

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it's all about the state

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Abstract

This article studies how the European Court of Human Rights (ECtHR, the Court) adjusts damages for human rights violations. The article empirically analyses 13 years of ECtHR's case law in relation to Articles 2 (right to life), 3 (torture, inhuman and degrading treatment), and 5 (arbitrary detention) of the European Convention on Human Rights (ECHR, the Convention). The goal is to understand whether the statements made by the Court about the aims pursued through just satisfaction are confirmed in practice. Through an empirical quantitative study relating to non-pecuniary damages, the article analyses the practice of the Court in awarding non-pecuniary damages for human rights violations and compares it to the competing visions of the ECtHR's function. In particular, I am interested in determining whether just satisfaction is aimed at redressing the suffering of the victim, her circumstances and vulnerability, or whether the focus is more on the respondent state, its conduct and its past human rights record. The answers to these questions will contribute to the debate whether the ECtHR's role is one of delivering 'individual justice' or whether the Court is – as an international court enforcing an international treaty – focused on the 'state'.

Keywords: damages; European Court of Human Rights; human rights; non-pecuniary; remedies

1. Introduction

In 2013, the UK Supreme Court ruled that in a case involving a loss of liberty the compensation awarded by the Court of Appeal should be reduced from £10,000 to £6,500 because 'it appears . . . that an award in the region of £6,500 would *adequately compensate* Mr Faulkner'.² The decision in *Faulkner* had come on the back of a series of cases in which the English courts decided that the

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The case law is generated from the HUDOC database ©Council of Europe/European Court of Human Rights - Conseil de l'Europe/Cour Européenne des droits de l'Homme. The analysis presented in this article formed the basis for papers I have already published and which I refer to throughout this article: V. Fikfak 'Changing State Behaviour: Damages before the European Court of Human Rights', (2018) 29(4) EJIL 1091–125.

²*R Faulkner v. Secretary of State for Justice and another* [2013] UKSC 23, at 87.

domestic approach to human rights damages should ‘mirror’ the approach of the ECtHR.³ Since the aim of incorporating the Convention ‘was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of report to Strasbourg’.⁴ English courts adopted the same approach as Strasbourg: they adjusted the quantum to ECtHR judgments. Since before the Strasbourg Court the awards for ‘just satisfaction’ were on the ‘low side’⁵ compared to the normal damage awards in the UK, they lowered compensation awarded by the Court of Appeal, justifying their award with the phrase that the amount would ‘adequately compensate’ the applicant. No other reasons were given for the award nor explanations about the specific circumstances of the case or characteristics of the victim that may have been taken into account in the determination of the award.

The approach of the UK Supreme Court in *Faulkner* to the determination of just satisfaction should not come as a surprise. The case law of the ECtHR in relation to just satisfaction has been cloaked in mystery. Judgments of the Court regularly provide only the briefest of justifications for the award: ‘Making its assessment on an equitable basis, the Court awards . . .’,⁶ or ‘Having regard to the relevant circumstances of the present case and ruling on an equitable basis . . .’.⁷ Although there are rumors that the Court is using a set of tables to determine the amounts and maintain consistency,⁸ the Court has refused to publish these since this would limit the inherent discretionary nature of the award and would lead to additional disputes regarding expected sums.⁹ Some have interpreted this refusal as proof that no tables exist and that the amount of the award is determined on a case-by-case basis, ‘often without considering or distinguishing cases involving similar facts’.¹⁰ In 2001, the Law Commission – the law reform body for England and Wales – criticized the Court’s approach as arbitrary and lacking in transparency.¹¹ Others have argued that damages are awarded intuitively.¹² The accusation has been made that, instead of adopting a clear approach, the Court’s lack of reasoned decisions articulating principles on which a remedy is afforded makes the work of practitioners and national judges seeking to apply the ECtHR approach across member states difficult.¹³

As *Faulkner* shows, the ECtHR’s refusal to set out any rules or guidelines as to when individuals are likely to get compensation or, indeed, which elements of their treatment might affect the ultimate award, provides little opportunity to English courts to bolster mechanisms to remedy human rights violations at home.¹⁴ As an international court responsible for interpreting the Convention

³*Ullah* [2004] UKHL 26.

⁴See *Faulkner*, *supra* note 2, at 28, referring to *R (Greenfield) v. Secretary of State for the Home Department* [2005] 1 WLR 673.

⁵*Ibid.*, at 27.

⁶*Ushakov v. Russia*, Merits and Just Satisfaction, Judgment of 25 October 2011, app. 10641/09 [2011] ECHR.

⁷*Jashi v. Georgia*, Partial Restoration, Decision of 8 January 2013, app. 10799/06 [2013] ECHR.

⁸*Cocchiarella v. Italy*, Judgment of 29 March 2006, [2006] ECHR (Ser. A.), at 209.

⁹D. Harris, M. O’Boyle and E. Bates (eds.), *Law of the European Convention on Human Rights* (2014), 156.

¹⁰The Law Commission, ‘Damages Under the Human Rights Act 1998 – Report’, (2001) Cm 4853, SE/2000/182; P. Leach, ‘Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery’, (2006) 27 HRLJ 11–25.

¹¹Law Commission, *ibid.*

¹²F. Bydliniski, ‘Methodological Approaches to the Tort Law of the ECHR’, in A. Fenyves, E. Karner and H. Koziol (eds.), *Tort Law in the Jurisprudence of the European Court of Human Rights* (2011), 176; C. Kissling and D. Kelliher, ‘Compensation for Pecuniary and Non-Pecuniary Loss’, in *ibid.*, at 579; O. Ichim, *Just Satisfaction under the European Convention on Human Rights* (2015), 121.

¹³J. Beatson, S. Grosz and T. Hickman (eds.), *Human Rights: Judicial Protection in the United Kingdom* (2008); L. Lester, D. Pannick and J. Herberg (eds.), *Human Rights Law and Practice* (2009).

¹⁴Generally, L. Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, (2008) 19 EJIL 125–59. On the particularities of the internalization of the ECHR by English courts, V. Fikfak ‘English Courts and the “internalisation” of the European Convention on Human Rights – Between Theory and Practice’, (2013–2014) 5 *Cambridge Journal of International and Comparative Law – The UK Supreme Court Yearbook* (April 2015) 183; ‘International Law Before English and Asian Courts: Finding the Judicial Role in the Separation of Powers’, (2013) 3(2) *Asian Journal of International Law* 271.

and ensuring that member states abide by obligations set out there, the case law of the ECtHR affects the laws and practice of 47 states. Every one of these countries is bound to comply with decisions of the Court and enforce human rights appropriately on the domestic level. Yet, the uncertain practice of the ECtHR provides little clarity as to how non-pecuniary damages ought to be determined. If the European human rights system seeks to change the behaviour of states by encouraging them to embed the protection of the Convention into their domestic legal systems then, in the context of damages, such internalization might lead to a perverse situation where it could perpetuate or even encourage the lack of clarity on the part of domestic judges. In the UK, a two-tier system is now in place, where damages under tort law considerably outweigh human rights awards.¹⁵ Whilst the rules relating to the former are clear, no one knows how human rights awards are determined. As judges assert, 'we have no principles' to apply.¹⁶

Given the impact of the practice of the ECtHR case law on jurisdictions which have embedded the Convention into their own legal systems and the immense legal gap that exists both on the international and domestic level, it is high time to elucidate the practice of the Court in relation to just satisfaction. A first empirical study that sought to fill this gap was published a couple of years ago, when scholars from the Max Planck Institute found that the 'frequently voiced academic reproach that the Court's practice is arbitrary or unprincipled' is incorrect. They found that the Court does follow the hierarchy (or 'ranking') inherent in the Convention and awards higher damages for absolute rights violations compared to procedural breaches.¹⁷ However, the study only investigated a year of the Court's practice¹⁸ and apart from the 'ranking' did not identify other variables that may affect the determination of damages. It is still unclear, for example, whether the just satisfaction is aimed at redressing the suffering of the victim, affirming his or her rights under the Convention, or whether it is aimed at governments and intended to primarily act as a 'serious and effective means of dissuasion' of repetitive unlawful conduct.¹⁹ These questions are not merely about which variables potentially affect the Court's approach to damages. Instead, they go to the very heart of the Court's identity.

Ever since its inception and the drafting of the Convention, there has been a serious tension between two visions of the purpose of the European Convention on Human Rights. One perspective views as the soul of the Convention 'the entitlement of each and every complainant to examination of his or her complaint and, if it is upheld, to individualized relief'.²⁰ From this perspective, the Court's mission is to hear every individual complaint and focus the proceedings before the Court on the victim of the violation and the vindication of his or her right. The other perspective sees the mission of the Court as enforcing the Convention as the 'constitutional instrument of the European public order'.²¹ In this regard, the ECtHR judgments seek to raise the general standard of protection of human rights in the country concerned and across the community of states by correcting the defects in the national approaches of member states. From this 'constitutional justice' perspective, the role of the Court is mainly 'corrective' and focused on the state, rather than the victim.

¹⁵J. Varuhas, *Damages for Breaches of Human Rights* (2016).

¹⁶Some judges recognize this, saying 'We have no principles'. Others responded: 'We have principles, we just do not apply them.' See D. Shelton, *Remedies in International Human Rights Law* (2015), 2. Though it should be noted that individual judges are hard at work to try and distil principles from ECtHR jurisprudence (see Lords Reed and Carnwath in *Faulkner*).

¹⁷S. Altwickler-Hamori, T. Altwickler and A. Peters (eds.), 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights', (2016) 76 *ZaöRV/HJIL* 1–51, at 43.

¹⁸The choice of the year was also problematic (2006), since this is supposedly the year in which the Just Satisfaction Unit sought to change/standardize the Court's approach to damages. See Harris, *supra* note 9, at 156.

¹⁹*Guiso-Gallisay v. Italy*, Judgment of 22 December 2009, [2009] ECHR, at 85.

²⁰P. Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership', (2002) 21 *Penn State International Law Review* 101, 104.

²¹*Loizidou v. Turkey*, Preliminary Objection, Judgment of 23 March 1995, [1995] ECHR (Ser. A.), 310, at 75.

These two competing visions have been debated every time that a new reform of the Convention system was proposed.²² For example, when the new pilot procedure was introduced in 2008, as a solution to the Court's increasing work load, it was welcomed because it allowed the Court to summarily deal with hundreds of repetitive claims against a respondent state and required that the state adopt legislative and administrative measures to address the systemic problem. Yet, advocates of individual justice argued that the Court had to look beyond the numbers to ensure that the new admissibility criteria would not lead to well-founded applications being dismissed without sufficient review.²³ In the end, both proponents of the constitutional and individual justice 'were positive in their reception of the pilot judgment mechanism'.²⁴ It represented a good compromise between a more constitutional role for the Court 'ordering member states to adopt general measures', whilst still preserving a forum for individuals' claims to be heard.²⁵

Whilst this old debate is reignited anytime a new reform of the Convention system is proposed, there is little, if any, discussion on how it has affected the Court's handling of damages and in particular, its approach to non-pecuniary damages. From the individual justice perspective, the primary function of damages is presumably to address the harm done to the victim. If the applicant has suffered 'evident trauma', 'pain and suffering, distress, anxiety', they should be compensated for their suffering and placed in the same position as they would be had no injury occurred.²⁶ In contrast, for constitutionalists the remedies adopted by the Court should be such as to motivate and incentivize the state to change its behaviour and avoid future repetitive conduct. Just satisfaction for example could act as a 'serious and effective means of dissuasion with regard to the repetition of unlawful conduct of the same type'.²⁷ In this regard, the Council of Ministers and the Parliamentary Assembly of the Council of Europe have explicitly supported the use of punitive damages against states to ensure the effectiveness of ECtHR judgments.²⁸

These two visions reveal very different conceptions of the identity and role of the ECtHR as one of the most important and influential human rights courts in the world. One vision sees it focusing on the victim, the other on the state. Each of these requires a very different approach to monetary damages. In particular, the determination of what constitutes 'just' in the phrase 'just satisfaction' necessitates an answer to the question *who is at the centre of the determination* of monetary damages – *the individual victim or the perpetrator state*.²⁹ This article aims to answer this question. It empirically analyses 13 years of ECtHR case law in relation to Articles 2 (right to life), 3 (torture, inhuman and degrading treatment), and 5 (arbitrary detention) of the Convention. The goal is to understand whether the statements made by the Court about the aims pursued through just satisfaction are confirmed in practice. Through an empirical quantitative study relating to non-pecuniary damages, the article will analyse the practice of the Court in awarding non-pecuniary damages for human rights violations and compare it to the competing visions of the ECtHR's function. In particular, I am interested in determining whether just satisfaction is aimed at redressing the suffering of the victim, her circumstances and vulnerability, or whether the focus is more on the respondent state, its conduct and its past human rights record. The answers to these

²²See Mahoney, *supra* note 20, at 101; L. Wildhaber, 'A Constitutional Future for the European Court on Human Rights?', (2002) 23 HRLJ 161.

²³J. Gerards, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning', (2014) 14 *Human Rights Law Review* at 148.

²⁴D. Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations', (2016) 16 *Human Rights Law Review* at 731, 735.

²⁵*Ibid.*

²⁶*Barberà, Messegué and Jabardo v. Spain*, Just Satisfaction, Judgment of 13 June 1994, [1994] ECHR at 16, following *Ringeisen v. Austria*, Just Satisfaction, Judgment of 22 June 1972, [1972] ECHR at 21.

²⁷See *Guiso-Gallias v. Italy*, *supra* note 19.

²⁸Council of Europe (Parliamentary Assembly), Execution of Judgments of the ECtHR, Doc. 8808 (2000), para. 94.

²⁹J. Varuhas, 'A Tort-Based Approach to Damages under the Human Rights Act 1998', (2009) 72 *Modern Law Review* 750–82; D. Feldman, 'Remedies for Violations of Convention Rights under the Human Rights Act', (1998) *European Human Rights Law Review* 691.

questions will contribute to the debate whether the ECtHR's role is one of delivering 'individual justice' or whether the Court is – as an international court enforcing an international treaty – focused on the 'state'.

2. Competing visions of the ECtHR's function

Article 41 of the ECHR provides that:

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

The requirements for just satisfaction to be awarded are therefore (i) a finding of a violation, (ii) internal law allowing only partial reparation, and (iii) if necessary to afford just satisfaction.³⁰

The first pre-condition is straightforward.³¹ The second is of no more than historical significance for the Strasbourg Court. In some of the early cases, there were suggestions that, even after a finding of violation, these words imposed a limit on the Court's jurisdiction to consider just satisfaction until the extent of reparation under the domestic law had been fully explored.³² In practice, however, the 'partial reparation' test is easily satisfied, and the Court has reserved itself jurisdiction to consider the question of just satisfaction in virtually all cases where a violation is found.³³ Having found a violation the Strasbourg Court has been willing to grant a remedy without requiring the applicant to return to the domestic system.³⁴ Even when the first two pre-conditions are met, an award of damages will not be made unless the Court considers that it is 'necessary' to afford just satisfaction to the injured party. This final requirement gives the Strasbourg Court wide discretion to determine when an award of damages should be made.³⁵ Damages are not available as of right. In practice, the Court has 'frequently [held] that the finding of a violation is sufficient satisfaction without any further award'.³⁶ Therefore, even if a violation has been established, an award of damages is not guaranteed. Instead, the applicant will have to have suffered some loss and the intensity of his suffering will have to be such as to 'justify an award of compensation for non-pecuniary damage'.³⁷

The phrasing of Article 41 accords great discretion to the Court and imposes few, if any, limits on the Court's powers. The choice of terminology by the drafters ('satisfaction') appears to even further contribute to the Court's extensive powers. In the ILC Articles on State Responsibility, the term 'satisfaction' requires that the offending state provides satisfaction for the injury caused by

³⁰*Guzzardi v. Italy*, Merits and Just Satisfaction, Judgment of 6 November 1980, [1980] ECHR at 114.

