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# Towards a Fragmented International Legal Order? Rethinking the Quantification of Moral Damages for Coherent and Consistent Treatment

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# TOWARDS A FRAGMENTED INTERNATIONAL LEGAL ORDER? RETHINKING THE QUANTIFICATION OF MORAL DAMAGES FOR COHERENT AND CONSISTENT TREATMENT

Dogan Gultutan\*

## Abstract

This article examines the fragmented treatment of moral damages under international law, with a particular focus on how international courts and tribunals assess and quantify such claims. Moral, non-pecuniary harm - intangible harms such as psychological suffering, humiliation, loss of reputation, and diminished enjoyment of life - have long been recognised in principle, dating back to the *Opinion in the Lusitania Cases* of 1923. Yet, nearly a century later, arbitral practice remains inconsistent, with tribunals adopting divergent approaches to both entitlement and valuation. This lack of coherence not only undermines predictability but also risks eroding confidence in the international legal order.

The article undertakes a comparative analysis of three principal *fora*: arbitral tribunals operating under the ICSID Convention, the European Court of Human Rights, and the Inter-American Court of Human Rights. The jurisprudence of these bodies demonstrates wide disparities in awards. While ICSID tribunals, beginning with *Desert Line v Yemen*, have recognised the availability of moral damages in exceptional circumstances and frequently awarded sums of around US\$1 million, human rights courts typically award far more modest amounts for comparable harms, but generally without imposing a requirement for exceptionality. This divergence reveals a troubling absence of cross-fertilisation between sub-branches of international law, resulting in unequal treatment of similar injuries.

To address the difficulties of quantification, the article explores the possibility of resorting to the willingness to pay methodology long debated and utilised in the United States to quantify and value pain and suffering related loss and damage. National and international courts have frequently been asked to and do put a price tag on moral harm suffered. The economic methodologies developed in other fields may assist international courts and tribunals in structuring moral damage awards. While none of these methods is flawless, their use - especially when combined with psychological assessments - can move decision-making away from *ad hoc* judgments toward more principled and transparent outcomes. The article concludes that a more coherent, scientifically informed approach is urgently required. By adopting established valuation techniques, such as the willingness to pay methodology, and fostering convergence across different *fora*, international law can ensure fairer and more consistent treatment of

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moral damage claims, advancing both the principle of full reparation and the credibility of the international legal system.

**Keywords:** Moral Damages; International Legal Order; Coherence; Consistent Treatment.

## I. INTRODUCTION

Moral (non-pecuniary) harm is as much real as material (pecuniary) harm. The fact that moral harm must be compensated was authoritatively expressed by the tribunal in *Lusitania* in the following terms:

“That one injured is under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as penalty.”<sup>1</sup>

More than a century has passed since the delivery of that seminal decision. However, international courts and tribunals are nowhere near consensus on when to grant moral damages and, more importantly, their quantification. Investment law is “littered” with examples of inconsistent and directly contradictory judgments and awards of international courts and tribunals. This begets the question: are we witnessing the gradual fragmentation of international law, at least insofar as concerning the award of moral damages? If so, will such fragmentation result in a disjointed and disunified international legal order, potentially undermining the very existence of the rule of law in the international law arena? Those issues strike to the core and threaten the very existence of international rule of law. Needless to say, such an unwanted outcome ought to be averted.

This article seeks to critically examine the international rules and principles that underpin the entitlement to moral damages as a matter of customary international law, especially focusing on the decisions of three *fora* that hear and determine claims for such damages, i.e., investment tribunals constituted under the ICSID Convention<sup>2</sup> (“ICSID tribunals”), the European Court of Human Rights (“ECtHR”) and the Inter-American Court of Human Rights (“IACtHR”). This article will focus, in particular on the quantification of moral harm by international courts and tribunals, assessing the justifiability and appropriateness of the various approaches to

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<sup>1</sup> *Opinion in the Lusitania Cases*, United Nations Reports of the International Arbitral Awards, 1 November 1923, Vol. VII 32, 40. See also, *The Factory at Chorzów (Germany v. Poland)*, Decision on Indemnity, 1928 PCIJ (Ser A).

<sup>2</sup> Convention on The Settlement of Investment Disputes Between States and Nationals of Other States of 1965.

quantifying moral harm. Whether and how expert evidence could be utilised to help counter the difficulties of quantification will be considered. Solutions will be proposed to counter the adverse repercussions of the fragmentation of international law so as to ensure that international law maintains the requisite level of unity necessary to protect the international legal order and the rights of those concerned.

## II. ENTITLEMENT TO MORAL DAMAGES UNDER CIL

It is generally accepted that there is a right to moral damages as a matter of customary international law (“CIL”) where moral harm is suffered and such harm arises from a breach of an international law obligation.<sup>3</sup> This was recognised as early as 1923 in the *Opinion in the Lusitania Cases*.<sup>4</sup> The Permanent Court of International Justice (“PCIJ”), the predecessor to the International Court of Justice (“ICJ”), confirmed shortly thereafter in the *Chorzów* case that all forms of harm must be compensated.<sup>5</sup> That principle now forms the foundation of Article 31 of the International Law Commission (“ILC”) Articles on State Responsibility (the “Articles”).<sup>6</sup>

Until somewhat recently, scholars and arbitrators questioned whether an entitlement to moral damages could be asserted on the basis of customary international law in investment arbitration cases. There were many instances where investment tribunals seemed reluctant to grant moral damages. For instance, in *Técnicas v. Mexico*<sup>7</sup> the ICSID tribunal refused to grant the investor moral damages on the basis that it could not be shown that “the actions attributable to [Mexico] that the Arbitral Tribunal has found to be in violation of the Agreement [] also affected the Claimant’s reputation and therefore caused the loss of business opportunities for the Claimant”. The reasoning muddled material damages with moral damages. Entitlement to moral damages was not dependent on there being adverse monetary impact on the business. Strikingly, the tribunal did not address whether, as a matter of principle, moral damages were available to investors.

A similar approach was adopted in *Bogdanov v. Moldova*.<sup>8</sup> That was a case where the Russian investor argued that the Moldova’s attempt to retroactively apply certain of its legislation, which had the effect of limiting the investor’s right to compensation under a privatisation agreement, was unlawful. The investor sought both material and moral damages by way of compensation. The tribunal found that the host state had violated the fair and equitable

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<sup>3</sup> Whilst monetary compensation is not the only remedy available, other forms of remedy are often considered impossible, impracticable or insufficient, thus leaving monetary compensation as the only available “real” remedy for the harm sustained: see, Sugarman, D., “Chapter 15: Tort damages for non-economic losses: personal injury” in *Comparative Tort Law* (2021, Edward Elgar Publishing), 306.

<sup>4</sup> *Opinion in the Lusitania Cases* (n 1 above).

<sup>5</sup> *The Factory at Chorzów* (n 1 above).

<sup>6</sup> See Article 31 ILC Articles on State Responsibility for Wrongful Acts, Commentaries (1)-(3), available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), accessed 22 July 2025.

<sup>7</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, [198].

