assumed calculation of the State (or any tortfeasor) is as follows: the State engages in a violation if and only if benefits outweigh the costs:  $B > P(H)$ .  $B$  is the benefit of the activity for the State,  $P$  is the probability of Harm ( $H$ ) which equals the compensation due. This is of course simplified in that the State is not a unitary actor (ie, those committing the violation are not necessarily those who pay) and harm done does not necessarily equal compensation, for many reasons. Furthermore, one may question whether States (entities in general) react to incentives as individuals and whether they are rational, but we rely here on a long tradition in international law and international-relations scholarship assuming rational States. After all, law is presumed (even if often implicitly) to cause reactions in its addressees. On the problem of the rationality assumption, see Anne van Aaken, 'Behavioral International Law and Economics' (2014) 55 *Harvard International Law Journal* 421.

<sup>71</sup> Since fault is not required for finding a human rights violation, the ECHR can be equated to a strict-liability regime, as in some areas of national tort law.

<sup>72</sup> According to economic theory, the level of precaution taken by the tortfeasor is independent from the liability regimes (strict or fault), also in a strict-liability regime, eg, product liability in some countries. A product can still be produced with more or less caution, leading accordingly to more or less damage caused.

<sup>73</sup> The level of activity means that a certain activity, eg, car driving, can be reduced so that it causes less harm. The same applies for human rights violations—the State can engage more or less in human rights violating activity.

<sup>74</sup> See for a discussion in the realm of private law Louis T Visscher, 'Economic Analysis of Punitive Damages' in Koziol and Wilcox (n 35) 219–36.

<sup>75</sup> cf Anne van Aaken, 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of *Ius Standi* Provisions' in Stefan Voigt, Max Albert, and Dieter Schmidchen (eds), *International Conflict Resolution, Conferences on New Political Economy* 23 (Siebeck/Mohr 2006) 29–58.

<sup>76</sup> The idea that a person who fights for his rights also fights for the (rule of) law is an old one, see Rudolf von Jhering, *Der Kampf ums Recht* (6th edn, Manz 1880).

<sup>77</sup> cf Visscher (n 74) 224 et seq.

outrageous violations which were committed intentionally. If society views certain violations as especially unacceptable, the deterrence function of punitive damages demands stronger incentives through the imposition of higher than expected damage payments.<sup>78</sup> Fourthly, if the State has taken steps to avoid detection and verifiability in order to lower the probability of being convicted,<sup>79</sup> punitive damages can compensate that by imposing higher damage payments. Fifthly, many times, there are hard-to-measure components of harm (such as non-pecuniary losses), which are often excluded from damages, and thus damages do not equal the harm done.<sup>80</sup>

In all those cases, the probability of being convicted would fall under 100 per cent and, thus, the State no longer weighs the cost of violating human rights correctly—the deterrence purpose is impacted. Economic analysis is thus primarily concerned with under-detection and under-enforcement.<sup>81</sup> But it also takes into account systematically insufficient compensatory damages, eg, in cases of death or serious bodily injury.<sup>82</sup> Thus, the factor by which compensatory damages should be multiplied in those cases is the reciprocal of the probability of being held liable.<sup>83</sup> If, for example, the probability is 50 per cent, compensatory damages should be doubled to provide correct incentives. This reciprocal is termed the 'total damage multiplier'.<sup>84</sup> The punitive part then consists of total damages minus the compensatory part.

A further argument for punitive damages arises from behavioural economics, a rather new branch of economics based on psychological insights tested in lab experiments and field studies. In contrast to the rational choice assumption, people have cognitive biases, are fairer on the one hand and more spiteful on the other hand, and have only bounded willpower.<sup>85</sup> The economic analysis of law has traced the incentive effects of punitive damages on potential wrongdoers based on the assumption

<sup>78</sup> As held in *Myrna Mack Chang* (n 60) separate opinion of Judge Cançado Trindade, para 30: 'Reaction to grave and systematic violations of human rights and of International Humanitarian Law became, in our days, a legitimate concern of the international community as a whole.'