³¹*Butsee Caballero v. UK*, Merits and Just Satisfaction, Judgment of 8 February 2000, [2000-II] ECHR (Ser. A.), at 45 for the application of Art. 41 where liability is conceded, so that there is no actual 'finding' of a violation.

³²Some judges have argued that today this phrase should be given more emphasis and that the determination of damages should be left to domestic courts. P. Mahoney, 'Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order', in *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views* (2007), 263–83.

³³A claim for just satisfaction is viewed, not as an independent procedure, but as a part of an entire claim, of which the question of liability forms the first part: see P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention of Human Rights* (1998), 241.

³⁴*De Wilde, Ooms and Versyp v. Belgium*, Just Satisfaction, Judgment of the 10 March 1972, [1972] ECHR (No 2) A 14 (1972), 1 EHRR 438, [16], where the court noted that obliging the applicant to return to the domestic courts would mean that '... the total length of the procedure ... would scarcely be in keeping with the idea of the effective protection of Human Rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention ...'.

³⁵See Beatson, Grosz and Hickman, *Human Rights: The 1998 Act and the European Convention*, *supra* note 13, at 144 on 'broad discretionary exercise'.

³⁶*A v. UK*, Merits and Just Satisfaction, Judgment of 19 February 2009, [2009-II] ECHR, at 250.

³⁷*Silver v. UK*, Just Satisfaction, Judgment of 24 October 1983, [1983] ECHR, (Ser. A.), 6 EHRR 62, at 10.

the wrongful act insofar as it cannot be made good by restitution or compensation. At first sight, therefore, ‘satisfaction’ appears to be differentiated from monetary damages and may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.³⁸ In this sense, ‘satisfaction’ under the Convention could refer to other types of remedies than compensation. Yet, through its case law, the Court has only ever made monetary awards and has only exceptionally required other action from member states.³⁹ Yet, perhaps monetary damages under the heading of ‘just satisfaction’ may have been used by the Court not primarily for individuals’ benefit but as ‘punishment of the guilty’ and ‘assurance as to future conduct . . .’.⁴⁰ The choice of terminology – together with the Court’s consistent jurisprudence awarding monetary damages – therefore allows for several different interpretations of ‘just satisfaction’ under the Convention. It enables the Court to pursue either of the aims of individual and constitutional justice.

2.1 Individual justice and the focus on the victim

In its case law, the Court has affirmed that ‘the primary purpose of the Convention system is to provide individual relief’.⁴¹ Individuals therefore have a right to submit an application directly to the ECtHR and to receive a binding determination from the Court of whether the facts presented constitute a violation of their rights and, finally, they may be entitled to a remedy to address this breach.⁴² The focus on the individual and his or her rights therefore ‘lies at the heart of the European regional system for the protection of human rights’.⁴³

Such focus on the victim requires a very specific approach to just satisfaction. In her book *Remedies in International Human Rights Law*, Dinah Shelton sets out a legal framework expressing the functions damages should play in the context of human rights violations. She notes that in most legal systems, including the international legal system, the primary function of damages is compensatory, that is to address the wrong done to a victim and correct the injustice. When a violation occurs, the balance between the victim and perpetrator is upset and the aim of compensatory justice is to ‘make the parties equal by the penalty (a judge) imposes, whereby he takes from the aggressor any gain he may have secured’.⁴⁴ In this regard, a need arises to establish a new balance between the perpetrator’s gain and victim’s loss, which involves finding the mean between the loss and gain.⁴⁵ This view comes from the perspective that the two parties – the victim and perpetrator – are equal and that, when damage is inflicted by one on the other, the remedy has to restore the victim to the condition they were in before.⁴⁶ When such restitution is not possible, damages offer the ‘second best’ option to compensate for the loss or harm inflicted.

As Shelton argues, this view appears to have been transposed into the context of human rights, where wrongs are committed against individual victims. The ECtHR, for example, insists that since the Convention seeks to protect ‘human rights’, all rights-infringing conduct assaults the dignity and equality of the victim.⁴⁷ The Court argues that when the applicant has suffered ‘evident trauma’, ‘pain and suffering, distress, anxiety’, the award seeks to ‘give recognition to

³⁸Art. 37 of Articles of State Responsibility.

³⁹*Volkov v. Ukraine*, Merits, Judgment of 9 January 2013, [2013-I] ECHR, at 73 where Art. 41 was used together with Art. 46.

⁴⁰See Shelton, *supra* note 16, at 157.

⁴¹*Karner v. Austria*, Merits and Just Satisfaction, Judgment of 24 July 2003, [2003- IX], 209, at 26.

⁴²Amnesty International’s Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights, AI Index: IOR 61/005/2004, February 2004, para. 5.

⁴³*Ibid.*

⁴⁴Aristotle, translated by J. A. K. Thompson as *The Ethics* (1955), 148–9.

⁴⁵*Ibid.*

⁴⁶E. Weinrib, ‘Understanding Tort Law’, (1989) 23 *Val. U.L. Rev.* at 485.

⁴⁷See Shelton, *supra* note 16; C. McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’, (2008) 19(4) *EJIL* 655–724.

the fact that moral damage occurred as a result of a breach of a fundamental human right⁴⁸ and to compensate the victim and place them in the same position as they would have been had no injury occurred; in other words, *restitutio in integrum*.⁴⁹ However, if the nature of the injury suffered is such that it may make it impossible to return to the situation existing prior to the breach, then the only claim the applicant can make is for just satisfaction, i.e., monetary damages.⁵⁰

In this regard, the Court's Practice Directions state that the Court 'will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law'.⁵¹ The Directions explicitly invite applicants who wish to be compensated for non-pecuniary damage to 'specify a sum which in their view would be equitable'.⁵² As long as the victim's claim is 'equitable', it appears, the compensatory model would allow for the victim's self-assessment of loss to be taken into account in determination of damages.

In the context of compensating the victim for the suffering, the Court looks at the applicant's 'loss'. It looks at whether the victim has suffered psychological harm;⁵³ distress;⁵⁴ frustration;⁵⁵ inconvenience;⁵⁶ humiliation;⁵⁷ anxiety;⁵⁸ loss of reputation;⁵⁹ sense of injustice;⁶⁰ and loss of relationship.⁶¹ In certain situations the degree of loss incurred may be insufficient to justify a monetary award.⁶² This is the case when, for example, an individual applicant has suffered anxiety and frustration as a result of a violation but this is not 'of such intensity that it would in itself justify an award of compensation for non-pecuniary damage'.⁶³ In establishing whether or not damages will be awarded, the Court is therefore looking for 'situations [in which] the impact of the violation may be regarded as being of a nature and degree to have impinged so significantly on the moral well-being of the applicant as to require something further [than a finding of a violation]'.⁶⁴ In the context of torture, which we study below, the Court has underlined that 'even in the most difficult circumstances . . . the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment'.⁶⁵ In this context, the conduct has to attain a 'minimum level [of severity] if it is to fall within the scope of Article 3'.⁶⁶ Once such a violation is established, a certain level of suffering is assumed to be inherent to Article 3 violations and an award seeking to compensate a victim's suffering is highly likely. The same would apply for Article 2 (right to life), and (though to a lesser extent) for Article 5.

⁴⁸*Varnava and others v. Turkey*, Merits and Just Satisfaction, Judgment of 18 September 2009, [2009-V] ECHR, 87, at 224.

⁴⁹See *Barberà, Messegué and Jabardo v. Spain*, *supra* note 26, at 16, following *Ringelsen v. Austria*, Just Satisfaction, Judgment of 22 June 1972, 1 EHRR 504, at 21.

⁵⁰*Konig v. Germany*, Just Satisfaction, Judgment of 10 March 1980, [1980] ECHR (Ser. A.) 2 EHRR 469, at 15.

⁵¹Rules of the Court, Practice Directions, at 60ff, available at www.echr.coe.int/Pages/home.aspx?p=basictexts/rules/practicelirections, para 14.

⁵²*Ibid.*, para 15.

⁵³*Aydın v. Turkey*, Merits and Just Satisfaction, Judgment of 25 September 1997.

⁵⁴*Hokkanen v. Finland*, Merits and Just Satisfaction, Judgment of 23 September 1994, [1994] ECHR, (Ser. A.), at 44.

⁵⁵*Van Der Leer v. The Netherlands*, Merits and Just Satisfaction, Judgment of 21 February 1990, [1990] ECHR (Ser. A.), at 170.

⁵⁶*Olsson v. Sweden* (No. 2), Merits and Just Satisfaction, Judgment of 27 November 1992, [1992] ECHR (Ser. A.) No. 250.

⁵⁷*Young, James and Webster v. UK*, Just Satisfaction, Judgment of 18 October 1982.

⁵⁸*López Ostra v. Spain*, Merits and Just Satisfaction, Judgment of 9 December 1994, [1994] ECHR (Ser. A.) No. 303C.

⁵⁹*Sakik v. Turkey*, Merits and Just Satisfaction, Judgment of 26 November 1997, [1998] 26 EHRR 662.

⁶⁰*Devlin v. UK*, Merits and Just Satisfaction, Judgment of 30 October 2001, [2002] 34 EHRR 43.

⁶¹*W. v. UK*, Just Satisfaction, Judgment of 9 June 1988, [1988] ECHR (Ser. A.), No 136-C.

⁶²See Law Commission, *supra* note 10, at 3, 44.

⁶³See *Silver and others v. UK*, *supra* note 37, at 10; see also *Faulkner v. UK*, *supra* note 2; *Campbell v. UK*, Merits and Just Satisfaction, Judgment of 28 June 1984; *Schonenberg v. Switzerland*, etc.

⁶⁴See *Varnava and others v. Turkey*, *supra* note 48, at 224. The idea of a threshold for recovery of damages for non-pecuniary loss was rejected by the Law Commission in its report.

⁶⁵*Aksoy v. Turkey*, Merits and Just Satisfaction, Judgment of 31 October 2006, at 62.

⁶⁶*Ireland v. UK*, Merits and Just Satisfaction, Judgment of 18 January 1978, [1978] EHRR 25, Ser A, at 162.

If the Court is seeking to compensate the victim for their loss, then we should expect the Court to follow the ‘individualization principle’, that is, to adjust the amount of compensation ‘to the concrete situation of each’ victim.⁶⁷ In its judgments, the Court does state that it looks to ‘all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.’.⁶⁸ Yet, whilst the Court asserts that these characteristics relating to the applicant may play a role in the determination of the ‘minimum level of severity’ and establishment of a violation under Article 3,⁶⁹ it is unclear whether they affect the level of compensation. Judge de Albuquerque has insisted that this has to be the case and that the compensatory model which puts the victim at the centre of the claim has to adapt compensation depending on the *personal circumstances of the applicant*.⁷⁰

One particular manner of adjusting the remedy to the victim is to take into account their *vulnerability*. Noticeably, the Court has taken important steps – through the development of ‘positive obligations’ to recognize and ‘increase human rights protection for some of the most vulnerable people in society’.⁷¹ These include younger and elderly applicants,⁷² women, and members of unpopular minorities, who are often ‘unprotected by the ordinary democratic process’.⁷³ However, the question arises of whether this vulnerability is also recognized (or taken into account) when the Court sets damages. A person in detention has been recognized to be automatically ‘in a vulnerable situation’ whilst in the charge of the state, and the authorities have a duty to protect such a person.⁷⁴ A disabled or otherwise unhealthy prisoner may, for example, require special adjustments to be made for them or to be released from jail if such adjustments are impossible.⁷⁵ Commentators insist that in such cases, damages awarded to the applicant for the failure of the state to provide the duty of care to the vulnerable victim ought to be adapted ‘to the circumstances of the case’.⁷⁶ In this regard, the individual’s personal situation should influence the quantum. In relation to the vulnerability of victims, Ichim, for example, argues that ‘if the victim is particularly vulnerable . . . the award will go towards the maximum limit’.⁷⁷

2.2 Constitutional justice and the focus on the state’s conduct

Whilst no one disputes the Court’s assertion that its aim is to provide individual justice, the question that arises is whether this should take priority over the Court’s other aims. From the constitutional justice perspective, the mission of the Court is not exclusively limited to individuals, but rather it focuses on:

the more general purposes of ensuring that each Convention country puts in place within its own internal legal order effective means for securing the guaranteed rights (subsidiary facet); avoiding repetition of circumstances giving rise to a violation of the guaranteed rights (preventive facet); and welding together a human rights community of nations with shared legal values across the whole mosaic of post-1989 Europe (unifying facet).⁷⁸

⁶⁷*Mironovas v. Lithuania*, Merits and Just Satisfaction, Judgment of 8 December 2015.

⁶⁸*Ibid.*

⁶⁹*Y v. UK*, Struck out of the list, Judgment of 29 October 1992, Report of the European Commission, at 43–4.

⁷⁰See *Mironovas v. Lithuania*, *supra* note 67.

⁷¹A. Donald, J. Gordon and P. Leach (eds.), ‘The UK and the European Court of Human Rights’, Equality and Human Rights Commission Research report 83, at 110.

⁷²*M. and C. v. Romania*, Merits and Just Satisfaction, Judgment of 27 September 2011, at 119.

⁷³B. Emmerson ‘The European Court of Human Rights enhances our democracy’, *The Independent*, 8 February 2011.

⁷⁴*Esen v. Turkey*, at 28; *Yaz v. Turkey*, at 30; *Ayşe Tepe v. Turkey*, judgment of 22 July 2003.

⁷⁵*Mircea Dumitrescu v. Romania*, Merits and Just Satisfaction, Judgment of 30 July 2013 (wheelchair); *Wenerski v. Poland* (No. 2), Merits and Just Satisfaction, Judgment of 24 July 2012 (epilepsy).

⁷⁶See Ichim, *supra* note 12, at para. 6.5.3.

⁷⁷*Ibid.*

⁷⁸See Mahoney, *supra* note 20, at 105.

The pursuit of ‘constitutional justice’ is therefore an ‘attempt’ to ensure that the Court selects and adjudicates cases in a manner to most effectively identify, condemn, and resolve violations across the Council of Europe and prevent similar future breaches. The focus is therefore on the respondent state and on addressing the structure or modus operandi of its institutions. In this sense, individual cases through which the Court works, serve to elucidate the Convention principles which can be applied by national authorities.