<sup>8</sup> *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Award, 22 September 2005.

treatment obligation embodied in Article 3 of the Russia-Moldova BIT and ordered material compensation. The request for moral damages, however, was dismissed. The reasons for dismissal were similar to those of the *Técnicas v. Mexico* tribunal, i.e. failure for lack of proof on harm suffered.<sup>9</sup>

The ICSID tribunal's award in *Desert Line v. Yemen*<sup>10</sup> turned the tide of jurisprudence. The tribunal's award has rightly been coined as the seminal case on moral damages in international investment law.<sup>11</sup> It is the first ever reported investment arbitration case where an investor has been awarded moral damages on the basis of CIL. The case also set out the test to be applied to moral damages claims in investment cases.

In that case, Desert Line Projects LLC ("Desert Line"), a limited liability construction company established in Oman, undertook to build roads in Yemen. Desert Line experienced payment issues and threatened to cease work and pull out of the country. The Yemeni Government took drastic measures to pressurise Desert Line to continue the works and complete project. On one occasion, armed tribe members and other subcontractors opened fire and threatened Desert Line's employees. Further, Desert Line's attempts to evacuate its equipment from the construction sites were unlawfully prevented by armed forces dispatched by the Minister of the Interior. The Yemeni President refused to lift the siege on Desert Line's equipment and personnel.

The parties eventually reached a consensus on the basis that the work would be completed by Desert Line, for which it would be paid the sums due as evaluated by third parties (British and Jordanian companies) applying an average pricing formula. To that end, the parties signed an arbitration agreement and appointed two contractors to act as arbitrators to determine any issues of valuation.

The Yemeni Government refused to accept the arbitrators' decision. An altercation took place thereafter on site and three of the investor's personnel were detained for three days. The Government also sought to annul the arbitrators' award in the local courts. Ultimately, under pressure, Desert Line agreed to a settlement agreement that required Yemen to pay less than

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<sup>9</sup> *Técnicas v. Mexico* (n 7).

<sup>10</sup> *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008.

<sup>11</sup> See, Conway Blake, 'Moral Damages in Investment Arbitration: A Role for Human Rights?' (2012) 3(2) *Journal of International Dispute Settlement* 371, 375; and Gultutan, D., *Moral Damages under International Investment Law: The Path Towards Convergence* (Kluwer Law International, 2022), 99.

the sum that had been ordered by the arbitral tribunal. Desert Line later challenged the validity of the settlement in ICSID arbitration proceedings, seeking material and moral damages.

The ICSID tribunal found for Desert Line, holding that Yemen had breached multiple protections promised in the Oman-Yemen BIT, most notably the obligation under Article 3 of the BIT to treat the investor fairly and equitably. The tribunal also granted the request for moral damages, considering the physical assault, illegal detention of the investor's personnel and the threats to life. It awarded the sum of US\$ 1 million.

On the entitlement to moral damages, the *Desert Line* tribunal reasoned as follows:

“Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them.”<sup>12</sup>

It will be observed that the tribunal considered moral damages available as a remedy only in exceptional circumstances. Grave and serious harm to person will have to be shown for an investor to be entitled to moral damages.<sup>13</sup> This runs contrary to the established position under CIL, especially considering the decisions of other international courts and tribunals.<sup>14</sup>

The tribunal acknowledged that quantifying the moral harm in that particular case was “difficult, if not impossible”,<sup>15</sup> but that was no bar to granting such damages. Citing the *Opinion in the Lusitania Cases*<sup>16</sup> with approval, the tribunal expressed that non-material damages are real and that “the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated”.<sup>17</sup>

As for the sum granted, the tribunal explained that it was “more than symbolic yet modest in proportion to the vastness of the project”.<sup>18</sup> The tribunal provided little reason as to why the

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<sup>12</sup> *Desert Line (n 10)* [289].

<sup>13</sup> *Gultutan (n 11)* 3.

<sup>14</sup> *Gultutan (n 11)* 154 *et seq.*

<sup>15</sup> *Desert Line (n 10)* [289].

<sup>16</sup> *Opinion in the Lusitania Cases (n 1 above)*.

<sup>17</sup> *Desert Line (n 10)* [289].

<sup>18</sup> *Ibid*, [290].

sum of US\$ 1 million was considered appropriate, and the reasons provided give rise to more questions than they answer.

Subsequent ICSID tribunals<sup>19</sup> have followed the *Desert Line* approach and have expressed willingness to grant and/or granted moral damages only in cases involving grave violations of international law obligations and where harm or threat of harm to persons is present. Later ICSID tribunals have similarly dictated for the payment of US\$ 1 million sum, again without much quantification analysis. In all of the cases, the US\$ 1 million sum awarded -to use the Shakespearean expression- seems to have been plucked out of “thin air”.

An investor is accordingly entitled to seek moral damages as a matter of right under CIL principles, irrespective of whether there is express language in the applicable treaty or any contract. However, rules and principles concerning the appropriate quantum for moral harm claims continue to evolve. There are no established guidelines to assist with the quantification exercise. The section below will further scrutinise quantification issues and related inconsistencies in approach, in light of the jurisprudence of non-investment courts and tribunals and suggest a fairer and more consistent way forward.

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<sup>19</sup> See, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, 28 March 2011; and *Bernhard Friedrich Arnd Rudiger von Pezold et. Al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015.

### III. MORAL DAMAGES AWARDS: TALE OF THREE FORA

Different approaches are being taken in different international law settings as regards the entitlement to moral damages. International courts and tribunals have taken manifestly divergent approaches to quantifying moral harm.

This section will analyse in detail the treatment of moral harm and their quantification in three distinct international *fora* to ascertain the nature and scope of the disparity between them on the treatment of moral damages claims. The outcome of that exercise will help evaluate any room for convergence on the issue of quantification.

#### A. ICSID awards

##### a. *Desert Line v Yemen*

As explained above, the ICSID tribunal in *Desert Line v Yemen* ruled that moral damages may be claimed as a matter of CIL.<sup>20</sup> There does not need to be express permission for moral damages claims in the applicable treaty or contract. That being said, the tribunal was at pains to point out that such entitlement only arises in exceptional cases.<sup>21</sup>

Another ICSID tribunal concurringly noted that to succeed in a moral damages claim, the investor must show that the host state's "...actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act ... [and which causes] a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and both cause and effect are grave or substantial".<sup>22</sup>

The sum awarded to the claimant investor in *Desert Line v Yemen* was US\$ 1 million. The tribunal sought to justify the sum on the basis that, that "based on the information at hand and the general principles [the sum was] more than symbolic yet modest in proportion to the vastness of the project".<sup>23</sup> The investor had claimed for claimed sum of OR 40 million.<sup>24</sup> The tribunal found that to have been exaggerated. No further analysis was provided as to the

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<sup>20</sup> *Desert Line (n 10)*.

<sup>21</sup> *Ibid* [289].

<sup>22</sup> *Lemire (n 19)* [333].

<sup>23</sup> *Desert Line (n 10)* [290]-[291].

<sup>24</sup> This seemingly refers to the 'Omani Rial'. OR 40 million equated to circa USD 100 million in July 2020.

quantification exercise, nor did the tribunal explain what the “general principles” referenced were.