<sup>79</sup> cf Visscher (n 74) 223.

<sup>80</sup> This is not to say that there are not good reasons for the latter problem, which arises in all legal systems: cf A Mitchell Polinsky and Steven Shavell, 'Punitive Damages' in Michael Faure (ed), *Tort Law and Economics Encyclopedia of Law and Economics* (vol 1, 2nd edn, Edward Elgar 2009) 232 et seq; as well as Visscher (n 74) 225.

<sup>81</sup> Catherine M Sharkey, 'Economic Analysis of Punitive Damages: Theory, Empirics and Doctrine' in Jennifer H Arlen (ed), *Research Handbook on the Economics of Tort* (Edward Elgar 2013) 491.

<sup>82</sup> Joni Hersch and Kip Viscusi, 'Saving Lives Through Punitive Damages' (2010) 83 *Southern California Law Review* 229.

<sup>83</sup> Robert Cooter, 'Punitive Damages for Deterrence: When and How Much?' (1998) 40 *Alabama Law Review* 1143.

<sup>84</sup> AM Polinsky and S Shavell, 'Punitive Damages' in P Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (1998) 193.

<sup>85</sup> For an overview, see Christine Jolls, Cass R Sunstein, and Richard H Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471; Russell B Korobkin and Thomas S Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *California Law Review* 1051; Cass R Sunstein (ed), *Behavioral Law and Economics* (CUP 2000); Eyal Zamir and Doron Teichman (eds), *Handbook on Behavioral Economics and the Law* (OUP 2014).

that they pursue their material advantage. Behavioural economics focuses inter alia on social norms. As Cooter holds:

The institution of punitive damages allows judges [...] to express righteous anger through speech and punishment. Expression of emotions by the court demonstrates the strength of its commitment to the law in question. Perception of this commitment shapes the expectations of citizens [in our case: States] and changes their behavior.<sup>86</sup>

This is not the place to expand on that approach,<sup>87</sup> but what can be safely said is that punitive damages express a special verdict on the shamefulness of conduct. It is well established that honour, stigma, and social norms influence behaviour. Changing people's perceptions of what constitutes 'normal' behaviour or values among their peers also influences their behaviour (notwithstanding material incentives).<sup>88</sup> We may assume that this holds also for States.<sup>89</sup>

There has been a long discussion on the expressive law theory, holding that the law is more than a set of prices but also serves to convey a society's norms of behaviour.<sup>90</sup> This discussion has largely been theoretical, focusing on the symbolic content of legislation on drinking or smoking in public, religious displays, etc, and of course upon the question of whether a certain behaviour should be regulated by administrative or rather criminal law (the latter expressing stronger repudiation of the behaviour in question). Recently, this theory has been tested empirically and is largely confirmed.<sup>91</sup>

The theory of expressive adjudication focuses this research on the role of courts and their decisions.<sup>92</sup> The theory provides an additional explanation for adjudicative compliance that is distinct from both the court's threat of sanctions and its institutional legitimacy. It holds that 'there are certain circumstances in which adjudicative expression can, by itself, influence the behaviour of existing disputants and of future potential disputants. Here, the account of adjudication is non-coercive and "expressive" in that it focuses on what law says rather than the sanctions that law threatens'<sup>93</sup> (as rational choice approaches would) in order to induce compliance. This is especially important in international law. But it also leads us to stress the importance of the expressive function of punitive damages—expressing clear

<sup>86</sup> Robert Cooter, 'Punitive Damages, Social Norms and Economic Analysis' (1997) 60 *Law and Contemporary Problems* 73, 74.

<sup>87</sup> See extensively van Aaken (n 70).

<sup>88</sup> Roland Benabou and Jean Tirole, 'Law and Norms' NBER Working Paper 17579 (2011) <www.nber.org/papers/w17579> accessed 29 September 2017.