From this perspective, the aim of remedies used by the Court is not so much to redress the loss suffered by the victim, but to hold the wrongdoer responsible for his conduct and potentially to ‘encourage, cajole, and, where necessary, sanction insufficiently resourced or recalcitrant countries to deter human rights violations from occurring’ in the future.⁷⁹ There are therefore two aspects to damages – the punitive and the preventive.

As Shelton argues, ‘[t]he wrong is an essential element’. ‘[I]t is the rights-infringing wrongful conduct that is the source of a claim’ and which triggers the need to provide restitution to the victim through compensation.⁸⁰ The Court has explicitly adopted this approach: it asserts that the ‘seriousness of the violation’ plays a crucial role in the determination of damages.⁸¹ In this regard, it pays special attention to how the particular form of state conduct should be *qualified*. Within Article 3, for example, the Court draws distinctions embodied in the provision: whether the ill-treatment should be qualified as torture, inhuman, or degrading treatment.⁸² In particular in relation to torture, the Court has said that, ‘it was the intention that the Convention with its distinction between torture and inhuman treatment should by the first of these terms attach a special stigma to *deliberate* inhuman treatment causing very serious and cruel suffering’.⁸³ Since the victim cannot be ‘un-tortured’ or ever adequately compensated for her loss, damages in such cases may be used to condemn the act itself, the wrong, and even to impose a penalty on the perpetrator.⁸⁴ In this regard, retributive justice seeks to restore the balance between the wrongdoer and the victim by permitting survivors of human rights abuses who experience deep emotions of anger and hatred an opportunity to see the wrongdoer punished.

The punitive model focuses very clearly on the action of the defendant – the respondent state – and on its conduct. But if damages are to have a deterrent effect, then behavioural economists argue that they have to be sufficiently high or framed retributively, so as to produce an incentive to change noncompliant behaviour. Eisenberg and Engel show, for example, that, depending on the amount of damages, actors may be deterred the more uncertain the threat of the sanction and the higher its severity if they were sanctioned in the past.⁸⁵ Both the certainty and the harshness of damages may be at play, as well as players’ previous experiences. Therefore, if a respondent state is a repetitive violator and systemically breaches human rights, it would be expected that if the Court wished for damages to have a deterrent effect, just satisfaction would increase with the number of similar cases, at times perhaps drastically to incentivize the state (through unpredictable judicial approach to damages) to change its conduct.⁸⁶

⁷⁹See Helfer, *supra* note 14, at 155.

⁸⁰See Shelton, *supra* note 16, at 20.

⁸¹*T.M. and C.M. v. Moldova*, Merits and Just Satisfaction, Judgment of 28 January 2014.

⁸²*Aydın v. Turkey*, Merits and Just Satisfaction, Judgment of 25 September 1997, at 83–4, 86, *Reports* 1997-VI; *Selmouni v. France* [GC], Merits and Just Satisfaction, Judgment of 28 July 1999, [1999-V] ECHR, 183, at 105; *Dikme v. Turkey*, Merits and Just Satisfaction, Judgment of 11 July 2000, [2000-VIII] ECHR, 255, at 94–6; among recent authorities, *Bati and Others v. Turkey*, Merits and Just Satisfaction, Judgment of 3 June 2004, [2004-IV], 271, at 116; *Menesheva v. Russia*, Merits and Just Satisfaction, Judgment of 9 March 2006, [2006-III] ECHR, 153, at 55.

⁸³See *Ireland v. UK*, *supra* note 66, at 167.

⁸⁴See Shelton, *supra* note 16, at 12.

⁸⁵T. Eisenberg and C. Engel, ‘Assuring Civil Damages Adequately Deter: A Public Good Experiment’, (2014) 11(2) *Journal of Empirical Legal Studies* 301–49.

⁸⁶P. Pinto de Albuquerque and A. van Aaken, ‘Punitive Damages in Strasbourg’, in A. van Aaken and I. Motoc (eds.), *The ECHR and General International Law* (2017), 230. I first raised this hypothesis in V. Fikfak, ‘What price for human rights? Compensation for human rights violations’, (2017) 2017(9) *Impact* 6–8(3).

Whilst international law has always made use of the material inducement approach to change state practices,⁸⁷ the idea of punitive damages has generally been rejected. Compensation is not intended ‘to punish the responsible State, nor . . . have an expressive or exemplary character’.⁸⁸ In fact, even when a serious breach of an international obligation has occurred, ‘the award of punitive damages is not recognized in international law’.⁸⁹ Even more, after the International Law Commission made a proposal for damages to reflect the gravity of the breach, the overwhelmingly negative reaction led the rapporteur to conclude that ‘the idea of punitive damages under international law is currently unsustainable’.⁹⁰ The ECtHR explicitly accepts this approach and has until now not considered it appropriate to accept claims for damages with labels such as ‘punitive’, ‘aggravated’ or ‘exemplary’.⁹¹ As the Court insists, damages:

serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned.⁹²

In this sense, the Court has rejected that awards could serve ‘some collective interest, such as the public interest in punishing a wrongdoing state or in rendering respect for human rights more effective in general’.⁹³

Yet, as De Albuquerque and Van Aaken note, these statements rejecting punitive damages do not mean that the Court may not, in practice, already be punishing states for certain types of behaviour.⁹⁴ In their article, they list at least seven ways in which the Court has acted punitively, including in *Cyprus v. Turkey*, in which the Court awarded millions in non-pecuniary damages although the exact number of individual victims of human rights violations was not established and the victims in the Karpas region were neither identified nor identifiable on the basis of the evidence in the file. As a consequence – Pinto argues in his concurring opinion – ‘the claimant State will be the final beneficiary of the amounts paid by the respondent State. The punitive nature of this compensation is *flagrant*’.⁹⁵ Pinto welcomes this approach, underlying that ‘punitive damages [are] an appropriate and necessary instrument for fulfilling the Court’s mission to uphold human rights in Europe and ensuring the observance of the engagements undertaken by the Contracting Parties in the Convention and the Protocols’. For Pinto this:

conclusion applies with even greater force in the case at hand, where the respondent State not only committed a multitude of gross human rights violations over a significant period of time in northern Cyprus, and did not investigate the most significant of these violations adequately and in a timely manner, but also deliberately failed year after year to comply with the Grand Chamber’s judgment on the merits delivered a long time ago with regard to these specific violations.⁹⁶

⁸⁷R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights Through International Law* (2013), 125.

⁸⁸Commentary to the ILC Articles on State Responsibility 2001, available at legal.un.org/ilc/texts/instruments/english/commentaries/962001.pdf, at 99.

⁸⁹*Ibid.*, at 111.

⁹⁰J. Crawford, *State Responsibility* (2013), at 526.

⁹¹See Practice Directions, *supra* note 51, para. 9; *Akdivar v. Turkey*, Just Satisfaction, Judgment of 1 April 1998; *Selçuk and Asker v. Turkey*, Merits and Just Satisfaction, Judgment of 24 April 1998.

⁹²See *Varnava and others v. Turkey*, *supra* note 48, at 224.

⁹³See Altwickler, *supra* note 17, at 11.

⁹⁴See Pinto and Van Aaken, *supra* note 86; see Fikfak, *supra* note 1 EJIL article where I query whether the Court has imposed punitive damages implicitly/covertly.

⁹⁵See *Cyprus v. Turkey*, Just Satisfaction, Judgment of 12 May 2014, Concurring Opinion of Judge Pinto de Albuquerque, paras. 12–13 (emphasis added).

⁹⁶*Ibid.*, at 19.

The discussion of punitive damages is not limited to *Cyprus v. Turkey*. In *Guiso-Gallisay v. Italy*, the Court explicitly stated that Article 41 awards must be ‘a serious and effective means of dissuasion with regard to the repetition of unlawful conduct of the same type, without however assuming a punitive function’.⁹⁷ The debate about the introduction of such ‘exemplary’ or ‘aggravated’ damages has also been present in the Committee of Ministers. The Committee has previously explicitly supported the use of punitive damages to ensure the effectiveness of ECtHR judgments, as has the Parliamentary Assembly of the Council of Europe, which considered the introduction of fines to be imposed on states that persistently fail to execute the judgments of the Court, with a view to introducing more effective measures in the face of non-compliance.⁹⁸ The issue was debated most recently in relation to the Brighton Declaration, where the UK ‘invited the Committee of Ministers to consider the introduction of a financial penalty where a failure to implement a judgment leads to a significant number of repetitive applications to the Court’.⁹⁹ However, these proposals did not make it into the final draft.

Figure 1, below, summarizes the two models:

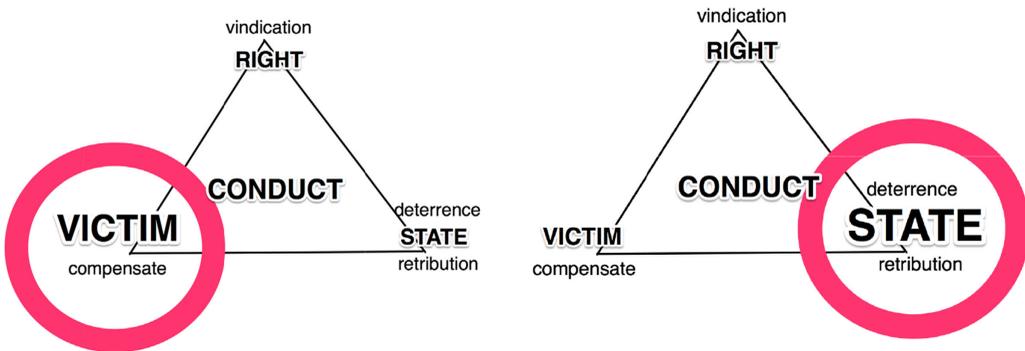


Figure 1. Victim model vs State model.

3. The data and methodology

To establish what approach the ECtHR takes to ‘just satisfaction’, I looked at all the cases in which a violation of Article 2 – right to life, Article 3 – torture, inhuman and degrading treatment, and Article 5 – arbitrary detention was established between the beginning of 2003 and end of 2015 (13 years).¹⁰⁰ This resulted in, for Article 2: 267 cases, 791 victims; for Article 3: 771 cases, totaling 1,128 victims;¹⁰¹ and for Article 5: 867 cases, 1,247 victims. All the cases analysed are violations of a single Article. I therefore excluded cases in which there were violations of more than one Article (e.g., cases in which Article 2, 3, or 5 was found to have been violated in addition to other Articles of the Convention). This was done in order to isolate the effect that multiple violations may have on quantum and to be able to see – further down the line – whether the Court adopts a structured

⁹⁷See *Guiso-Gallisay v. Italy*, *supra* note 19, at 85.

⁹⁸See Council of Europe, *supra* note 28, at 94.

⁹⁹High Level Conference on the Future of the European Court of Human Rights, Draft Brighton Declaration, 23 February 2012, para. 36(d).

¹⁰⁰At the beginning of this project (January 2016), we initially chose the last ten years of cases, however, we added an additional three years (2003–2006) after learning that the Court set out to reform its practice to damages in 2006 (Harris et al. 2014, *supra* note 9). This expanded dataset allows us to try and test whether, indeed, a shift took place and assess its impact.

¹⁰¹I excluded extradition cases because the aim of these cases is to prevent deportation for fear of a potential Art. 3 violation and no compensation is awarded. The Court concluded that a finding *per se* amounted to just satisfaction. See *Soering v. UK*, Merits and Just Satisfaction, Judgment of 7 July 1989; *Chahal v. UK*, Merits and Just Satisfaction, Judgment of 15 November 1996; *Ahmed v. Austria*, Merits and Just Satisfaction, Judgment of 17 December 1996.

approach to different violations which are internal to each Article, rather than just distinguishing between different Articles. In certain models in the regression analysis, further victims are missing due to missing data. These are limited to cases in which the *age* of the applicant was not provided by the Court.

Initially, the study focused only on Article 3. This was for several reasons: first, according to the Court the Article enshrines one of the most fundamental values of democratic society. Yet, Article 3 is the second most frequently violated Article in the Convention and represents 23 per cent of the violations established by the Court.¹⁰² Secondly, the Convention prohibits torture or inhuman or degrading treatment in absolute terms. This means that in comparison to other Articles, no proportionality assessment takes place and that a violation of Article 3 takes place irrespective of the victim's conduct. As regards damages, this would suggest that the values protected in the provision are considered highly important. Thirdly, although Article 3, in comparison to the UN Convention against Torture, prohibits clearly all three forms of ill-treatment, a distinction appears to be drawn between the different degrees of ill-treatment.¹⁰³ The internal hierarchy between the different concepts, in particular between torture and the other violations, may be especially amenable to a statistical analysis and may show the Court's attitude towards different forms of ill-treatment by the state.

In the second stage of the study and after interviews with judges, I have additionally included both Article 2 and Article 5 in the analysis. This was done in order to verify whether the pattern that was identified in the context of torture, inhuman, and degrading treatment, can also be confirmed in relation to the other two Articles. The three Articles are similar in many respects: they relate to physical integrity and are considered to cover the most important aspects of the Convention. Yet, there are also important differences between them,¹⁰⁴ which allows me to test some additional variables. For example, in contrast to Article 3, both Articles 2 and 5 consider the individual's contribution in the context of damages. Adding both to the analysis can therefore permit us to understand whether the victim's contribution to the violation affects the quantum. Secondly, as far as the state as the originator of the violative conduct is concerned, the structure of the data is somewhat different relating to the different Articles. In relation to Article 2 (right to life), most of the violations come from new countries (those that joined after 1990), or Turkey. In relation to Articles 3 and 5, the proportion is more evenly distributed: between 15–19 per cent of cases come from old countries (those that joined the ECHR before 1990), 50 per cent from new countries, and around 30 per cent from Turkey. If the results for the three Articles – as far as states are concerned – are similar regardless of the different split between the countries, then the results will be even more robust.¹⁰⁵

The basic unit of analysis adopted in the article is the individual victim. If the Court adopts an individualized approach to the Convention's rights and considers the circumstances of a particular case and the effect a violation may have had on the individual, then the unit of analysis has to be the *individual victim*. 'Victim' is a technical term relating to the application procedure before the Court.¹⁰⁶ In order for an individual to be considered a victim, they have to show that they have been directly affected by a measure which arguably led to a violation and which is allegedly

¹⁰²Violations of Art. 3 constituted 23% of all violations found in 2015. Annual report: echr.coe.int/Documents/Annual_report_2015_ENG.pdf; see Shelton, *supra* note 16, at 212. Violations of Art. 3 come only after a large percentage of cases concerning procedural delay of justice or lack of due process in violation of Arts. 5 and 6(1). These constituted 40% in 2015.

¹⁰³1984 UN Convention against torture, UNTS vol. 1465 at 85.

¹⁰⁴One of the differences is that on average, violations of Arts. 2 and 5 are much less frequent: only 15% for 2015 for Art. 5 and 7% for Art. 2.