However, the reference to the “information at hand” was likely a reference to the factual matrix that was put before the tribunal. This was a case where the investor and its personnel were physically assaulted, detained and threats made to their life by armed men, who opened fire at its various construction sites. The unlawful acts therefore were considered to have clearly caused moral harm, both to the company and its officers. Construed in light of the “general principles” of international law, US\$ 1 million was considered adequate compensation for the moral harm sustained.

*b. Bernhard von Pezold et al v Zimbabwe*

A near-identical approach was taken by another ICSID tribunal. In *Bernhard von Pezold et al v Zimbabwe*, the tribunal similarly awarded the investor the sum of US\$ 1 million for moral harm suffered at the hands of the host state.

This case involved an ICSID claim filed by a group of German and Swiss investors, along with separate claims by Zimbabwean companies in which those investors held shares. They alleged that Zimbabwe unlawfully expropriated their investment — namely, land owned by the Zimbabwean companies — through its 1992 land acquisition program. The claims were brought under the Germany-Zimbabwe and Switzerland-Zimbabwe BITs.

The tribunal upheld the claims, finding unlawful expropriation, unfair and inequitable treatment, and failure to ensure full protection and security.<sup>25</sup> It ordered restitution, or compensation if restitution was not possible.<sup>26</sup> The tribunal also awarded moral damages of US\$ 1 million each to one of the claimants, Mr Heinrich von Pezold, and the relevant Zimbabwean companies, due to threats, violence, kidnapping, beatings, torture, and humiliation inflicted by illegal settlers on Mr von Pezold and the companies’ employees.<sup>27</sup> The investors had “firearms put to [their] heads, and were kidnapped”, were beaten and tortured, and further humiliated.<sup>28</sup>

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<sup>25</sup> *Bernhard von Pezold* (n 19) [1016].

<sup>26</sup> *Ibid* [1020]- [1021].

<sup>27</sup> *Ibid* [923] and [1020.5].

<sup>28</sup> *Ibid* [898]-[899] and [902].

In its decision, the tribunal conducted an in-depth analysis of moral damages under international investment law, examining prior ICSID cases like *Desert Line v Yemen*<sup>29</sup> and *Lemire v Ukraine*<sup>30</sup>, and confirmed that a state's duty to provide reparation includes both material and moral harm, as reflected in the ILC Articles. It further emphasized, consistent with *Desert Line v Yemen* and *Lemire v Ukraine*, that moral damages should only be granted in exceptional cases.

It is noteworthy that Mr Bernhard von Pezold had requested US\$ 5 million as compensation for his moral harm suffered. However, the tribunal found such sum to be excessive, especially considering the analogous facts in *Desert Line v Yemen* and the moral damages award made to the investor in that case.<sup>31</sup> The *Bernhard von Pezold v Zimbabwe* tribunal noted that, when considering a claim for moral damages, the tribunal must confine itself to what would be a "prudent assessment" in the particular circumstances of the case.<sup>32</sup>

It is unfortunate that the ICSID tribunal did not fully engage with the quantification exercise, fleshing out the reasons for its decision. For instance, it is not entirely clear whether the tribunal considered that the factual matrix was mirroring that of *Desert Line*. In the latter, the host state's apparatus (i.e. governmental and armed officials) was directly responsible for the investor's moral harm, whereas in the former, the failure was of the host state to provide adequate security. In other words, in *Bernhard von Pezold* it was not the host state itself pointing the gun and physically assaulting the investor and its employees. That arguably demotes the state's responsibility and blameworthiness.

### c. Smurfit Holdings v Venezuela

The issue of moral damages in the context of an ICSID arbitration more recently arose once more in *Smurfit Holdings and Venezuela*.<sup>33</sup> In that case the investor, Smurfit, alleged that the Venezuelan State had expropriated the entirety of its investment, which comprised both corporate shareholdings and real estate assets. This expropriation formed part of Venezuela's broader policy of re-nationalising land located in areas deemed to be of strategic importance, where "exceptional circumstances of social interest or public utility so require".<sup>34</sup> The State

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<sup>29</sup> *Desert Line (n 10)*.

<sup>30</sup> *Lemire (n 19)*.

<sup>31</sup> *Bernhard von Pezold (n 19)* [921].

<sup>32</sup> *Ibid* [910].

<sup>33</sup> *Smurfit Holdings BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/18/49, Award, 23 August 2024.

<sup>34</sup> *Ibid* [357].

was further accused of forcibly assuming control over the management of several subsidiaries and of adopting financial measures specifically directed at foreign investors, including the claimant. In addition to claims for material loss, the investor sought compensation for moral damages arising from the moral harm allegedly suffered by both the company and its employees as a result of the State's conduct.

The ICSID tribunal upheld the investor's claims, finding, *inter alia*, that Venezuela had unlawfully expropriated the relevant investments.<sup>35</sup> It further concluded that the State had breached its obligation to accord fair and equitable treatment to the protected investments. Of particular relevance for present purposes, the tribunal affirmed its jurisdiction to entertain claims for moral damages and, while recognising the existence of such harm, awarded symbolic compensation in the amount of \$1 Bolivar. By contrast, the compensation granted for expropriation and other treaty violations amounted to approximately US\$ 395 million.

In respect of its moral damages award, the ICSID tribunal confirmed the approach adopted in *Desert Line v Yemen* that moral damages would only be available in exceptional cases.<sup>36</sup> The tribunal then undertook a detailed assessment of the witness statement and oral testimony of an employee who had been subjected to "approximately two months of illegal detention, part of that time in a secret prison".<sup>37</sup> The claimant alleged that its employees had endured ill-treatment, intimidation, harassment, public humiliation, attempted extortion, and physical coercion, among other forms of abuse. Having determined that "there was no legal basis for the arrest[s]", and observing that deprivation of a fundamental right such as personal liberty - particularly when effected outside ordinary legal procedures and accompanied by legal uncertainty- can inevitably give rise to anguish, anxiety, and psychological suffering, the tribunal concluded that "both cause and effect [were] grave enough to award moral damages".<sup>38</sup>

Notwithstanding its findings, the tribunal ultimately awarded moral damages in the nominal amount of \$1 Bolivar, apparently as a purely symbolic response to the State's internationally wrongful conduct. This stood in sharp contrast to the claimant's request for moral damages equivalent to "10% of the sum awarded", which would have amounted to approximately US\$40 million.<sup>39</sup> The tribunal rejected that request on the basis that "the Claimant [had] not provided

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<sup>35</sup> Ibid [777].

<sup>36</sup> Ibid [739]: ("The Tribunal agrees that awarding moral damages should be made in "exceptional circumstances," whether for a natural or legal person. It is a high standard.")

<sup>37</sup> Ibid [739].

<sup>38</sup> Ibid [740], [749] and [750].

<sup>39</sup> Ibid [752].

a full explanation or a methodology in which the 10% figure is grounded”. Yet, somewhat paradoxically, the tribunal offered no corresponding explanation as to why, “[i]n light of the circumstances of the case”, it considered an award of \$1 Bolivar to be appropriate.