<sup>89</sup> For a discussion of caveats of transposing individual behavioural insights to collective actors such as states, see van Aaken (n 70).

<sup>90</sup> Elizabeth Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503; Robert D Cooter, 'Expressive Law and Economics' (1998) 27 *Journal of Legal Studies* 585; Richard H McAdams, 'A Focal Point Theory of Expressive Law' (2000) 86 *Virginia Law Review* 1649; Richard H McAdams, 'The Expressive Power of Adjudication' (2005) 5 *University of Illinois Law Review* 1045; Richard H McAdams, 'An Attitudinal Theory of Expressive Law' (2000) 79 *Oregon Law Review* 339.

<sup>91</sup> For an overview, see Benabou and Tirole (n 88).

<sup>92</sup> McAdams, 'The Expressive Power of Adjudication' (n 90).

<sup>93</sup> *ibid* 1046.

signals to the respondent State but also all other member States of the Council of Europe on the disapproval of the State's behaviour. Thus, also from a behavioural-economics point of view, punitive damages have a function which should even enhance the arguments brought forward by traditional rational choice theory.

## 5. Conclusion and Outlook

Summing up, the ECtHR has been at the forefront of an international trend, using just satisfaction to prevent further violations of human rights and to punish wrongdoing governments. In all the cases described, there was no explicit and exact calculation of the harm suffered by the victim, but rather an add-on to the amount awarded which is not otherwise explicable. The acknowledgment of punitive, or exemplary damages, under the Convention is essential in at least three cases: (i) gross violations of human rights protected by the Convention or the additional Protocols, especially when there are multiple violations at the same time, repeated violations over a significant period of time, or a single continuing violation over a significant period of time (eg, the killing of a political opponent or the silencing of a critical TV channel could justify such punitive damages); (ii) prolonged, deliberate non-compliance with a judgment of the Court delivered with regard to the recalcitrant Contracting Party (eg, the prolonged indifference of a State Party to a judgment of the Court, which had found it in breach of the Convention, in spite of repeated efforts of the Committee of Ministers and the injured party to have the judgment complied with); and (iii) the severe curtailment, or threat thereof, of the applicant's human rights with the purpose of avoiding, impairing, or restricting his or her access to the Court, as well as the Court's access to the applicant (eg, the use of some grave tactics to silence the applicant, such as directly or indirectly threatening his life or that of his loved ones or initiating arbitrary criminal proceedings against the applicant, like in *Oferta Plus SRL v Moldova* (Just Satisfaction)).<sup>94</sup> In all these three cases, the underlying premise for punitive damages is not only causality between the wrongful conduct and the harm, but also intention or recklessness (gross negligence) by the wrongdoing State—that is to say, by its organs and agents. All three instances described above (gross violations, deliberate non-compliance, and curtailing access to court) are in conformity with the social-science insights regarding when punitive damages should be used for deterrence.

Furthermore, the Court's legal and moral authority and the practical solvency of the entire European human rights protection system are particularly at stake here. The gravity of such breaches engages the interests of all Contracting Parties to the Convention, the Council of Europe as an institution, and Europe as a whole. The principle of State sovereignty cannot, in the light of Article 26 of the Vienna

<sup>94</sup> *Oferta Plus SRL v Moldova* (Just Satisfaction) App no 14385/04 (ECtHR, 12 February 2008), para 76.