¹⁰⁵Since the study was conducted, the analysis has also been expanded to other Articles, including Art. 6 (right to a fair trial and length of proceedings). The results have confirmed the relevance of many of the variables studied in this article. Where relevant, these results are mentioned in footnotes of this article. They will be published in due course.

¹⁰⁶Art. 34 ECHR.

attributable to the respondent state.¹⁰⁷ He or she must also show that the violation has not yet been redressed by the state.¹⁰⁸

Although my unit of analysis is the victim, judges have emphasized that they work and assess cases.¹⁰⁹ For them, therefore, the unit through which compensation is determined is a case, rather than the victim. In this regard, the study's multivariate regression analysis is complemented by a multilevel analysis in order to control the variation between and also within cases.¹¹⁰ In cases with multiple victims, such analysis allows me to determine whether or not the variables connected to the victim are in fact relevant for the determination of damages. As the reader will see, some results from the regular linear regression are dismissed because they give contrasting results to the multilevel analysis.

The data is tested in several stages, in order to test to what extent the variables associated with *victim* and the *state* affect the quantum. In the first model, I focus on variables related exclusively to the *victim*. In this regard, the model analyses how much of the non-pecuniary satisfaction award can be explained by variables related to the individual applicant. The second model looks at the *state* and its conduct. In this context, I look at who the state is and whether they are a systemic violator. Then, I look at how their conduct has been qualified by the Court (and therefore how serious the violation is). In addition to these two main models, I also investigate to what extent the award of damages is determined by the simple act of making a claim for damages. This is done in the *preliminary* model, since the rules of the Court require applicants to 'make a specific claim' for just satisfaction. Without such a claim, the 'Court considers that there is no call to award him any sum on that account'.¹¹¹ Finally, I join the three models to show how much variability in the data can be explained by putting all three models together. In all three Articles, the preliminary model (whether a claim was made) and the last model are the best fit.

The list of variables analysed is contained in the Annex, as well as a description of how they fit into the four models. The results of the regression analysis for each of the three Articles are provided in the annex.¹¹²

3.1 The preliminary model – Making a claim

Under Rule 60 of the Rules of Court any claim for just satisfaction must be itemized and submitted in writing together with the relevant supporting documents or vouchers, 'failing which the Chamber may reject the claim in whole or in part'. This statement suggests that the inherent purpose of compensation is to 'place . . . [the injured party] in the position in which he or she would have been had the violation found not taken place'.¹¹³ 'Reparations should not make the victims or their successors either richer or poorer.'¹¹⁴ In this regard, if a claimant makes no claim for dam-

¹⁰⁷*Oleksy v. Poland*, Decision of 16 June 2009; *Burden v. UK*, Merits, Judgment of 29 April 2008, [2008-III] ECHR, 64, at 33.

¹⁰⁸*Scordino v. Italy* (no.1), Merits and Just Satisfaction, Judgment of 29 March 2006, [2006-V] ECHR, 81.

¹⁰⁹Interview with ECtHR Judge 24 March 2018.

¹¹⁰M. K. Dhimi and I. Belton, 'Statistical Analyses of Court Decisions: An Example of Multilevel Models of Sentencing', *Law and Method*, available at pdfs.semanticscholar.org/1276/633f2001d4a98dba9e51eb517489d54fd8b2.pdf.

¹¹¹See Practice Directions, *supra* note 51; *Drozdz v. Ukraine*, Merits and Just Satisfaction, Judgment of 30 July 2009, at 75; *Gharibachvili v. Georgia*, Merits and Just Satisfaction, Judgment of 29 July 2008.

¹¹²Multilevel results can be provided upon request. The asterisk in the list of variables means: In Art. 2, where the majority of the victims are deceased, the applicant is claiming compensation for their own pain and suffering due to the deprivation of life of a relative (i.e., victim). In this regard, in the context of Art. 2, I use an additional model to determine the role of the applicant (who makes the claim). This is in addition to the model which investigates the role of the victim (relative who is deceased).

¹¹³See Practice Directions, *supra* note 51, at 10.

¹¹⁴*Case of Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 1 July 2006, Inter-American Court of Human Rights, at 348.

ages, they are considered not to have suffered loss and therefore no compensation should ensue in such situations.¹¹⁵

The empirical results reveal that whether a victim makes a claim is significantly determinative of whether they are likely to get the compensation in Article 2, 3, and 5 claims.¹¹⁶ The majority of those who made no claim also received no compensation (98, 85 and 97% for the three Articles respectively). Yet, as scholars note, the ECtHR has awarded compensation in certain cases in which the applicant had not asked for compensation or in which they failed to submit the claim within the required time limits.¹¹⁷ In the *Fedorov* case, for example, the Court held:

The applicant did not submit [a claim] within the required time-limits. In such circumstances the Court would usually make no award. In the present case, however, the Court has found a violation of the applicant's right not to be subjected to inhuman and degrading treatment. Since this right is of an absolute nature, the Court finds it possible to award the applicant 10,000 euros (EUR) by way of non-pecuniary damage.¹¹⁸

Most of the cases in which an award is made regardless of the absence of the victim's claim related to inhuman and degrading treatment or inhuman treatment.¹¹⁹ In cases in which ill treatment was not qualified as inhuman, the Court ruled that way even though it would usually make no award without a claim. However, the 'absolute nature of the right' and 'fundamental character' of Article 3 required it to award non-pecuniary damages.¹²⁰

Cases in which the Court awards damages without a victim's request are exceedingly rare.¹²¹ The Court acknowledges such exceptional treatment in the use of its phrasing. On one side, it argues that 'the applicant must have suffered'¹²² or that 'a mere finding of a violation' cannot compensate the 'distress and frustration resulting from the procedural violation of Article 3'.¹²³ The absoluteness of the provision of Article 3 appears to have a special bearing on the Court's consideration. Both Articles 2 and 5, which are not absolute, lead to fewer awards for victims who made no request. On the other side, the Court also seeks a pragmatic explanation for its award. It argues that the different treatment is necessary because the

¹¹⁵See Pinto and Van Aaken, *supra* note 86 on cases in which no claim is made.

¹¹⁶An initial look at the Art. 3 data shows that out of 1,128 victims, 1,027 made a specific claim for damages setting out the amounts requested, 37 victims left the determination of the level of award to the Court (3%), whilst 64 of applicants did not make a claim for damages or were out of time (5.6%). Out of the 64 victims who made no claim, 54 victims were not awarded any non-pecuniary damage. In relation to Arts. 2 and 5, the picture is similar. One hundred and eight Art. 5 victims out of 1,247 made no request for non-pecuniary damages and 105 received none. And in relation to Art. 2, 72 applicants out of 791 made no claim and out of those, 71 received no damages. This is confirmed in the results of the regression analysis of all three models. The act of making a claim is able to explain between 40–68% of variability in the data.

¹¹⁷P. Tavernier, 'La contribution de la jurisprudence de la CEDH relative au droit de la responsabilité internationale en matière de réparation – Une remise en cause nécessaire', (2007) 72 RTDH 958; see Ichim, *supra* note 12.

¹¹⁸*Vladimir Fedorov v. Russia*, Merits and Just Satisfaction, Judgment of 30 July 2009; exactly the same phrasing in *Nadrosov v. Russia*, Merits and Just Satisfaction, Judgment of 31 July 2008; *Borodin v. Russia*, Merits and Just Satisfaction, Judgment of 6 November 2012 etc.

¹¹⁹*Igor Ivanov v. Russia*, Merits and Just Satisfaction, Judgment of 7 June 2007, at 50.

¹²⁰*Chember v. Russia*, Merits and Just Satisfaction, Judgment of 3 July 2008, [2008-IV] ECHR 1; *Kats and others v. Ukraine*, Merits and Just Satisfaction, Judgment of 18 December 2008. Also *ibid.*, and *Mayzit v. Russia*, Merits and Just Satisfaction, Judgment of 20 January 2005, at 87–8, plus any tax that may be chargeable.

¹²¹In the dataset, there were only ten such cases out of 64 in which no claim was made; i.e., less than 1% of the whole dataset of Art. 3 violations. These awards appear to have been made only once a year, though perhaps this will change in light of the *Nagmetov* decision.

¹²²*A.N. v. Ukraine*, Merits and Just Satisfaction, Judgment of 29 January 2015.

¹²³*Korobov v. Estonia*, Merits and Just Satisfaction, Judgment of 28 March 2013.

applicant was unrepresented and that given the circumstances it was ‘exceptionally possible’¹²⁴ to award the applicant non-pecuniary damage and that such a different approach was ‘warrant[ed]’.¹²⁵

3.2 The victim model: The victim and levels of suffering

For those victims who do request some compensation for their suffering, the Court would be expected to be seeking to address the victim’s harm or loss. In this regard, one would expect just satisfaction to be adjusted according to variables related to the victim. On one side, the Court could take into account the loss reported by the victim, on the other, it could adjust the award depending on the particular circumstances of the individual victim. In this section, I seek to establish first whether the victim’s assessment of loss or harm potentially affects the final award. In addition, I look at whether the awards are adapted to each individual’s circumstances: the analysis considers the impact of applicant’s age, gender, their vulnerability (health, race/nationality, gender, other) on quantum, as well as serious consequences suffered by the victim. In the context of Articles 2 and 5, I also consider whether the individual’s contribution to the situation may affect the damage amount.

3.2.1 Assessing the harm and reporting one’s loss

The ECtHR acknowledges that ‘[i]t is in the nature of non-pecuniary damage that it does not lend itself to precise calculation’.¹²⁶ In this context, the loss will be subjective to the applicant and intangible, meaning no real proof can be adduced.¹²⁷ A victim may experience ‘specific feelings of humiliation and degradation’¹²⁸ or ‘a loss of human dignity’¹²⁹ but those who suffer may ‘not always have an altogether clear-sighted appreciation of their condition’.¹³⁰ In this context, individuals may feel that ‘no amount of money would be capable of compensating the harm suffered by them’¹³¹ and so may request only symbolic compensation. In the same vein, a victim may feel that values protected under the Convention may be ‘incommensurable’¹³² and may be not willing to accept ‘anything less than an infinite sum of money’.¹³³

Given these acknowledged difficulties in the determination of non-pecuniary damages, the Court has adopted and regularly employs a ‘series of detailed tables setting out a method of calculation of non-pecuniary damage in respect of each article of the Convention’.¹³⁴ As a consequence, the awards are standardized and in principle not influenced by the level of award requested. The presence of tables effectively removes the most frequent bias in damage

¹²⁴See *Kats v. Ukraine*, *supra* note 120.

¹²⁵*X v. Croatia*, Merits and Just Satisfaction, Judgment of 17 July 2008; see *Mayzit v. Russia*, *supra* note 120.

¹²⁶See Practice Directions, *supra* note 51, para. 14.

¹²⁷This subjective element of non-pecuniary damage has been criticized by judges. In *Kasperovičius*, Judge Jočiene questioned the issue that the just satisfaction claim of the applicant was ‘not supported by any medical evidence which might provide proof of the adverse consequence caused to the applicant, such as distress and/or frustration’. Instead, he noted that ‘[t]he claim is based on the applicant’s personal assessment, which cannot be considered reasonable in the particular circumstances of this case’. Application 54872/08, 20 November 2012.

¹²⁸B. Phillips, ‘The Case for Corporal Punishment in the United Kingdom. Beaten into Submission in Europe?’, (1994) 43 ICLQ 153.

¹²⁹J. Vorhaus, ‘On Degradation. Part One: Article 3 of the European Convention on Human Rights’, (2002) 31 *Common Law World Review* 374, at 380.

¹³⁰*Ibid.*

¹³¹*Lorse v. Netherlands*, Merits and Just Satisfaction, Judgment of 4 February 2003; *Shishmanov v. Bulgaria*, Merits and Just Satisfaction, Judgment of 8 January 2009.

¹³²See Shelton, *supra* note 16, at 29.

¹³³R. Posner, *Economic Analysis of the Law* (1977), at 197.

¹³⁴See Harris, *supra* note 9, at 155–6.

determination – the so-called anchoring effect, when those victims who assess their harm and suffering as higher also receive higher awards. This cognitive bias is regularly identifiable in tort and in wrongful death damage awards, when judges or juries rely too heavily on the damage claims made by the plaintiff.¹³⁵ Yet, before the ECtHR, the empirical analysis shows that there is no correlation between the amount claimed and the award provided.¹³⁶ In effect, by adopting detailed tables the Court has removed the danger of anchoring and the request by the victim has no influence on the award received.

Of course, this is not the complete picture. For example, when individuals who feel that ‘no amount of money would be capable of compensate the harm suffered by them’¹³⁷ request only symbolic compensation, they usually receive the full amount requested. In *Lorse*, for example, the victim asked for 1,000 Dutch guilders as just satisfaction for detention in a maximum-security prison, which constituted inhuman and degrading treatment. The Court awarded the applicant the full amount in Euros, the least it has ever awarded for inhuman and degrading treatment. Following the tables of the Court, the victim would have likely received a higher amount.¹³⁸

In addition, it is important to note that the requests for compensation often mirror the Court’s previous case law. The Practice Directions explicitly invite applicants to specify a sum which, in their view, would be *equitable*. In practice, lawyers set an ‘equitable sum’ by looking at awards made in previous similar cases against the same respondent state. They then make a compensation request following that case law. If the Court’s previous awards are taken as a guide for an equitable/just claim,¹³⁹ the requests made are not independent of previous awards and will of course correlate with the amounts awarded.¹⁴⁰ Some NGOs use the practice of mirroring to push damage amounts higher. By looking at the practice and citing other cases, they draw distinctions with previous practice and strategically argue for an increase in damage awards.¹⁴¹ To the extent that victims and their lawyers follow previous practice, the Court may be willing to agree with the victim’s subjective assessment of harm and adjust the damages slightly higher.

As another proof of the existence of tables, the statistics make clear that victims who leave the determination of the award to the Court’s discretion do not receive significantly different satisfaction than victims who ask for a specific monetary sum.¹⁴² This result is perhaps most relevant to practitioners: as long as a claim for non-pecuniary damages is made, the individual should get compensation regardless of whether they specify the amount or leave the assessment to the Court. In fact, the discovery might encourage practitioners not to set damage amounts in case they may inadvertently cap compensation at a lower amount than the Court may be willing to award. Indeed, some NGOs appear to be already aware of this practice and have strategically left the quantification of damages to the Court.¹⁴³

¹³⁵Y.-C. Chang et al., ‘Pain and Suffering Damages in Wrongful Death Cases: An Empirical Study’, (2015) 12 *J. Empirical Legal Stud.* 128; C. Guthrie et al., ‘Inside the Judicial Mind’, (2000) 86 *Cornell Law Rev.* 777; J. Campbell et al., ‘Countering the Plaintiff’s Anchor: Jury Simulation to Evaluate Damages Arguments’, (2014) 101 *Iowa Law Review* 543.

¹³⁶This appears to be affirmed by a lack of correlation between the claimed award and the award received (corr. -0076, not significant) and by the results of the regression analysis (see annex).

¹³⁷See *Lorse v. Netherlands*, *supra* note 131.

¹³⁸Normally, just satisfaction for inhuman and degrading treatment starts with €1,000 and €5,000 is the most frequently awarded sum.