The tribunal’s treatment of the quantification of moral harm -or, more accurately, its refusal to engage meaningfully with that exercise- is deeply unsatisfactory. Having expressly acknowledged that moral harm is no less real than material damage, the tribunal ought to have subjected the issue of quantum to a rigorous and transparent analysis, potentially informed by expert evidence. The award of a merely symbolic \$1 Bolivar fails to reflect the gravity of the moral harm suffered by the claimant and its employees and risks trivialising such injury altogether. This approach departs from settled and widely accepted principles of international law that moral harm must be fully, and not merely “symbolically” compensated.<sup>40</sup> By contrast, as will be seen from the below discussion, international human rights courts and tribunals have developed a more principled and methodologically coherent approach to moral damages, applying the same underlying legal standards. There is no convincing justification for this differential treatment. On the contrary, it exacerbates the fragmentation of sub-branches of customary international law.

#### *d. Zongshan v Nigeria*

It would be wrong to assume from the above that non-ICSID tribunals do not grant moral damages claims. An UNCITRAL tribunal in *Zhongshan v Nigeria*<sup>41</sup> awarded a Chinese investor a total of US\$ 75,000 in moral damages for harm suffered by its employees and officers as a result of threats, arrest, and improper treatment, including physical assault, by members of the Nigerian police over a period of up to two weeks.

The tribunal, presided over by Lord Neuberger of Abbotsbury, found that Nigeria had breached its treaty obligations, inter alia, to accord fair and equitable treatment to the investment and to refrain from unlawful expropriation. In addressing the claim for moral damages, the tribunal observed that there was “no doubt” that certain conduct attributable to organs of the Nigerian

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<sup>40</sup> See, Gultutan (n 11) 132 *et seq.*

<sup>41</sup> *Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria*, UNCITRAL, Award (26 March 2021).

State justified such an award, particularly in light of the “indefensible and serious infringement” of the chief finance officer’s human rights.<sup>42</sup>

Seeking to rationalise the quantum awarded, the tribunal explained that the amount awarded, which it considered to be “an appropriate sum”, corresponded to approximately US\$ 5,000 for each day of the chief finance officer’s mistreatment, supplemented by an additional sum to account for other inappropriate conduct directed at the investor’s employees and a director.<sup>43</sup> The tribunal did not elaborate on why the sum awarded was considered “appropriate”.

What is striking -and increasingly difficult to defend- is the award of only US\$75,000 in *Zhongshan* in circumstances that closely resemble those in *Desert Line* and *von Pezold*. Indeed, the disparity becomes even more pronounced when the underlying facts are compared: in *Desert Line*, the claimant’s personnel were unlawfully detained for a period of three days, whereas in *Zhongshan* the unlawful arrest and mistreatment extended for approximately ten days. Notwithstanding this greater duration and severity, the tribunal in *Zhongshan* awarded moral damages that were orders of magnitude lower than the million-dollar awards previously granted in comparable cases.

Crucially, the tribunal in *Zhongshan* made no attempt to explain or justify its departure from what had appeared to be an emerging arbitral practice of awarding substantial -often seven-figure- sums for serious moral harm in investor-state arbitration. In the absence of any articulated reasoning, the award risks appearing arbitrary. It may be inferred that the tribunal regarded million-dollar moral damages awards as excessive or disproportionate and consciously sought to align its approach more closely with that of international human rights courts, whose awards for non-pecuniary damage typically fall within the thousands rather than the millions. This inference is reinforced by the tribunal’s express reliance on the human rights violations committed by the Nigerian State, suggesting a deliberate cross-fertilisation with human rights jurisprudence.

While convergence between investment arbitration and international human rights law is, in principle, to be welcomed, such convergence cannot occur implicitly or selectively. Absent a clear methodological explanation, the tribunal’s approach in *Zhongshan* contributes to doctrinal uncertainty and exacerbates the fragmentation of moral damages jurisprudence.

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<sup>42</sup> Ibid [177].

<sup>43</sup> Ibid [178].

A more principled course would require future tribunals to engage directly with the specific factual matrix of each case and to determine quantum by reference to the actual severity, duration, and impact of the moral harm suffered by the investor and its personnel. To that end, expert (medical and other) evidence could -and should- be deployed to assist tribunals in assessing the extent of the harm and in arriving at an award that is neither symbolic nor arbitrary but instead reflects a reasoned and proportionate valuation of moral injury.

## **B. ECtHR decisions**

Having examined the approaches adopted by both ICSID and non-ICSID investment tribunals in relation to claims for moral damages, this paper now turns to the jurisprudence of the ECtHR. It considers how that court identifies and quantifies moral harm, with a view to determining whether a more coherent and normatively defensible methodology has emerged in that context and to assessing the potential for meaningful cross-fertilisation between the two fields.

### **a. Garabayev v Russia<sup>44</sup>**

The case involved alleged breaches of Articles 3 and 5 of the European Convention on Human Rights (“ECHR”), which protect against torture and guarantee the right to liberty and security, respectively.

The applicant, Murad Redzhepovich Garabayev, a dual citizen of Russia and Turkmenistan, argued that he had been unlawfully extradited to Turkmenistan at the request of Turkmen authorities, who had accused him of embezzling US\$ 40 million in state assets through abuse of office.<sup>45</sup>

After arriving in Turkmenistan, Mr Garabayev reported being threatened with torture directed at him and his family. He stated that he was physically beaten on his head and back during interrogation by a public prosecutor, resulting in lasting injuries over several months. Additionally, he was denied legal counsel, confined in a cramped cell lacking toilet facilities, deprived of opportunities for exercise, and isolated from outside contact. Mr Garabayev denied all charges brought against him.<sup>46</sup>

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<sup>44</sup> *Garabayev v. Russia*, Merits and Just Satisfaction, Judgment of 30 January 2008.

<sup>45</sup> *Ibid* [9].

<sup>46</sup> *Ibid* [29]-[31].

Mr Garabayev did not seek any compensation for financial losses but requested EUR 81,000 for non-material harm suffered throughout his entire detention, plus an additional EUR 50,000 for the distress and suffering he endured as a result of being extradited to Turkmenistan. Russia contended that the amounts claimed were excessive and not supported by sufficient evidence.<sup>47</sup>

The ECtHR unanimously determined that, at the time of his extradition, there were strong reasons to believe that the applicant faced a genuine risk of torture, and that the extradition had been carried out without adequately considering that danger. As a result, the Court found violations of the applicant's rights under Article 3 (prohibition of torture), as well as Articles 5 and 13 (right to liberty and security, and right to an effective remedy, respectively).

Regarding compensation, the Court awarded the applicant a total of EUR 20,000, noting that this sum was determined on an equitable basis.<sup>48</sup> Addressing Russia's argument, the Court clarified that an applicant is not required to provide proof of non-material damage suffered. The Court concluded that, given the seriousness of the violations, the Mr Garabayev's suffering could not be sufficiently addressed merely by acknowledging the breaches of the Convention.

It is difficult to square this decision with the approach taken by ICSID tribunals, where moral damages speak in millions, not thousands. The relevant facts are not too dissimilar. In fact, the fact pattern is analogous. The *Garabayev* case, like *Desert Line* and *Bernhard von Pezold*, similarly concerns a factual setting that involves physical abuse and threats to one's life and family.