Convention on the Law of Treaties, be invoked to justify such gross wrongdoing. As Lauterpacht put it:

[A] violation of international law may be such that it needs, in the interest of justice, an expression of disapproval that goes beyond material reparation. To place limits on liability within the State to *restitutio in integrum* would be to abolish the criminal law and a major part of the law of torts. To abolish these aspects of liability between States would be to adopt, on the grounds of sovereignty, a principle that is repugnant to justice and carries with it an encouragement to wrongfulness.<sup>95</sup>

The Court correctly applies punitive damages when the general rule of law is at stake, using both, the positive incentives of punitive damages for the applicants overcoming rational apathy as well as the negative incentives for States violating the Convention. It does so presumably to set a signal also for other member States, and thus to strengthen its own authority and with it human rights protection in Europe. Following behavioural insights, using punitive damages may also send strong signals to other States that a certain behaviour is highly reproachable, and thus induce better compliance even without strong sanctioning mechanisms, which is especially important in international law.

Whereas, between sovereign nations, the question of the power to impose penalties is political rather than legal in nature, if there is no court adjudicating the case, the conclusion is different between nations bound by a human rights treaty, such as the Convention, which confers rights on natural and legal persons and imposes negative and positive obligations on the Contracting Parties enforceable by an international court through binding judgments. Within this framework, just satisfaction by means of punitive damages does not entail a sanction applied by one State against another, but instead corresponds to an authoritative and indispensable response by an international court to the wrongdoing State. The Court speaks then on behalf of all the Contracting Parties, acting as the ultimate defender of a Europe rooted in the rule of law and faithful to human rights. This is in line with the object and purpose of the Convention. To overlook the need for such a response would in turn encourage States, especially the most powerful ones, to assume that human rights violations can easily be made good by mere pecuniary compensation. Moreover, in determining punitive damages the Court acts, as we have identified, within the boundaries established by the principle of proportionality and with full regard to such factors as the objective gravity of the wrongful conduct, the degree of reprehensibility of the intention or recklessness of the wrongdoer, the extent of the harm caused to the applicant and third parties, the consequential gains obtained by the wrongdoer and third parties, and the probability of non-enforcement of the breached right. Therefore, punitive damages are an appropriate and necessary instrument for fulfilling the Court's mission to uphold human rights in Europe and to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention and the Protocols thereto.

<sup>95</sup> Hersch Lauterpacht, 'Règles Générales du Droit de la Paix' (1937) 62 *Recueil des Cours de l'Académie de Droit International* 350.

Furthermore, this direction might be the way international law is moving. Is the 'private law' approach in international law, holding on to the principle of reparation of harm done that must be compensated, still adequate? Or can the other goal of deterrence be captured by other incentives for norm conformity of States? The ARSIWA have on the whole moved in this direction. Pellet talks about a 'revolution' in international law.<sup>96</sup> Damage is not a prerequisite for responsibility; rather it is necessary and sufficient under Articles 1 and 2 of the ARSIWA that only two elements are present: breach and attribution. This imposes a responsibility of conduct, not result (as in administrative law, in which a fine can be imposed for crossing a red light without injuring anyone). This move towards an 'objectification'<sup>97</sup> of international responsibility (or the public law dimension)<sup>98</sup> that stresses the second goal: the deterrence or incentive function. In times of increasing global public goods, including human rights as a normative public good, those functions might become more important. Punitive damages may serve to effectuate the *inter omnes* obligations of States, as well as the human rights of the peoples of the Council of Europe.

<sup>96</sup> Alain Pellet, 'The Definition of Responsibility in International Law' in J Crawford et al (eds), *The Law of International Responsibility* (OUP 2010) 9.

<sup>97</sup> *ibid* 8, 15, and 9: '[I]nternational law must be respected independently of the consequences of a violation and any breach entails the responsibility of its author.'

<sup>98</sup> Nollkaemper and Jacobs (n 34) 401 et seq. See also George Abi-Saab, 'The Uses of Article 19' (1999) 10 *European Journal of International Law* 339, 350-51: '[T]o defend the normative integrity of the legal system itself against patterns of behaviour which go against its most fundamental principles and thus undermine its regular functioning and credibility [...] It can legitimately be feared that setting aside the dual regime of responsibility would be widely perceived as a reversal of the evolution of general international law from a community-oriented system back to a purely intersubjective one.'