¹³⁹Looking at the case law, the most that has been awarded as just satisfaction for Art. 3 violation (in the 13 years under investigation) is €105,000 in *Kopylov v. Russia*, Merits and Just Satisfaction, Judgment of 29 July 2010; 989 out of 1,128 Art. 3 victims made a claim lower than that amount.

¹⁴⁰corr. 258. Correlation is significant at 0.01 level. Out of 1128 victims, 87% (982) asked for less than €105,000. Similar results are confirmed in relation to Art. 2 (corr. 0.153*) and (corr. 0.174*).

¹⁴¹EHRAC – award increases for disappearances from €50 to €60,000.

¹⁴²Anova Sig (.273).

¹⁴³Open Society intervention at EHRAC. Though, note that an NGO may also seek to actively change the practice of the Court and encourage it to improve compensation.

3.2.2 An individualized award

The purported focus of the Court on the victim is tested further through the principle of equity, which according to the Court ‘involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred’.¹⁴⁴ The equitable principle implies that the Court treats victims in similar situations similarly and those in different situations differently. Whilst the regression analysis shows that there is no variation in damages due to victim’s gender or age, I explore the results in relation to the other variables below.

3.2.2.1 Victim’s vulnerability and impact of the violation. In his book on just satisfaction under the ECHR, Ichim argues that for victims that are particularly vulnerable, ‘the award will go towards the maximum limit’.¹⁴⁵ He also cites two cases (one under Article 2 and one under Article 3) in which victim’s vulnerability was taken into account in the award of damages.¹⁴⁶ I decided to test this claim in our dataset. Out of 1,128 Article 3 applicants, 225 victims were coded as vulnerable. Following the case law, we defined ‘vulnerability’ as including applicants that were particularly young or elderly,¹⁴⁷ those that suffered a serious or chronic medical condition¹⁴⁸ or were vulnerable because of their gender,¹⁴⁹ as well as members of minorities.¹⁵⁰ When the Court, therefore, in its judgment found an applicant vulnerable due to their age, gender or other, we coded the applicant as vulnerable.¹⁵¹ The T-test analysis showed that there was no significant difference in award between cases in which applicants were qualified as vulnerable and cases in which no vulnerability was reported.¹⁵² In the regression analysis, the victim model shows a negative, though not significant, impact of vulnerability on damages. The results are similar in the context of Article 2, where 371 out of 791 victims (not applicants) are labelled as vulnerable.¹⁵³ In Article 5 cases, the victim’s vulnerability appears to have no impact on the award.

Scholars insist that, in addition to the victim’s vulnerability, one of the elements that affects the level of awards is also the injury that the applicant may have suffered as a consequence of state

¹⁴⁴See *Varnava and others v. Turkey*, *supra* note 48; *Al-Skeini and others v. UK*, Merits and Just Satisfaction, Judgment of 7 July 2011, [2011-IV] ECHR, 99.

¹⁴⁵See Ichim, *supra* note 12, para. 6.5.3.

¹⁴⁶*Nencheva and Others v. Bulgaria*, Merits and Just Satisfaction, Judgment of 18 June 2013; see *Wenerski v. Poland* (no. 2), *supra* note 75.

¹⁴⁷*Nieciecki v. Greece*, Merits and Just Satisfaction, Judgment of 4 December 2012; *Sarigiannis v. Italy*, Merits and Just Satisfaction, Judgment of 5 April 2011; *Salmanoglu v. Turkey*, Merits and Just Satisfaction, Judgment of 17 March 2009, etc.

¹⁴⁸See *Mircea Dumitrescu v. Romania*, *supra* note 75; *Kovalchuk v. Ukraine*, Merits and Just Satisfaction, Judgment of 4 November 2010 (health, wheelchair).

¹⁴⁹This is particularly the case in domestic violence cases. *Valiuliene v. Lithuania*, Merits and Just Satisfaction, Judgment of 26 March 2013, or in prison where a male applicant was ordered to strip naked in the presence of a female prison officer, *Wiktorko v. Poland*, Merits and Just Satisfaction, Judgment of 31 March 2009.

¹⁵⁰Roma minority in particular: *Koky and others v. Slovakia*, Merits and Just Satisfaction, Judgment of 12 June 2012; *Dzeladinov v. Macedonia*, Merits and Just Satisfaction, Judgment of 10 April 2008.

¹⁵¹It should be noted, however, that although all persons in custody under Art. 3 are considered ‘vulnerable’ because they are under the control of state authorities, we did not code these as vulnerable unless the Court found the applicant was in a particularly difficult position because of his personal circumstances. We therefore sought to isolate the impact of the applicant’s personal circumstances from the general position in which detainees find themselves. *D.F. v. Latvia*, Merits and Just Satisfaction, Judgment of 29 October 2013; *Lautaru v. Romania*, Merits and Just Satisfaction, Judgment of 18 October 2011.

¹⁵²Even taking account of all mentions of vulnerability (including those that refer to general applicant vulnerability), there is still no correlation between vulnerable victims and the award provided.

¹⁵³In the regular linear regression analysis, the impact of the vulnerability is significant and negative, and victims that have a health problem or have been singled out as vulnerable because of their nationality, race or gender, appear to receive less than other applicants. In the multilevel model, this negative impact on quantum is lost.

conduct.¹⁵⁴ The Inter-American Court of Human Rights, for example, appears to differentiate between victims on the basis of whether they had suffered complete permanent or permanent but partial disability, a permanent injury or other injury.¹⁵⁵ The ECtHR argues that it ‘must . . . take into account the serious consequences the treatment had on the applicant’ when evaluating whether the treatment ‘reached the minimum level of severity required for application of Article 3 of the Convention’.¹⁵⁶ Yet, it is unclear whether the Court takes the injury suffered by the victim into account when determining damages.

In his opinion in *Kasperovičius*,¹⁵⁷ Judge Jočiene appears to suggest that the injury should play a role in the setting of quantum. The case concerned a seven-day detention in poor conditions of a 44-year-old healthy man. The detention had ‘no negative impact . . . on the applicant’s physical health’ and based on applicant’s personal circumstances, the dissenting judge argued that ‘in determining the amount of the award, the above-mentioned [element] should have been taken into account and therefore the award for non-pecuniary damage should have been significantly reduced in this case’.¹⁵⁸

The regression analysis in the victim model shows that the impact of the violation on the victim will not influence the award. If an applicant develops a chronic condition as a result of conditions in prison, or if they are severely and permanently injured as a result of Article 3 state conduct,¹⁵⁹ the award will not differ considerably from the case where the victim suffers no long-term consequences. The same holds in situations in which the person dies as a result of the violation and a relative makes the application on their behalf. The results are consistent across the different models.¹⁶⁰

The irrelevance of both vulnerability and the impact the violation had on the individual on damage awards is striking. It is possible that the Court takes the applicant’s vulnerability (age, gender, disability or health condition, ethnicity, and other) into account only when establishing a violation and that, as a consequence, vulnerable individuals are more likely to have suffered a human rights breach than other individuals.¹⁶¹ In a similar manner, this result could mean that the ‘serious consequences of treatment’ are considered at the level of determining the type of ill-treatment only. Yet, once this ill-treatment has been qualified as torture, inhuman or degrading treatment, the impact of injury on damages is no longer palpable. It appears therefore that vulnerability or serious consequences may form part and parcel of the violation and that the impact on the applicant is not significantly relevant to the setting of quantum.¹⁶² Once a breach has been established, personal circumstances of the victim appear to have no bearing on the award.

¹⁵⁴O. Dörr, ‘Entschädigung und Schadensersatz’, in R. Grote and T. Marauhn (eds.), *Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (2013), at 2148.

¹⁵⁵*Castro-Castro Prison v. Peru*, (Merits, Reparations and Costs), Int-Am Ct HR, Judgment of 25 November 2006, Series C No.160, paras. 421, 424–5, 432–3.

¹⁵⁶*Bureš v. Czech Republic*, Merits and Just Satisfaction, Judgment of 18 October 2012.

¹⁵⁷*Kasperovičius v. Lithuania*, Merits and Just Satisfaction, Judgment of 20 November 2012.

¹⁵⁸*Ibid.*

¹⁵⁹*Sacilik v. Turkey*, Merits and Just Satisfaction, Judgment of 5 July 2011 (case of amputation); *Yermolenko v. Ukraine*, Merits and Just Satisfaction, Judgment of 15 November 2012.

¹⁶⁰There is a slight negative impact for individuals who have only suffered risk of death but not actually experienced further trauma, but the results are negligible due to a low number of cases within the four categories.

¹⁶¹See *Ireland v. UK*, *supra* note 66, at 162: ‘The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim . . .’.

¹⁶²The results especially regarding the impact on the victim should be tested on a bigger sample (N=12 victims with serious consequences).

3.2.2.2 Group vs individual cases. The Court allows applicants whose complaints are based on the same or similar facts or applicants who find themselves in similar circumstances (e.g., in the same prison) to make the application together. Under Article 3, these mass violations cases arise particularly when detention in poor conditions¹⁶³ is alleged or when a breach of the Convention has arisen as a consequence of police violence in the context of protests¹⁶⁴ or mass detention.¹⁶⁵ In Article 2 cases, they concern mass disappearances or hostage crises, where many individuals died at the same time.¹⁶⁶ Such cases often reveal a consistent or systemic problem and touch upon issues that have arisen from the same event.

In principle, appearing in a group with other claimants rather than on their own should not affect the level of award received. Yet, according to the textbooks on the topic, there is anecdotal evidence to suggest that in multiple applicant cases, compensation to each victim is lower than if they had appeared in a single-applicant claim.¹⁶⁷ The results of the regular regression analysis support these statements: the group has a negative impact on the award received by the individual victim. Individuals receive approximately €30 less for each applicant in an Article 3 case, €67 less for each applicant in an Article 5 case, and €318 less per applicant in an Article 2 case.¹⁶⁸

The reasons for this different treatment could be evidentiary. On one side, mass violations 'are often characterized by the fact that victims have limited evidence to show that they suffered a violation'. Although this may appear counter intuitive given the scale of the violation, victims have often lost relevant documents that may prove ownership or identity; they may be traumatized or may have been threatened; considerable time may have passed since the event etc.¹⁶⁹ All of these elements represent an obstacle to showing the failure on the part of the state to investigate their case. Even more, 'the circumstances of mass violations and the large number of victims frequently make it difficult to compile the required evidence'.¹⁷⁰ For this reason, the Inter-American Court of Human Rights accepts a lower standard of *plausibility* as proof,¹⁷¹ thus easing the burden on applicants. Before the ECtHR, however, the evidentiary difficulties apply 'in equal measure to proving damages'.¹⁷² As a consequence, groups seeking to prove state misconduct might struggle proving their case and this might influence compensation.

In other cases, in which appearing in a group might be easier, other factors might influence the reduction in compensation. In cases alleging mass violations like inhuman or degrading treatment due to poor conditions, the task of groups is likely to be easier. The Court in these cases relies heavily on reports provided by the European Committee for the Prevention of Torture, which visits and assesses the state of prisons around Europe. The Court presents the findings of the Committee as well as its recommendations. This reliance on an external expert and fact-finding body reduces the need for applicants themselves to gather evidence about their situation. In this regard, their inconvenience and uncertainty are alleviated. Yet, the Court has underlined that the

¹⁶³*Sakar and others v. Turkey*, Merits and Just Satisfaction, Judgment of 20 October 2015; *Taggatis v. Greece*, Merits and Just Satisfaction, Judgment of 11 October 2011, etc. The poor conditions cases regularly concern the same prisons – Jilava, Rahova, and Galati prisons in Romania; Ioannina prison in Greece, and special detention prisons in Russia IZ.

¹⁶⁴*Habimi v. Serbia*, Merits and Just Satisfaction, Judgment of 3 June 2014.

¹⁶⁵See *Sacilik v. Turkey*, *supra* note 159; *Alecu v. Romania*, Merits and Just Satisfaction, Judgment of 27 January 2015.

¹⁶⁶*Finogenov v. Russia*, Merits and Just Satisfaction, Judgment of 20 December 2011, [2011-VI] ECHR, 365.

¹⁶⁷See Harris, *supra* note 9, at 156; see also explanation in ECtHR, *Arvanitaki v. Greece*, Merits and Just Satisfaction, Judgment of 15 February 2008, underlying that group cases are different.

¹⁶⁸For ease of interpretation, these initial values are produced in a regular regression analysis, where the award is not given in a logarithmic form. All results are significant.

¹⁶⁹L. Oette, 'Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (2009), 233.

¹⁷⁰*Ibid.*, at 227.

¹⁷¹H. Holtzmann and E. Kristjansdottir, *International Mass Claims Processes* (2007), 210 ff.

¹⁷²See Oette, *supra* note 169, at 233.

sole fact of appearing as a group in a ‘single set of proceedings with a shared objective . . . alleviated the inconvenience and uncertainty experience[d] . . . and so meant a reduction in the amount of the award’.¹⁷³ Appearing in front of the Court with others, therefore, provided individuals with support and could lead to a decrease in quantum.

Furthermore, it is clear that when victims appear together with others who have suffered similar fate, they are likely to be treated similarly. In this regard, there is clearly a lack of individualization. Judge de Albuquerque argues that ‘the basic compensatory principle is the imperative of individualized compensation, which implies that pre-determined, flat or fixed daily compensation will be inadmissible’.¹⁷⁴ In particular in respect of claims in which multiple applicants are alleging similar conduct or find themselves affected by the same event, the amount of award must correspond to ‘concrete situation of each’ applicant.¹⁷⁵ This requires that the duration and severity of detention conditions be taken into account.

The only contrast that is made between victims in group cases in Article 2 cases is based on the relationship the applicant enjoyed with the victim (with the partner and parents of the victim receiving more in damages than other relatives). The impact is especially strong in cases of financial dependency.¹⁷⁶ Beyond this, however, ‘reparation measures tend to be of a general (and collective) nature’.¹⁷⁷ By their nature, mass violations shift ‘the focus from the identity of the applicant to the nature of the violation’.¹⁷⁸ Before the Inter-American Court of Human Rights, for example, ‘[t]he principal approach is to award the same amount of compensation to all victims falling within the category, in particular for non-pecuniary damages’.¹⁷⁹ This lack of individualization can be noticed also before the ECtHR. In *Taggatidis*, for example, 47 applicants brought a complaint about poor conditions in Ioannina prison.¹⁸⁰ Some of the prisoners had spent over 11 years in badly ventilated cells and suffered medical problems, whilst others lived there for a few months. For a couple of prisoners, the duration was unknown. Yet, the Court in awarding damages made no distinction between the victims, awarding each one €10,000. This standardization of amounts of compensation did not go unnoticed. In *Sacilik*, a case concerning police violence, Judges Popović and Sajó criticized the Court’s failure to distinguish between the suffering of the victims:

The sums . . . awarded take into account neither the gravity of the injuries suffered by each applicant nor the respective periods for which they were unable to work . . . we find it indispensable to consider the amount of suffering inflicted on the applicants when awarding just satisfaction, especially in a situation such as the present one, where the only information available relating to the inhuman and degrading treatment (including, for example, the anxiety and helplessness the prisoners must have felt) concerns the gravity of the injuries. Those who suffered less should be awarded a smaller sum than those who suffered more.¹⁸¹

¹⁷³*Arvanitaki-Roboti v. Greece*, Merits and Just Satisfaction, Judgment of 15 February 2008, at 29–32; also *Kakamoukas and Others v. Greece*, Merits and Just Satisfaction, Judgment of 15 February 2008.