The inconsistent approaches adopted by international tribunals in quantifying moral damages undermine the coherence and predictability of decision-making. It is accepted that moral harm is by its nature difficult to quantify precisely, but the wide disparity in awards for similar types of harm indicates the absence of clear standards guiding the assessment. The inconsistency in approach risks perceptions of arbitrariness and unequal treatment. Fairness and equity demand that tribunals strive for consistency, applying principled criteria that ensure comparable harms result in comparable awards.

We consider another ECtHR decision to demonstrate that *Garabayev v Russia* is not an outlier decision in the ECtHR jurisprudence.

b. *Hellig v Germany*<sup>49</sup>

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<sup>47</sup> Ibid [110]-[112].

<sup>48</sup> Ibid [113]-[115].

<sup>49</sup> *Hellig v. Germany*, Merits and Just Satisfaction, Judgment of 7 July 2011.

Mr Hellig, a German national serving a prison term, contended that his placement in a security cell constituted inhuman and degrading treatment under Article 3 of the ECHR, and he sought compensation as just satisfaction for this alleged violation. Specifically, he asserted that he was moved from his single-occupancy cell to a shared cell housing two other prisoners, which lacked any partition separating the toilet from the main living area. When he refused to relocate, he claimed he was threatened with the use of force, leading him to leave his cell and be escorted to the shared cell. Upon further refusal to enter that cell, he alleged that prison staff physically forced him inside. He was subsequently taken to a security cell, where he was strip-searched and left without clothing. The German Government denied these allegations, asserting that the applicant had physically attacked prison staff.<sup>50</sup>

The ECtHR, proceeding on the basis that the applicant had remained naked in the security cell for all seven days of his detention there, concluded that his rights under the ECHR had been breached.<sup>51</sup> The Court observed that depriving a prisoner of clothing can provoke feelings of fear, distress, and humiliation, amounting to degrading treatment. It further noted that the authorities had failed to explore less intrusive alternatives, such as providing tear-resistant clothing, before resorting to such extreme measures. The Government's inability to offer adequate justification for this severe treatment played a significant role in the Court's finding of a violation.

The applicant had sought EUR 40,000 in compensation for the suffering he endured due to his injuries, forced transfer, and detention in the security cell. The Court, applying equitable principles and recognizing that the complaint succeeded only in part, awarded him EUR 10,000, one quarter of the amount claimed.<sup>52</sup> There was no elaboration on what those equitable principles are or how they ought to apply in such or similar cases.

This case also highlights the notable discrepancy between the compensation awarded for non-pecuniary, moral harm under the ECtHR framework and the amounts typically granted to investors in ICSID arbitration in comparable factual circumstances. While it is true that applicants before the ECtHR generally claim more modest amounts for moral damages, this reflects established court practice, which tends to award only relatively modest sums for non-pecuniary harm. In comparable situations, there is no justification for treating investors under

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<sup>50</sup> Ibid [6]-[9].

<sup>51</sup> Ibid [55]-[58].

<sup>52</sup> Ibid [63]-[65].

the ICSID system more generously than individuals seeking redress before international human rights courts. A consistent and fair approach should ensure that similar harms attract similar compensation, regardless of the forum.

The article will consider the jurisprudence of the IACtHR in respect of claims for moral harm compensation, to analyse whether international human rights courts consistently “under-write” in comparison to investment tribunals.

### C. IACtHR decisions

#### a. *Atala Riffo v Chile*<sup>53</sup>

The case involved an application by a Chilean judge who alleged that she had been unlawfully discriminated against and lost custody of her children after revealing her sexual orientation as a lesbian, in violation of her rights under the Inter-American Court of Human Rights (“IACHR”), which prohibits discrimination on grounds including race, sex, religion, political opinion, national or social origin, economic status, and “any other social condition.” This case is regarded as one of the first before the IACHR to directly address LGBTI rights and discrimination based on sexual orientation.

Ms Atala married Mr Allendes in 1993, but by early 2002 they decided to separate. They initially agreed that Ms Atala would retain custody of their three daughters. In November 2002, Ms Atala’s partner, Ms de Ramón, moved into the family home, and they began living together as a family. Mr Allendes objected to this arrangement and, on 14 January 2003, filed for custody, arguing that the girls’ physical and emotional wellbeing would be seriously harmed if they remained with Ms Atala. He claimed that Ms Atala’s sexual orientation and her cohabitation with another woman were detrimental to the children’s development and even asserted that the children faced an elevated risk of contracting sexually transmitted diseases due to the nature of a lesbian relationship.<sup>54</sup>

The Chilean Supreme Court, by a narrow three-to-two majority, awarded permanent custody to the father. The Court concluded that Ms Atala had prioritized her own interests over those

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<sup>53</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 254 (24 February 2012).

<sup>54</sup> *Ibid* [30]-[31].

of her daughters by choosing to live with a same-sex partner in the same home where she was raising them, apart from their father. It considered there to be a genuine risk that the girls would face social discrimination because of their mother's relationship and noted that evidence suggested the children were confused about their mother's sexuality.<sup>55</sup>

The IACtHR ruled in favour of Ms Atala, finding that Chile had violated, among other rights, her rights to equality and non-discrimination as well as her right to privacy.<sup>56</sup> The Court specifically observed that the Chilean Supreme Court's references to the girls' supposed need to grow up in a "normally structured family that is appreciated within its social environment" rather than in an "exceptional family" revealed a narrow and stereotypical view of what constitutes a family.

The IACtHR awarded Ms Atala US\$ 10,000 in pecuniary damages to cover expenses related to her medical and psychological treatment. She had also sought US\$ 100,000 in non-pecuniary damages for herself and each of her daughters, citing the emotional suffering caused by the violation of her fundamental rights, the impact on her life plans, and the pain of separation and loss endured by both mother and children. The IACtHR, applying its standard equitable approach and considering what it deemed appropriate in the circumstances, awarded Ms Atala USD 20,000 and USD 10,000 to each of her daughters. The Court noted that its assessment of non-pecuniary damages reflected consideration of the compensation it had granted in other cases, the specific circumstances of this case, the harm suffered by the victims, the changes in their living conditions, and other intangible effects.<sup>57</sup>

The decision is open to criticism for granting disproportionately modest non-pecuniary compensation, given the severity of the emotional harm suffered by Ms. Atala and her daughters. The court's monetary award falls short of adequately acknowledging the extent of their distress, humiliation, and suffering. This shortfall is particularly stark when compared with the significantly larger sums frequently awarded by investment tribunals in analogous or even less serious circumstances.<sup>58</sup> By awarding relatively low amounts in international human rights cases, the court risks establishing an insufficient benchmark for future claims, thereby undermining the credibility and effectiveness of moral damages as a means of delivering justice.

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<sup>55</sup> Ibid [54]-[57].

<sup>56</sup> Ibid [314].

<sup>57</sup> Ibid [145], [294], [296] and [299].