¹⁷⁴See *Mironovas v. Lithuania*, *supra* note 67, separate opinion of Judge Pinto de Albuquerque at 15.

¹⁷⁵*Ibid.*

¹⁷⁶See multilevel results for Art. 2 in annex.

¹⁷⁷See *Oette*, *supra* note 169, at 223.

¹⁷⁸Though this is noted in particular in the context of standing, it also explains the Court’s treatment of group actions. See *Oette*, *ibid.*, at 222.

¹⁷⁹*Ibid.*; citing three Inter-American Court cases: *Rochela Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 11 May 2007; *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 5 July 2006; *Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment of 25 November 2006.

¹⁸⁰See *Taggatidis v. Greece*, *supra* note 163.

¹⁸¹See *Sacilik v. Turkey*, *supra* note 159.

In subsequent cases, the Court appears to have addressed the issue, at least in the context of poor conditions. A year after *Taggaidis* (and *Sacilik*), it applied three different amounts in *Samaras* and *Tzamalīs*¹⁸² and later in *Torreggiani*, *Nikolaos*, and *Lakatos*.¹⁸³ The Court awarded three different award amounts depending on the duration of imprisonment in poor conditions.¹⁸⁴ In turn, awards for poor conditions appear to be correlated with the time spent living in those conditions.¹⁸⁵

3.2.3 Conclusion

The results of the regression analysis reveal how little relevance victim variables in fact have on the determination of damages. The victim model explains only between 0–5 per cent of the variability in the award of just satisfaction.¹⁸⁶ This is consistent across the different Articles. The result is negligible. It suggests that the victim is clearly not at the centre of the Court's analysis. We therefore turn to consider whether the variables associated with the state can better explain the non-pecuniary awards.

3.3 The state model: The conduct of the state

There are three aspects in which the state may play a role in the determination of damages: first, through its conduct; secondly, according to the identity of the state and how rich or poor it may be; and finally, how frequent a violator of the respective article the state is. These three variables are analysed in the following sections.

3.3.1 State conduct

The Convention protects a number of legal interests. Many have argued or wondered to what extent articles of the Convention reveal a hierarchy of rights,¹⁸⁷ with the right to life and the prohibition of torture protecting the most important¹⁸⁸ and essential legal interests and other articles then focusing on progressively 'lesser' values such as liberty, procedural justice, and private and family life and property. As Ichim maintains, although 'the Convention avoids categorization of the rights ... the rights are listed according to their importance even if, again, officially there should be no hierarchy'.¹⁸⁹

When in 2006, a new Just Satisfaction Unit was established within the Court, its aim was to 'adopt a series of detailed tables setting out a method of calculation of non-pecuniary damage in respect of each article of the Convention'. The Court was driven by a concern 'not only to ensure consistency of awards as between the Court's five Sections, but also to ensure consistency as

¹⁸²*Samaras and others v. Greece*, Merits and Just Satisfaction, Judgment of 28 February 2012; *Tzamalīs and others v. Greece*, Merits and Just Satisfaction, Judgment of 4 December 2012.

¹⁸³*Torreggiani and others v. Italy*, Merits and Just Satisfaction, Judgment of 8 January 2013.

¹⁸⁴See *Tzamalīs and Others v. Greece*, *supra* note 182 and same in *Samaras and others v. Greece*, *supra* note 182, 7,000, 10,000 and 15,000.

¹⁸⁵ $N = 347$ victims in poor conditions, $\text{corr.} +.286^{***}$. In fact, the subsequent findings of my empirical analysis of Art. 6 cases (which will be published in due course) show that in assessing the state's conduct in Art. 6 cases (most of which are length of proceedings cases), the court counts the number of years of delay. V. Fikfak, 'Quantifying Pain and Suffering in Human Rights Adjudication' (forthcoming).

¹⁸⁶For Art. 2, applicant $r^2 = 0.079$, victim 0.050; for Art. 3, 0.006, for Art. 5, 0.021. Note that the 8% in Art. 2 refers to the applicant and his relationship to the victim and not to the victim. The results for Art. 6, which are not included in this article, similarly confirm the irrelevance of variables related to the victim.

¹⁸⁷E. De Wet and J. Vidmar, *Hierarchy in International Law, The Place of Human Rights* (2012).

¹⁸⁸See Ichim, *supra* note 12, at 128.

¹⁸⁹*Ibid.*

between the different articles of the Convention that have been violated'. As Harris and others argue, this was done since '*it had been observed that on occasions the awards for very serious breaches (loss of life or torture) were lower than awards for lesser breaches (loss of liberty or freedom of expression)*'.¹⁹⁰ In its study of 2006 case law, the Max Planck group assessed what value (in terms of compensation) was assigned to different legal interests as protected by the articles of the Convention. They found that the most intense type of violation – the right to life and the prohibition of torture – drew the most generous compensation levels.¹⁹¹ In this regard, the hierarchy of the articles of the Convention was reflected in the compensation awarded.¹⁹²

In my model, I study the gravity of the violation not as a mirror of the hierarchy of the different articles of the Convention, but rather by focusing on different types of state conduct which can lead to the violation of the same Convention Article. Article 3, for example, prohibits torture, inhuman and degrading treatment. At first sight, one would expect that the Court distinguishes between these three specific conducts of the state. The Court has said that, 'it was the intention that the Convention with its distinction between torture and inhuman treatment should by the first of these terms attach a special stigma to *deliberate* inhuman treatment causing very serious and cruel suffering'.¹⁹³

It is clear from the results of the dataset that in awarding compensation for different types of violations, the Court appears to be singling out torture in Article 3 from other behaviour.¹⁹⁴ A sole act of torture generates about €20,000, compared to acts of inhuman treatment (generating about €1,900), degrading treatment or general ill-treatment under Article 3 (about €3,000) and inhuman and degrading treatment at about €5,600. The gap between *torture* and other types of state conduct under Article 3 is therefore immense. This appears to be consistent with the special stigma attached to torture.

Similarly, Article 5 is divided into different paragraphs. Whilst the first paragraph sets out the general right to liberty and thus prohibits arbitrary deprivation of liberty, the subsequent paragraphs set out the rights of those who have been detained in order to ensure that this detention is lawful. An act of arbitrary detention will generate the best compensation (around €3,000) in the context of the protection of liberty, whilst Article 5(3) which protects persons pending trial on criminal charges will lead to considerably lesser damages (e.g., approximately €90).¹⁹⁵

It is clear therefore that the specific state conduct importantly influences the compensation awarded and that one type of behaviour is singled out.¹⁹⁶ In addition, it is hypothesized (by Ichim) that procedural limbs of both Articles 2 and 3 do not generate as much compensation as substantive violations (e.g., degrading treatment).¹⁹⁷ In this context, we would expect that the failure to investigate an act of inhuman and/or degrading treatment or the failure to prevent a violation (as part of the positive obligation) would lead to a lesser amount of compensation than the act itself. The results suggest that the approach of the Court is not entirely as expected: in Article 3, the failure to investigate costs about €4,000 to the state, with both inhuman treatment and degrading treatment generating less in compensation.¹⁹⁸ These results are

¹⁹⁰See Harris, *supra* note 9, at 155–6, emphasis added. Note that there is no footnote to reveal in which cases this happened.

¹⁹¹See Altwicker, *supra* note 17, at 32.

¹⁹²The study did find some discrepancies from the traditional hierarchy, e.g., it found that liberty cases (Art. 5) generated less compensation than Art. 6 cases (procedural justice). *Ibid.*

¹⁹³See *Ireland v. UK*, *supra* note 66 at 167.

¹⁹⁴For Art. 2 the results are inconclusive: the logarithmic regression puts disappearances on top, whilst the multilevel regression puts excessive force.

¹⁹⁵The result is significant in relation to Art. 5(1) violation, but not in relation to Art. 5(3).

¹⁹⁶Most of the conduct by the state is statistically significant.

¹⁹⁷See Ichim, *supra* note 12, at 129.

¹⁹⁸In Art. 2, substantive violations lead to more compensation than procedural.

surprising – potentially suggesting that in certain respects the Court is more concerned about the process and how authorities respond to a case of ill-treatment than the ill-treatment itself.¹⁹⁹

3.3.2 Adjusting damages to the GDP of the country

The Court insists that the awards are adjusted depending ‘on the overall context in which the breach occurred’,²⁰⁰ i.e., the ‘local economic circumstances’.²⁰¹ It is argued that the Court distinguishes between ‘victims in accordance with the level of economic development in the respondent state’.²⁰² For example, the Court held that the ‘basic award’ can be reduced ‘on the basis of the standard of living in the country concerned’.²⁰³ Ichim insists that the decision to adapt the damages is not discriminatory since:

it would make little sense to grant similar amounts for the same violation regardless of whether the applicant lives in a richer or poorer country . . . because the value of the money is different and does indeed depend on local economic development and purchasing power.

The sum therefore has to be adapted so that it is commensurate with the standard of living and ensures equivalent purchasing power in all countries.²⁰⁴

It is interesting to test these statements in the dataset. The analysis reveals that GDP is indeed positively correlated with the level of the award (corr. 212**).²⁰⁵ At first sight, therefore, countries which are richer will pay more for the same type of violation than countries with a smaller GDP. The regression analysis confirms this by showing that ‘old countries’ – coded on the basis of when they joined the Council of Europe and with a considerably higher GDP than the new countries – pay on average €5,277 more than new countries and even more than Turkey.²⁰⁶ Similar results arise in the context of Articles 2 and 5, where the country variable has a significant impact on the awards given.²⁰⁷

However, when the seriousness of violation is taken into account and the level of award is measured against the GDP, what becomes clear is that compensation is *not always* adjusted to ensure equivalent purchasing power. In particular, degrading treatment and general ill-treatment under Article 3 receive the same satisfaction regardless of the country’s GDP. In fact, in the case of general Article 3 violations, the amounts appear to slightly decrease the higher the GDP raises. This picture can be contrasted with the awards for procedural violations and torture, both of which increase with the GDP. The rise of awards for torture is particularly striking, with

¹⁹⁹This is consistent with the statement by Harris that procedural violations may generate better compensation than acts of torture and with Max Planck findings comparing Art. 6 to Art. 5 awards. It is also consistent with a more general focus of the Court on the procedural limbs of Arts. 2 and 3, e.g., identifying specific requirements of effective investigation, etc.: J. Kukavica et al., ‘Strasbourg’s U-turn on Independence as Part of an Effective Investigation under Article 2’, (2015) 74(3) *Cambridge Law Journal* 415–19.

²⁰⁰See *Al-Skeini and others v. UK*, *supra* note 144, at 182.

²⁰¹*Basarba OOD v. Bulgaria*, Just Satisfaction, Judgment of 20 January 2011, at 26. See also Practice Directions, *supra* note 51, at 2.

²⁰²See Ichim, *supra* note 12, at 47.

²⁰³*Apicella v. Italy*, Merits and Just Satisfaction, Judgment of 29 March 2006. Note that this was an Art. 6 case in which the Court took the most structured approach.

²⁰⁴See Ichim, *supra* note 12, at 160. This is consistent with the Court’s assertions in *Mironovas v. Lithuania*, *supra* note 67.

²⁰⁵GDP is coded for the country in the specific year in which decision was rendered.

²⁰⁶The coding mirrors the coding adopted by the Max Planck Study. See Altwicker, *supra* note 17; see annex.

²⁰⁷The impact of the country variable is significant also in the context of Art. 6. Only in Art. 5 cases does Turkey pay more than rich countries, though this may be due to the data (with the majority of cases coming from Turkey and only 15% from old countries).

quantum doubling from 20,000 for countries with US\$4 billion GDP to 40,000 for countries with US\$4 trillion GDP.

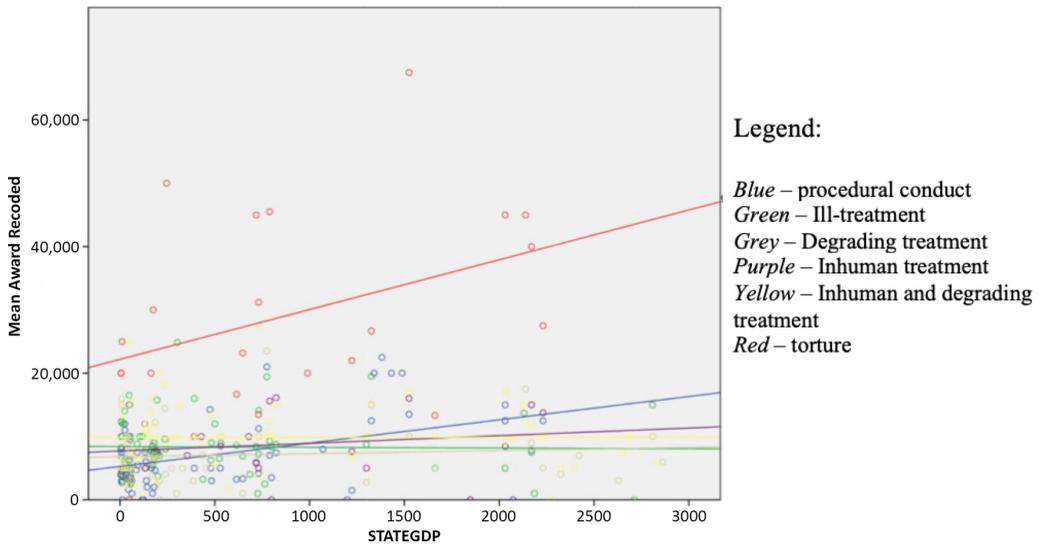


Figure 2. Mean awards depending on state GDP.

Figure 2, above, would therefore suggest that the claim that ‘local economic circumstances’ are taken into account and awards are adjusted to ensure equal purchasing power might not always hold or might not have such an influence as to be statistically significant, at least not for all types of conduct within a Convention article. Instead, the GDP adjustment appears to be used to maximize the punishing effect of torture in rich countries but when it comes to poor conditions, it appears compensation will remain pretty much similar across the different jurisdictions.

3.3.3 Deterrence of systemic violators?

If the Court is seeking to achieve deterrence through just satisfaction awards, then the level of the award will have to be such that state actors are deterred and persuaded that a repetition or continuation of breach is not economically viable. As Shelton argues, whilst retribution focuses on the wrongdoer and on preventing repetition of his action, a broader deterrent effort may seek to influence the behaviour of all potential actors (not just the future conduct of a particular perpetrator). Damages may therefore seek to encourage rational actors to weigh the costs of transgression against the anticipated benefits. In the international context, however, these deterrence goals become trickier to achieve, because the defendant is ‘the state’, which has resources far beyond those of an individual perpetrator and can pay compensation from the public treasury. If damages are to pursue a deterrent aim, if they are to act as ‘potent restraints’ against repetition of violations, then the ‘level of the award or the nature of remedy must be such that state actors are deterred and not permitted to purchase an option to continue violating human rights’.²⁰⁸ In this regard, punitive/aggravated damages will be key.²⁰⁹

The *systemic* variable counts the number of cases of Article 2, 3, or 5 violations that appear in my cohort (covering 13 years of case law).²¹⁰ This variable produces some of the most interesting results. It

²⁰⁸See Shelton, *supra* note 16, at 14.

²⁰⁹Though in some areas there is little correlation between severity of punishment and reduced incidence of wrongdoing. N. Biggar, *Burying the Past – Making Peace and Doing Justice after Civil Conflict* (2003), at 69.

²¹⁰I chose this variable because it is easiest (i.e., can be counted). It produces comparable results as if we coded the term ‘systemic’ in the judgments or used the existing CIRI data: D. L. Cingranelli, D.L. Richards and K. Chad Clay, ‘The CIRI Human Rights Dataset’, available at www.humanrightsdata.com.

first shows that, in the context of Articles 2 and 3, there is a slight positive influence on quantum. The more a country violates Articles 2 and 3, the more it pays in damages. In Article 2 cases, the state pays approximately €183 more for each additional case, whilst in Article 3 cases, the state pays between €21 and €27 more for each additional case that appears in the cohort. These results are significant, though amounts are negligible and can hardly be called punitive. Even more interesting are results in respect of Article 5, where states pay on average €10–15 less for every additional case of Article 5. This implies that the more a country violates Article 5, the less it pays. I have argued elsewhere²¹¹ that the same pattern of ‘price reduction’ can be noticed in the *Burmych v. Ukraine* case where, in a series of decisions relating to the non-enforcement of judgments of Ukrainian courts (i.e., violations of Article 6), the ECtHR reduced compensation for individuals waiting for enforcement from the initial €5,000 for non-pecuniary damage in 1999 to €1,000 in 2015. From 1999 to 2015, the ‘price’ for non-enforcement of domestic judicial decisions had therefore fallen from €5,000 to 20 per cent of this amount.²¹²

At first sight, these results are surprising. A human rights court is potentially allowing states to pay less the more they violate human rights norms.²¹³ When asked about these results, judges admit that sometimes concerns about compliance may affect the setting of damages.²¹⁴ In this regard, if a country has many repetitive cases arising from a systemic violation, the Court may be inclined to lower the award to provide ‘at least something’ to victims.²¹⁵ The lower the damages are, the reasoning goes, the more likely the state is to pay and the more likely the Court is to rid itself of the large number of (repetitive) cases. Yet, according to behavioural economists the decision to adjust or effectively lower damages to facilitate states’ compliance has no deterrent effect and may potentially be leading to the collapse of the system.²¹⁶ In 2017, in *Burmych v. Ukraine*, when the issue of non-enforcement of domestic cases arose again before the Court, the Grand Chamber effectively gave up on trying to incentivize Ukraine to comply with its judgments. The Court dismissed all of its remaining 12,148 non-enforcement cases against Ukraine as well as any future cases²¹⁷ and forwarded them to the Department of Execution at the Council of Europe. The Court’s argument was that it had done everything it could, and now it was up to the Department of Execution to find a solution for the implementation of its judgments.²¹⁸ The monies still remain unpaid.

This focus on compliance is intriguing – the just compensation awarded is therefore not motivated by the victim, but by what the state *can pay*. This result appears almost counterintuitive. But if we consider this from the perspective of the institution of the Court, perhaps the approach is not surprising: the ECtHR is overwhelmed with applications. On average, the Court received around 61,100 applications per year between 2010 and 2017.²¹⁹ Even more importantly, most of the applications received involve repetitive violations by the same countries. The desire to rid itself of these cases, to wipe them from the docket, is more than understandable. From the perspective of the institution, it might even be

²¹¹See Fikfak, *supra* note 1, EJIL article.

²¹²This result is confirmed in the larger dataset including more than 1,000 cases of Art. 6 claims. Results will be published in a forthcoming article.

²¹³When I saw the initial results, I was hesitant to assume that the Court was actively reducing the quantum for frequent violators (distinguishing between correlation and causality). I therefore sought to verify the results in interviews with judges.

²¹⁴Interviews with ECtHR Judge 27 and 30, February 2018.

²¹⁵*Ibid.*

²¹⁶L. Vischer, ‘Economic analysis of punitive damages’, in H. Koziol and V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (2009), at 25 (on how damages should be unpredictable, high and individualized in order to have deterrent effect).

²¹⁷*Burmych and Others v. Ukraine*, Struck out of the list, Judgment of 12 October 2017, at 6; Dissenting Opinions of Judges Yudkivska, Sajó, Bianku, Karakas, De Gaetano, Laffranque, and Motoc on *pro futuro* aspect of the judgment.

²¹⁸This conclusion was challenged by very strong dissents. See *Burmych and Others v. Ukraine*, *ibid.*, at 13, 19, Dissenting Opinions of Judges Yudkivska, Sajó, Bianku, Karakas, De Gaetano, Laffranque, and Motoc.

²¹⁹ECtHR, *The ECHR in facts and figures 2017* (2018), 5.

crucial for the survival of the Court.²²⁰ In this regard, all but one judge underlined that the cases before it are ‘not about money’; indeed, compensation is merely ‘symbolic’.²²¹ This symbolism and the discretion that the Court enjoys in the setting of just satisfaction under Article 41 allows judges to set the quantum by paying regard to other goals, such as compliance and docket control, rather than the victim.

4. The two models compared: The irrelevant victim and the state’s influence on damages

The data analysis reveals a discrepancy between what the Court says it is doing and what is in fact happening. They show that the victim is wholly neglected in the Court’s consideration of damages. Her vulnerability, individual circumstances and consequences she may have suffered are mostly ignored (including death). In group cases, the award is not individualized and the victim depends on others in the group.²²² As I mentioned above, the results of the regression analysis reveal that the victim model explains only between 0–5 per cent of the variability in the award of just satisfaction. The result suggests that the victim is clearly not at the centre of the Court’s analysis. Although the Court, whose main aim is to deliver *individual justice* and which insists its aim in awarding damages is to compensate the victim for *their* pain and suffering, this is clearly not understood in subjective terms or by paying attention to the particular circumstances of the victim.

In contrast to the victim model, the *state model* can explain at least twice as much of the variability in the data as variables related to the victim (up to an additional 15% of the variability in the data).²²³ It is striking that all state variables have a significant impact on the determination of the quantum: the identity of the country, the qualification of state conduct and the measurement of the frequency of such conduct. The Court appears to be focusing on state conduct and determines damages depending on how that conduct has been qualified (e.g., as torture, inhuman or degrading treatment). Damages for torture/excessive force/arbitrary detention are considerably elevated and adjusted on the basis of the country’s GDP. In principle, therefore, rich countries pay more for the same type of behaviour than poor countries. Although the Court asserts it is seeking to ensure equal purchasing power of the victim across all violations, this appears true only to a limited extent (e.g., with certain type of behaviour, like poor conditions, remaining similarly priced across different GDPs). Finally, if the Court is seeking to dissuade systemic violators of human rights, the regression analysis suggests that only up to €27 extra in Article 3 is paid for every additional violation the Court has found against that country in its docket. In Article 5 cases, this number is negative, suggesting that frequent violators get a discount on quantity in order to facilitate easier compliance with numerous ECtHR decisions.

There are, of course, a number of problems with the approach uncovered. First, if the general image of the ECtHR is that of a forum available to every human rights victim – to hear her claim and to redress the violation, the results clearly show that although *access to the Court* may be about the victim, *damages* most certainly are not. Instead, there is a clear shift from the victim to the state – what it might be able to pay or what it may be able to comply with. This differs greatly from the individual justice narrative the Court is trying to portray about itself. In fact, it almost reminds one of the arguments made by Laurence Helfer in his EJIL article on the embeddedness of the ECtHR framework in the domestic framework.²²⁴ Helfer argues that the Court has to look for

²²⁰The Court regularly receives threats from states that they may withdraw funding if decisions do not suit the respondents. The Court is naturally sensitive to these threats and, as some have argued, may be internalizing the discontent of states by adapting its approach to rights. As Helene Tigroudja put it: ‘The Court is paralysed by the fear of non-compliance.’, Hauser 25th Anniversary, NYU Law School, 11 October 2019, available at www.law.nyu.edu/global/globalevents/hauser25th.

²²¹Interviews with ECtHR Judges 27 and 30, February 2018.

²²²In addition, applicant’s contribution appears to have no bearing on the awards made, although the Court asserts that it will not provide damages to terrorists or others who have contributed to their situations. E.g., Art. 2, *McCann and others v. UK*, Merits and Just Satisfaction, Judgment of 27 September 1995.

²²³Though if awards are not given in a logarithmic form, the state variables can explain much more of the variability in the data, up to 40%.

²²⁴See Helfer, *supra* note 14.

new ways in which it can work with states and state organs to facilitate the embeddedness of the Convention into the domestic legal system. This includes looking for innovative and state-specific measures to address human rights violations in specific jurisdictions and to help these states – through domestic courts and governments – redress human rights violations themselves.²²⁵ Though Helfer talks mostly about subsidiarity and the margin of appreciation, the discounts used to facilitate payment of just satisfaction may also be one tool (though unexpected) to help states with compliance with the ECtHR.

It is an open question whether the Court is correct to reduce just satisfaction in cases involving frequent violators with the aim to facilitate compliance.²²⁶ I have argued elsewhere that the Court's approach goes against much of the behavioural economics literature, which instead recommends the use of punitive damages to motivate states to change their behaviour.²²⁷ Practitioners appearing before the Court similarly argue that low damage amounts together with states' belief that the payment of compensation concludes the case, mean that the system contains no real incentive to motivate states to address and remove systemic problems at home. Instead, the payment of damages frequently means that for states the issue is resolved and the 'door is closed'. Often, however, the underlying problem still remains and generates repeat cases. The question therefore remains as to whether the Court, in its approach to damage-setting, should be concerned with compliance and whether, by making repetitive violations cheaper, it is enabling frequent violators to 'pay off' their behaviour more easily and failing to deter future violations.

The second problem uncovered by the study is that the position of the victim is further undermined by information asymmetry about the potential remedies. By keeping the scales according to which damages are calculated secret, the Court is putting a disproportionate burden on the victims. Victims have to invest disproportionate amounts of time and effort (as well as money) to bring their claims to the Court. Often, they are unaware of how small the damage amounts will be. In contrast, states that appear frequently before the Court know precisely and accurately how much a certain type of behaviour may cost. Torture costs about €20,000, a disappearance €60,000, and arbitrary detention – depending on the respective paragraph of Article 5 – between €25 and €500 a day. As I have argued elsewhere, some countries are aware of the type of cases coming through the pipeline of the Court and are able to 'plan' how much the violations will cost. An intriguing example of such behaviour is Russia, which is one of the worst systemic violators of the ECHR (together with Turkey, Romania, and Ukraine). Russian legislation explicitly requires that the country's annual budget contains a part intended to pay off ECHR violations.²²⁸ Between 2010 and 2016, the amount 'reserved' for ECHR compensation was respectively 114 million rubles (US\$1.7 million) and 500 million rubles (US\$7.6 million).²²⁹ Although we cannot conclude from this that Russia 'plans' its violations in advance, the budgeting clearly reveals that Russia is able to calculate in advance how much ECtHR violations will cost in a given year. The same cannot be said of victims of human rights violations. As a rule, they remain ignorant of the low amounts of compensation and if offered friendly settlement, are often unable to assess whether the offer made is comparable to prior cases or not.²³⁰ The publication of the scales according to which damage

²²⁵*Ibid.*, at 141 ff.

²²⁶To my knowledge, the Court currently does not have the empirical data to assess whether and in which cases lower damage amounts lead to better compliance.

²²⁷See Fikfak, *supra* note 1 EJIL article.

²²⁸Federal Law no. 359-FZ on the Federal Budget for 2016, 14 December 2015, Art. 21(5).

²²⁹Note that Russia has rejected compliance with *Yukos v. Russia* following a decision of its Constitutional Court and 'compensation reserve' in the budget does not therefore refer to that decision. ECtHR, *Yukos v. Russia*, Merits, Judgment of 20 September 2011. See Decision of the Russia Constitutional Court 19 January 2017, available in documents submitted to the Committee of Ministers, Doc. DH-DD(2017)207 (2017).

²³⁰Note that friendly settlements are becoming increasingly frequent and in relation to certain countries represent up to 50% of all cases; V. Fikfak, 'Against Settlement before the ECtHR' (forthcoming). Also H. Keller et al., *Friendly Settlements before the European Court of Human Rights* (2010).

amounts are calculated (which the Court has thus far resisted) would go some way towards addressing this information asymmetry.

Whilst the current practice of the Court in relation to damages is to a large extent dictated by precedent and scales, which have sought to consolidate this precedent into consistent practice, this year the Court is embarking on a revision of its just satisfaction practice.²³¹ Important voices within the Court have suggested changes to its approach.²³² Let us hope that the current practice – though understandable from an execution/compliance perspective – can be revisited in order to redress the potential commodification of human rights, which this study has revealed.

Annex: Description of variables, models and regression analysis results

1. Coding and description of variables

1.1 General coding for all three articles

Award Award in Euros

Also provided *logAward* Award in logarithmic form²³³

ClaimNP Whether claim for non-pecuniary damage made

- | | |
|---|--|
| 0 | The applicant made no claim for damages |
| 1 | The applicant made a specific claim for damages |
| 2 | The applicant left the determination of quantum to the Court |

VICTIMquantum Exact quantum requested

Also provided *VICTIMquantumlog* Claim for quantum in logarithmic form²³⁴

VICTIMage Age of the victim at the time decision rendered

VICTIMgender Gender

- | | |
|---|--------|
| 0 | Male |
| 1 | Female |

VICTIMvulnerab Vulnerability

- | | |
|---|------------|
| 0 | None |
| 1 | Vulnerable |

VICTIMnoingroup Precise number of victims in case (for which violation found)

<i>Country</i>	Respondent State
1 Old countries (accession before 1989)	Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Italy, Malta, Netherlands, Portugal, Spain, Sweden, Switzerland, United Kingdom

(Continued)

²³¹This was confirmed in several interviews with judges (Judges 19, 22, 24), February/March 2018.

²³²See Pinto and Van Aaken, *supra* note 86.

²³³The variable is skewed to the right, therefore we generated a new variable $\log(\text{Award} + 1)$.

²³⁴The variable is skewed to the right, therefore we generated a new variable $\log(\text{VICTIMquantum} + 1)$, to include also cases in which the applicants have left it to the discretion of the Court to determine quantum.