<sup>58</sup> See, *Desert Line (n 10)*; and *Bernhard von Pezold (n 19)*.

b. Gonzales Lluy et al v Ecuador<sup>59</sup>

The case concerned medical errors during a blood transfusion that led to a young girl contracting HIV. Talía Gabriela Gonzales Lluy, born on 8 January 1995, was just three years old when she was infected with HIV after receiving a transfusion of blood from a Red Cross blood bank at a private clinic.<sup>60</sup> The transfusion was urgently needed to address severe and persistent nose bleeding. The blood, donated by a donor located by Ms Lluy's mother, Mrs Teresa Lluy, was administered the same day due to the emergency, but testing for HIV and other diseases was only conducted the following day, on 23 June 1998, by a Red Cross biochemist.<sup>61</sup>

Around fifteen days later, the donor was asked to return for additional blood samples, reportedly because "the phials had spilled."<sup>62</sup> When the donor questioned the need for further testing, he was reassured that it was merely for storage purposes. However, approximately a week later, the donor received a call from the Red Cross informing him that he was HIV-positive. Further testing confirmed this diagnosis. Despite reassurances from the Red Cross that his blood had not been used for Ms Lluy's transfusion, subsequent tests on Ms Lluy confirmed she had contracted HIV.

Mrs Lluy initiated various civil and criminal proceedings in Ecuador to hold those responsible accountable and seek compensation. Medical expert evidence ultimately concluded that the HIV infection had been transmitted to Ms Lluy through the transfusion of the donor's blood.<sup>63</sup>

The IACtHR found Ecuador responsible for the transmission of HIV to Ms Lluy, determining that the actions of private health care providers could be attributed to the state.<sup>64</sup> The Court explained that states have a duty not only to regulate and oversee public health care institutions but also private entities offering health care services. This obligation stems from the state's responsibility to protect individuals' rights to life and personal integrity, which are especially at risk when a person is receiving medical treatment. States must therefore put in place regulatory frameworks and supervisory mechanisms for all health care services provided within

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<sup>59</sup> *Gonzales Lluy et al. v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 102/13 (1 September 2015). See also Emma Samyan, 'Gonzales Lluy et al. v. Ecuador' (2017) 40(3) *Loyola of Los Angeles International and Comparative Law Review* 1697.

<sup>60</sup> *Ibid* [64].

<sup>61</sup> *Ibid* [75]-[78].

<sup>62</sup> *Ibid* [79] *et seq.*

<sup>63</sup> *Ibid* [105].

<sup>64</sup> *Ibid* [175] *et seq.*

their jurisdiction, and failure to do so incurs international liability. States must establish proper systems for inspecting institutions, handling and investigating complaints, and ensuring appropriate disciplinary or judicial action when patients' rights are violated.

In holding Ecuador liable, the IACtHR noted that Ecuador's delegation of blood bank management to the Red Cross lacked adequate supervision. It was also established that the Red Cross Blood Bank operated with scarce resources and failed to maintain comprehensive records of donors, tests conducted, and blood product distribution.<sup>65</sup>

As a result, Ecuador was found to have violated Articles 4 (right to life) and 5 (right to humane treatment) of the IACHR.<sup>66</sup> Additionally, the IACtHR found that Ecuador violated Article 5(1) (right to physical, mental, and moral integrity) with respect to Ms Lluy's mother, Mrs Lluy, and her brother, Mr Iván Mauricio Lluy, who faced discrimination and stigma due to their association with an HIV-positive family member.<sup>67</sup> Mrs Lluy was dismissed from various jobs, and Mr Lluy experienced stigma and exclusion at school. Both devoted significant physical, emotional, and financial resources to supporting Ms Lluy, resulting in a lasting state of anguish, uncertainty, and insecurity for all three.

As part of its judgment, the IACtHR ordered Ecuador to provide Ms Lluy with free and immediate medical and psychological or psychiatric care, including all necessary medication.<sup>68</sup> The Court also required Ecuador to fund Ms Lluy's undergraduate and postgraduate education through scholarships and grants.<sup>69</sup>

In terms of compensation, the IACtHR awarded US\$ 50,000 each to Mrs Lluy and Mr Lluy for pecuniary damages related to expenses incurred for Ms Lluy's care. The Court also granted non-pecuniary damages, awarding US\$ 350,000 to Ms Lluy in recognition of the severe psychological harm, prolonged depression, and behavioural disorder resulting from her infection and life with HIV. Additional non-pecuniary damages of US\$ 30,000 and US\$ 25,000 were awarded to Mrs Lluy and Mr Lluy, respectively, for the moral suffering they endured due to Ms Lluy's illness. Notably, the total compensation awarded fell short of half the amount requested by the victims, who had sought no less than US\$ 1 million.<sup>70</sup>

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid [191]

<sup>67</sup> Ibid [213]-[214].

<sup>68</sup> Ibid [358], [359] and [412].

<sup>69</sup> Ibid. [372] and [373].

<sup>70</sup> Ibid [410] and [413]-[416].

The decision arguably represents a positive development, and the compensation awarded seems fair and appropriate in light of the circumstances. Nevertheless, despite the relatively high amount granted, it remains difficult to reconcile this sum with the reality that Talía will face the lifelong impact of living with HIV. This is particularly striking when compared to the far greater sums routinely awarded by investment tribunals in cases involving less severe and serious harm.<sup>71</sup>

#### **D. Conclusion**

The above analysis demonstrates that international courts and tribunals have hereto adopted divergent approaches to valuing and *quantimising* moral harms suffered.<sup>72</sup> This is done without any proper justification. International courts and tribunals have so far failed to engage properly with the jurisprudence of their peers. Such wilful shutting of the eye has resulted in extreme divergence between the various sub-branches of international law. This is both unfortunate and unacceptable.

The divergent sums awarded by courts and tribunals operating under different settings but in respect of similar moral harms are difficult to justify and result in unfairness.<sup>73</sup> Cross fertilisation and convergence between the sub-branches of international law is therefore to be encouraged and strived for to ensure fairness and consistency of treatment.

Many commentators have remarked that given the inherently discretionary and highly fact-dependent nature of moral damages quantification, it may ever be possible to develop or discern any guidelines.<sup>74</sup> It is said that since the assessment relies heavily on the arbitrators and judges' collective understanding of equitableness, reasonableness etc., one may never be able to ascertain generally applicable guidelines. That being the case, IACtHR tribunal decisions show that the matter may be addressed from a scientific angle. Further, there is support from for the

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<sup>71</sup> See, *Desert Line (n 10)*; and *Bernhard von Pezold (n 19)*.

<sup>72</sup> Gilleri, G., "Chapter 4: Compensation at the intersection of tort law and international human rights law" in *Comparative Tort Law* (2021, Edward Elgar Publishing), 82, where the author explains that the "three regional courts [i.e., ACtHPR, IACtHR, and ECtHR] differ in terms of discretionary powers or bounded duties to award compensation" for moral harm.

<sup>73</sup> Gultutan (n 11) 174-175. See also, Marc Allepuz, 'Moral Damages in International Investment Arbitration' (2013) 17(5) *Spanish Arbitration Review* 5, 13-14.

<sup>74</sup> See, Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008), 312; and Lars Markert and Elisa Freiburg, 'Moral Damages in International Investment Disputes: On the Search for a Legal Basis and Guiding Principles' (2013) 14(1) *The Journal of World Investment & Trade* 1, 42.

proposition that valuing moral harm could be established on concrete foundations based on publicly available data and tangible factors.

#### IV. QUANTIFICATION OF MORAL DAMAGES

One of the conceptually most difficult tasks in law has been the assessment of non-pecuniary harm, i.e. moral harm. International and national courts and tribunals have and continue to be grappled with the task, with varying degrees of success. Various techniques and approaches have been experimented.

Nowhere has the experimentation and attempt to quantify moral harm probably been more extensive than in the United States, where both courts and scholars have sought to rationalise awards for pain and emotional suffering in litigation cases where astronomical sums could be awarded for torts committed.<sup>75</sup> Among these various approaches, the most influential and widely debated method for valuing non-pecuniary harm is the concept of willingness to pay to avert the risk of harm (the “WTP”).<sup>76</sup>

At its core, WTP is an economic valuation technique designed to assign a monetary value to harms that are not openly traded on a market and have no precise, set value. Instead of focusing on the amount of compensation a claimant retrospectively seeks once the harm has materialised, the method considers the sum that individuals would be prepared to pay in advance to avoid the risk of harm altogether or to minimise the risk of experiencing it.

As Avraham put it, the approach asks one “to assess how much a rational individual would have paid ex ante to eliminate the risk that caused the pain-and-suffering loss”.<sup>77</sup> In the context of pain and suffering, this involves estimating the monetary amount that individuals would

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<sup>75</sup> See, *Tierney Darden, Trudy Darden, and Tayah Minniefield v. City of Chicago and City of Chicago Department of Aviation* (2017) Jury Verdicts LEXIS 8941, where a 24-year-old was awarded US\$ 148 million for a severed spinal cord and permanent paralysis from the waist down due to poor maintenance and structure of a shelter, causing it to fall on the claimant during a storm.

<sup>76</sup> See, M. Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries* (1995) 83 *California Law Review* 773; and Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change* (2006) 100 *Northwestern University Law Review* 87. N.B. Whilst technically the willingness to accept risk and willingness to pay to eliminate risk are distinct concepts, they are treated as being synonymous for present purposes for simplicity purposes and given the immateriality of the matter considering the topic of discussion. However, when engaged in the quantification of non-pecuniary harm claims, parties and tribunals would need to explain the basis for the claim and the underlying rationale.

<sup>77</sup> Avraham (n 78) 106.

rationally exchange to avoid physical pain, emotional distress, or a diminished capacity to enjoy life.<sup>78</sup>

By way of illustration, consider a hypothetical scenario in which an individual receives an advance “courtesy call” from the state police or armed forces of a rogue state informing them that, the following day, they will be arrested and charged with a serious criminal offence, potentially resulting in several years’ imprisonment. Assume further that the caller adds -under the guise of benevolence- that the impending arrest and prosecution could be avoided upon payment of a specified sum. The question then becomes: how much would one be willing to pay, in monetary terms, to avert that outcome? Sugarman explains:

Pain and suffering, loss of pleasure, a shortened life, dismemberment, disfigurement, and the like are clearly injuries. They are harms that nearly everyone would prefer to avoid. Indeed, if offered the choice, people would opt to pay money to avoid suffering these injuries rather than suffer them. In fact, to avoid some grievous harms people would be willing to give up all or nearly all of what material wealth they have. To take an extreme example, kidnap victims who genuinely fear for their lives often want their families to offer all or nearly all of what material wealth they have in order to free them... In a world where money can often be used to buy pleasure or relief from pain, and where having money is typically associated with status and power, it is understandable that victims themselves might want to receive money in compensation for their injuries.<sup>79</sup>

Of course, in the illustration the occurrence of the event is a near certainty; where such is not the case, the risk of the event occurring, i.e. its likelihood, will need to be factored into the equation. What is the value of several years of personal liberty such that an individual would rationally choose to sacrifice that amount to avoid arrest and incarceration, or the risk thereof? It is this type of counterfactual inquiry that lies at the heart of the WTP methodology.

The appeal of the WTP approach lies in its effort to anchor valuation in identifiable and expressible preferences rather than unstructured intuition of disinterested persons. It provides the assessor, whether a judge, jury or arbitrator, with a framework through which it may rationalise the assessment of non-pecuniary harm by asking what level of monetary sacrifice would reasonably correspond to the gravity of the harm suffered. In doing so, it aspires to

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<sup>78</sup> Id.

<sup>79</sup> Sugarman (n 3), 306-307.

produce an award that more closely reflects the magnitude of the injustice endured and the compensation required to correct it, rather than one derived from discretionary or impressionistic judgment alone.

However, WTP is not without serious limitations. First and foremost, individuals differ significantly in their pain thresholds, fear of pain, risk aversion, and psychological resilience. A person who is highly risk-averse or acutely fearful of pain may be willing to pay far more to avoid a given injury than someone with a higher tolerance or different life experiences. One's financial standing in life may also have an effect on how much one is willing to pay to avert a risk. As a result, willingness to pay calculations inevitably involve abstraction and averaging, and they cannot perfectly capture the lived, subjective reality of any particular person's suffering.<sup>80</sup>

That being said, the alternatives, such as monetary caps on non-pecuniary damages and category-based harm schedules advocated by some, and some of which have in fact been deployed by certain jurisdictions, too have their problems, often rooted in concerns of injustice, arbitrariness and inoperability.<sup>81</sup> An entirely equitable approach is also unlikely to remedy the defects in the quantification of moral harm. The compared jurisprudence of the ECtHR and of international investment tribunals illustrate that what is equitable to one as regards the quantum for the harm is highly inequitable for another.<sup>82</sup> A consistent approach that treats individuals suffering comparable harm in compatible manner, thus being compliant with the principle of horizontal equity, is required.<sup>83</sup>

Whilst the category-based harm schedules could be a mid-way solution, that approach risks overly rigidifying non-pecuniary harms and their maximum quantification, and risks under-compensating. The WTP approach represents the optimal solution by attempting to fully compensate for the harm caused to the individual. Its emphasis is on the impact of the nature of harm on the individual and to what lengthly the individual would have gone to prevent the

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<sup>80</sup> See, e.g., Eyal Zamir, 'Chapter 1: Loss Aversion: An Overview', in *Law, Psychology, and Morality: The Role of Loss Aversion* (OUP, 2014).

<sup>81</sup> See, Geistfeld (n 78) 789 *et seq.* For a detailed assessment of capping non-pecuniary damages and scheduling losses etc., see Avraham (n 78) 97 *et seq.*; and Amram, D., and Comandé, G., "Chapter 16: Tort damages for non-economic losses: methodological approaches for comparative analysis served by new technologies" in *Comparative Tort Law* (2021, Edward Elgar Publishing), 337 *et seq.*

<sup>82</sup> See, Fikfa, V., Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it's all about the state (2020) 33(2) *Leiden Journal of International Law*, 335-369, whose empirical analyses results in the conclusion that "the victim is clearly not at the centre of the Court's analysis...[and that]... the specific state conduct importantly influences the compensation awarded"; this suggests that the ECtHR's primary focus is not generally to compensate the individual complainant for the harm sustained, but rather to punish and deter breaches.