(Continued)

2	New countries (accession 1990 onwards)	Albania, Azerbaijan, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Latvia, Lithuania, Republic of Moldavia, Poland, Romania, Russian Federation, Slovak Republic, Slovenia, The former Yugoslav Republic of Macedonia, Ukraine
3	Turkey	

STATEsystemic Number of cases in the cohort which violation of Article 3 was found against the respondent State

1.2 Specific coding for each article

1.2.1 Article 3 – Torture, inhuman and degrading treatment

VICTIMseriousC Serious consequences suffered by victim as a result of violation

0	None
1	Death
2	Other permanent or serious damage (loss of limb/injury or chronic illness)

STATEConduct

<i>STATEArt3</i>	Number of Article 3 violations the applicant suffered which are qualified as ill-treatment
<i>STATEitdt</i>	Number of inhuman and degrading treatment violations the applicant suffered
<i>STATEInhuman</i>	Number of inhuman treatment violations the applicant suffered
<i>STATEtorture</i>	Number of torture violations the applicant suffered
<i>STATEDegrading</i>	Number of degrading treatment violations
<i>STATEPositive</i>	Number of positive obligation violations the applicant suffered
<i>STATEEffective</i>	Number of lack of effective investigation violations the applicant suffered

1.2.2 Article 2 – Right to life

APPquantum Exact quantum requested

Also provided *APPquantumlog* Claim for quantum in logarithmic form²³⁵

APPRelationshipwVIC Applicant’s relationship with victim

1	Applicant is victim’s Partner
2	Children
3	Parents
4	Brother/sister
5	Other
6	Multiple victims

APPage Age of the applicant at the time decision rendered

APPgender Gender

0	Male
1	Female

²³⁵The variable is skewed to the right, therefore we generated a new variable $\log(\text{VICTIMquantum} + 1)$, to include also cases in which the applicants have left it to the discretion of the Court to determine quantum.

APPnoingroup Precise number of applicants in case (for which violation found)

APPIindividualcircs Applicant's specific circumstances

1	Financial dependence on victim
2	Health problems
3	Other

VICTIMDeceased Is the victim deceased?

0	None
1	Death

VICTIMContribution Did the victim contribute to their situation?

0	No
1	Yes

STATEConduct

<i>STATEUnexplained</i>	Whether the victim suffered unexplained death in violation of Article 2
<i>STATEDisappearance</i>	Whether the victim disappeared in violation of Article 2
<i>STATEIntentionalK</i>	Whether the victim was intentionally killed in violation of Article 2
<i>STATEExcessivefor</i>	Whether excessive force was used against the victim in violation of Article 2
<i>STATEDutytoprotect</i>	Number of times the duty to protect was not abided in violation of Article 2
<i>STATEEffective</i>	Number of lack of effective investigation violations the applicant suffered

1.2.3 Article 5 – Indefinite detention

VICTIMConvicted Was the victim convicted of crime?

0	No
1	Yes

STATEConduct

<i>STATEArticle51</i>	Number of violations of Article 5-1 against the applicant
<i>STATEArticle52</i>	Number of violations of Article 5-2 against the applicant
<i>STATEArticle53</i>	Number of violations of Article 5-3 against the applicant
<i>STATEArticle54</i>	Number of violations of Article 5-4 against the applicant
<i>STATEArticle55</i>	Number of violations of Article 5-5 against the applicant

2. Models

Variables	<i>Model Prelim</i>	<i>Model Victim*</i>	<i>Model State</i>	<i>Model Together</i>
<i>Whether claimed NP damages?</i>	X			X
<i>Victim: Age</i>		X		X
<i>Victim: Gender</i>		X		X
<i>Victim: Vulnerability</i>		X		X
<i>Victim (A2): Relationship applicant</i>		X		X
<i>Victim (A2): Deceased</i>		X		X
<i>Victim (A2): Individual circumstances</i>		X		X
<i>Victim (A2, 5): Individual contribution</i>		X		X
<i>Victim (A3): Serious consequences</i>		X		X

(Continued)

(Continued)

Victim (A3): Convicted	X	X
Victim: Solo or in group	X	X
State: Country (old, new, Turkey)	X	X
State: Systemic violation	X	X
State: Legal qualification of conduct	X	X
State: Effective investigation	X	X
State: Other positive obligation	X	X

*In Article 2, where the majority of the victims are deceased, the applicant is claiming compensation for their own pain and suffering due to the deprivation of life of a relative (i.e., victim). In this regard, in the context of Article 2, I use an additional model to determine the role of the applicant (who makes the claim). This is in addition to the model which investigates the role of the victim (relative who is deceased).

3. Regression analysis results

I use multiple regression analysis to examine the relationship between the amount awarded in moral damages and the different aspects of the case, namely variables related to the victim, to the state, and whether the victim made a claim. The different models are therefore defined as follows:

$$\text{Log}(\text{Award} + 1) = \beta_0 + \beta_{1x1i} + \dots + \beta_{kxki} + e_i, \quad i = 1, \dots, n$$

The dependent variable (amount awarded in respect of non-pecuniary damage) is the natural logarithm of the amount. The logarithmic transformation is used because the award distribution is skewed to the right (as the graphs in Figure 3, below, suggest) and it makes the distribution more normal.²³⁶

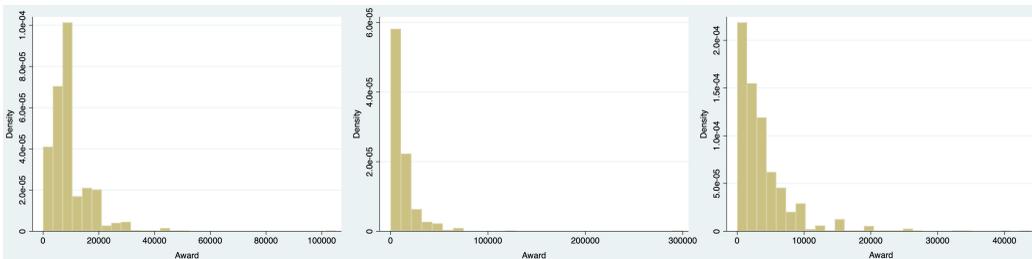


Figure 3. Graphs picturing awards in Article 3, Article 2 and Article 5 cases respectively.

The subscript *i* refers to the individual victims in the selected sample of *n* victims. The key independent variables are explained in the next sections in relation to each of the articles. The coefficients to be estimated are the β s, and *e* is an error term.

In addition to the linear regression, I also use a multilevel random intercepts model to control for the variation depending on the case (indicated by subscript *j*). Such a model allows for the error term to feature a set differences for all victims within each higher level unit (cases). Independent variables at level 1 are those marked by X, whilst Z are level 2 variables (case variables, which include variables: Country, STATEsystemic and number of victims in group).

$$\text{Log}(\text{Award} + 1) = \beta_{1x1ij} + \beta_1 Z_{1j} \dots + \mu_j + e_{ij}, \quad i = 1, \dots, n$$

²³⁶J. Wooldridge, *Introductory Econometrics: A Modern Approach* (2013), 191–4.

3.1 Article 3

The linear regressions in relation to Article 3 employ four models. The first one tests to what extent the sole action of claiming compensation can explain the variability in data. The second model, *victim* model, looks to variables associated with the victim. In this regard, I look at how much the victim asked for (including whether they left the determination to the discretion of the Court), their age and gender, their vulnerability, whether they appear in a group or on their own and what consequences they have suffered. This is followed by a *state* model, which looks to the variables associated with the state. In both *victim* and *state* models, I do not include the ‘whether they claimed’ variable, but instead I only include those cases in which a claim was made (thus the reduced number of cases). This is to get more precise results about how much variables related to the victim/state may have affected their quantum, independent of whether they claimed variable. In this regard, the *victim* model contains also the quantum variable, which indicates how victims assessed their loss. Finally, I put all models together to see how the variables interact when all are considered together (see Figure 4).

Variable	Prelim1	Victim1	State1	Together1
ClaimNP				
1	7.578***			7.556***
2	7.855***			7.900***
VICTIMquantumlog		0.030*		
VICTIMage		0.001		-0.005
VICTIMgender				
1		0.096		0.052
VICTIMvulnerab		-0.102		0.017
VICTIMnoingroup		-0.003*		-0.000
VICTIMseriousC				
1		0.166		0.697
2		0.550		0.498
Country				
2			-0.544***	-0.508***
3			-0.598***	-0.813***
STATEsystemic			0.003***	0.004***
STATEart3			0.353***	0.377***
STATEitdt			0.675***	0.847***
STATEinhuman			0.254*	0.470**
STATEtorture			1.357***	1.358***
STATEdegrading			0.370***	0.341*
STATEpositive			0.334*	0.265
STATEeffective			0.391***	0.504***
Constant	1.341***	8.644***	8.530***	0.993***
N	1128	969	1064	1033
r ² _a	0.677	0.006	0.150	0.714

Legend: * p<.05; ** p<.01; *** p<.001

Figure 4. Regression results for Article 3.

The results in the regression analysis clearly show that in addition to whether they claimed, variables connected to the state are the best indicators of the awards made (they can explain 67% and 15% respectively of the data). The final model shows that in addition to whether a victim claimed compensation, only variables related to the state have a significant impact on the quantum awarded. Specifically, they show that new countries and Turkey pay substantially less in compensation.

The results were also tested in a multilevel model, which controls for the fact that the Court considers cases not victims. This suggests that the best fit model is the *state* model (smallest -2loglikelihood and BIC, given the number of cases). The significance of variables does not change considerably, though the quantum claimed by the victim and the appearance in group rather than individually become insignificant.

3.2 Article 2

The linear regressions in relation to Article 2 employ five models. The first one tests to what extent the sole action of claiming compensation can explain the variability in data. The second model, the *applicant* model, investigates how much variables associated with the applicant, i.e., the relative claiming for their own pain and suffering after the death of the victim, can explain the variability in data. This is different from the *victim* model. First, how the applicant assesses their own pain and suffering in this context will depend also on how they value the relative’s life. In this regard, it looks to who the applicant is (gender and age) and what his relationship was to the victim, it considers the individual circumstances in which the applicant finds himself after the death of the victim (financial dependence, health issues or other), and whether the applicant claims on their own or in a group. The second model then looks at the *victim* and to variables associated with the victim. In this regard, I look at whether the victim is deceased, whether they were defined as vulnerable and whether they contributed to their situation. This is then followed by a *state* model, which looks to the variables associated with the state. As before, in *applicant*, *victim* and *state* models, I do not include the ‘whether they claimed’ variable, but instead I only include those cases in which a claim was made (thus the reduced number of cases). This is to get more precise results about how much variables related to the victim/state may have affected their

Variable	Prelim1	Applicant1	Victim1	State1	Together1
ClaimNP					
1	8.651***				8.617***
2	8.780***				8.786***
APPquantumLog		0.043*			
APPRelationshipwVIC					
1		-0.030			-0.498
2		-0.736**			-1.145**
3		-0.352			-0.796*
4		-0.899***			-1.380***
5		-1.704***			-2.360***
6		0.361			-0.775
APPage		0.003			0.006
APPGender		0.115			0.050
APPIndividualCirc					
1		0.533			0.187
2		0.860			1.781
3		0.511			0.306
APPno in group		0.002			-0.003
VICTIMdeceased			-0.032		0.428
VICTIMvulnerable			-0.603***		-0.363**
VICTIMContribution			0.647***		0.494**
Country					
2				-0.378	-0.591
3				-2.357**	-3.162***
STATEsystemic				0.024**	0.035***
STATEunexplained				0.866	1.105
STATEdisappearance				0.654	1.029**
STATEexcessiveforce				0.876***	0.654***
STATEduty to protect				0.334	0.556**
STATEeffective				0.426*	0.357
Constant	0.150	8.584***	8.977***	7.977***	-0.484
N	791	692	719	719	762
r2_a	0.684	0.079	0.050	0.067	0.730

Legend: * p<.05; ** p<.01; *** p<.001

Figure 5. Regression results for Article 2.

quantum, independent of whether they claimed variable. In this regard, the *applicant* model contains also the quantum variable, which indicates how they assessed their loss. Finally, I put all models together to see how the variables interact when all are considered together (see Figure 5).

The results in the regression analysis clearly show that in addition to whether they claimed, variables connected to the applicant and to the state are the best indicators of the awards made (they can explain 68%, 8% and 6,7% respectively of the data). The final model shows that in addition to whether a victim claimed compensation, the applicant’s relationship to the victim and variables related to the state have a significant impact on the quantum awarded. Specifically, they show that Turkey pays substantially less in compensation than old, rich countries.

The multilevel model suggests that the best fit model is either the *applicant* model or the *state* model (smallest -2loglikelihood and BIC, given the number of cases). There is some change to the significance of variables – although Turkey still pays less, this appears to be not significant (i.e., Turkey), whilst financial dependence of the victim becomes relevant in the multilevel model.

3.3 Article 5

The linear regressions in relation to Article 5 employ four models. The first one tests to what extent the sole action of claiming compensation can explain the variability in data. The second model, *victim* model, looks to variables associated with the victim. In this regard, I look at how much the victim asked for (including whether they left the determination to the discretion of the Court),²³⁷ their age and gender, their vulnerability, whether they appear in a group or on their own and whether they were convicted (i.e., to test whether convicted individuals vs others who have not yet been convicted

Variable	Prelim1	Victim1	State1	Together1
ClaimNP				
1	7.085***			7.455***
2	6.477***			6.874***
VICTIMquantumlog		0.106***		
VICTIMAge		-0.006		-0.002
VICTIMGender				
1		0.242		0.188
No in group		0.018		0.003
VICTIMconvicted		-0.250		-0.161
VICTIMVulnerab		0.166		0.032
Country				
2			-0.807***	0.277
3			-0.344	1.193***
STATEsystemic			0.006***	-0.005***
STATEArticle51			1.497***	0.967***
STATEArticle52			-0.701	-0.721
STATEArticle53			0.287	0.584***
STATEArticle54			0.416**	0.015
STATEArticle55			-0.028	-0.042
Constant	0.223	6.834***	6.352***	-0.459
N	1247	1034	1139	1138
r2_a	0.421	0.021	0.108	0.558

Legend: * p<.05; ** p<.01; *** p<.001

Figure 6. Regression results for Article 5.

²³⁷This variable is excluded in the *together* model because the other variable ClaimNP is included.

are treated differently). This is followed by a *state* model, which looks to the variables associated with the state. In both *victim* and *state* models, I do not include the ‘whether they claimed’ variable, but instead I only include those cases in which a claim was made (thus the reduced number of cases). This is to get more precise results about how much variables related to the victim/state may have affected their quantum, independent of whether they claimed variable. Finally, I put all models together to see how the variables interact when all are considered together (see Figure 6).

The results in the regression analysis clearly show that in addition to whether they claimed, variables connected to the state are the best indicators of the awards made (they can explain 42% and 11% respectively of the variability in the data). The final model shows that in addition to whether a victim claimed compensation, variables related to the state have a significant impact on the quantum awarded. Interestingly, they show that Turkey pays substantially *more* in compensation than old, rich countries.

The multilevel model suggests that the best fit model is either the *state* or the *together* model (smallest -2loglikelihood and BIC, given the number of cases). There is no change to significance of variables.