<sup>83</sup> Sugarman (n 3), 314.

occurrence of that harm. Evidence from psychologists and other medical experts could be mandated before the tribunal reaches any determination so as to fully assess the impact of the non-pecuniary harm on the individual, and to what lengths the individual would have gone to evade the said harm. As Amram and Comandé note, medical evaluation is critical in offering an objective description and a uniform estimate of the psychophysical impairment.<sup>84</sup> Without it, the court or tribunal would be unable to make a proper and accurate assessment of the nature and extent of the non-pecuniary harm caused by the violation.

Geistfeld therefore rightly concludes that whilst not being a perfect cure, the “ex ante full-compensation” approach based on the willingness to pay is one that is capable of “fairly compensate[ing] the plaintiff even though the award may not fully reflect the value of the injury caused”.<sup>85</sup> This is arguably the nearest one could come to attaining the ultimate aim of correcting the injustice that occurs following one’s harm to another in a manner unpermitted by law.<sup>86</sup> The Aristotelian theory of corrective justice requires that “every wrong must be corrected by a counter action. There must be an equality of quantities; where one wrongfully harms another, the wrongdoer must compensate the victim’s loss.”<sup>87</sup>

Accordingly, despite its shortcomings, WTP remains the most coherent, logical, and legally defensible framework currently available for valuing moral harm. Its imperfections are preferable to systems that rely predominantly on unstructured judicial or arbitral discretion, which often produce inconsistent, opaque, and difficult-to-justify awards, or to its alternatives which seem overly complicated and impractical to implement.<sup>88</sup> By offering a principled methodology that aspires to transparency, comparability, and rational justification, willingness to pay provides a more defensible foundation for the monetary assessment of non-pecuniary harm than ad hoc or purely intuitive approaches. Geistfeld’s words that the “ex ante full-compensation award provides a uniform method for determining the award, thereby introducing a degree of procedural equity that is presently lacking” ring true to this day.<sup>89</sup> As

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<sup>84</sup> Amram and Comandé (n 82) 337.

<sup>85</sup> Geistfeld (n 78) 815.

<sup>86</sup> See Ernest J. Weinrib, ‘Corrective Justice’ (1992) 77 *Iowa Law Review* 403; and Erik Encarnacion, ‘Corrective Justice as Making Amends’ (2014) 62(2) *Buffalo Law Review* 451. See also, Geistfeld (n 78) 818.

<sup>87</sup> Gultutan (n 11) 29.

<sup>88</sup> See, e.g., Avraham’s proposed “system of nonbinding age-adjusted multipliers (“NBAAM”) [that] would be associated with the medical costs of an injury in order to calculate the pain-and-suffering component”: Avraham (n 78) 100 *et seq.*

<sup>89</sup> Geistfeld (n 78) 831.

he explained: “A uniform method of computing damages should also lead to greater uniformity in damages awards for plaintiffs with similar injuries.”<sup>90</sup>

It is noteworthy that elements of a WTP-type reasoning can already be discerned in the UNCITRAL tribunal’s assessment of moral damages in *Zhongshan*.<sup>91</sup> It will be recalled that in that case, the tribunal held that the total award of US\$ 75,000 constituted “*an appropriate sum*”, principally because it “represent[ed] around USD 5,000 for each day of Mr Zhao’s mistreatment, together with an additional amount reflecting the other inappropriate conduct of representatives of Nigeria towards employees and a director of Zhongfu.” The tribunal thus appears to have translated Mr Zhao’s loss of liberty and mistreatment into a daily monetary rate of approximately US\$5,000, implicitly identifying that figure as an adequate monetary equivalent for each day of unlawful incarceration and abuse. This form of reasoning suggests that a structured, rate-based valuation of moral harm is not alien to investment arbitration practice and that a more explicit adoption of such techniques would neither be conceptually novel nor institutionally unwelcome.

International courts and tribunals confronted with claims for moral harm would benefit from adopting, or at least drawing upon, such structured valuation techniques. Although international adjudication operates in a distinct normative environment, the underlying challenge is the same: converting intangible harm into monetary compensation in a manner that is reasoned, transparent, and justifiable. Reliance on broad discretion or formulaic references to “equitable considerations” has too often resulted in unpredictable and weakly reasoned awards, particularly in investment arbitration and human rights disputes. Incorporating willingness to pay based reasoning -whether directly or as an anchoring framework- would assist tribunals in articulating why a particular quantum is appropriate and proportionate, thereby enhancing the legitimacy of their decisions.

Moreover, parties themselves should be encouraged to engage with such methodologies in their submissions. Rather than advancing moral damages claims in abstract or symbolic terms, claimants should be pushed towards substantiating their quantum by reference to recognised economic valuation techniques, empirical studies, or structured analogies drawn from domestic practice. Likewise, respondent states should test, critique, or refine those methodologies, enabling tribunals to adjudicate moral harm on the basis of competing, reasoned valuation

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<sup>90</sup> *Id.*

<sup>91</sup> *Zhongshan* (n 41).

models rather than intuition alone. Such an approach would not eliminate discretion, but it would discipline it, promoting consistency, predictability, and analytical rigour.

## V. CONCLUSION

The analysis undertaken in this article demonstrates that international law continues to grapple with the recognition and quantification of moral damages, despite their long-standing acknowledgment in principle. From the *Lusitania* decision in 1923 to more recent jurisprudence of ICSID tribunals, the ECtHR, and the IACtHR, it is clear that the entitlement to compensation for non-pecuniary harm is not in question; what remains unsettled is how such harm should be valued.

The disparities between *fora* - where investment tribunals often award millions while human rights courts award modest sums for similar or greater suffering - highlight a troubling lack of coherence across the international legal order. This fragmentation not only undermines consistency and predictability but also risks eroding confidence in the fairness of international adjudication.

This article has shown that quantification of moral harm need not be left entirely to judicial discretion or equitable guesswork. Economic methodologies long used in other contexts, such as the willingness to pay methodology long debated and utilised in the United States to quantify and value pain and suffering related loss and damage, can provide tribunals with structured, evidence-based frameworks for decision-making. None of those approaches is flawless, and each must be carefully adapted to the legal and factual context. Yet, when combined with forensic psychological assessments and supported by factual evidence, they can assist tribunals in moving beyond symbolic awards towards compensation that reflects the true extent of harm suffered.

The pressing need, therefore, is for cross-fertilisation and convergence among international courts and tribunals. While complete uniformity may be unrealistic, greater engagement with comparative jurisprudence and methodological tools can help narrow the existing gaps. Tribunals should resist the temptation to shut their eyes to the reasoning of their counterparts and instead embrace practices that promote fairness and coherence across the international legal order.

Ultimately, quantifying moral damages will always involve a degree of approximation. But structured methods grounded in empirical data offer a better alternative to the inconsistent and *ad hoc* approaches that currently prevail and better assist in the realisation of corrective justice. By adopting these techniques, international adjudicators can align more closely with the principle of full reparation, reinforce the rule of law, and deliver outcomes that are both fairer to victims and more credible in the eyes of the international community.