

JUST COMPENSATION? WHETHER “BUSINESS &
HUMAN RIGHTS” COMPENSATION AWARDS
SHOULD EMBRACE DETERRENCE
CONSIDERATIONS

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The Business & Human Rights (BHR) field increasingly dominates the discussion of corporate accountability for human rights violations. BHR, broadly, is the implementation of the U.N. Guiding Principles on Business & Human Rights (UNGPs), the “Third Pillar” of which guarantees Access to Remedy. Remedies under the UNGPs can be issued by company-led Operational-level Grievance Mechanisms (OGMs) as well as courts, and can theoretically come in many forms, although monetary compensation remains most typical. In issuing remedies, BHR currently follows the lead of international human rights (IHR) law more generally. It sets compensation awards by reference to the established mandate to make the affected person “whole,” typically without reference to whether the award will serve as a deterrent to future human rights violations by the same or other actors. This Article proposes that BHR scholars and practitioners need to consider the dimensions of compensation awards beyond just compensation and more articulately discuss the role of the deterrence rationale in award formulation. It frankly reviews existing legal and political controversies surrounding deterrence in the civil damages context across different countries and, relatedly, the constrained nature of the role of deterrence in IHR. It then more narrowly considers whether the same constraints apply when the award debtor is a corporation rather than a State. It then turns to normative questions, asking whether BHR really needs deterrence given the deterrent threat of negative publicity and other tools leveraged in BHR practice. In contrast, the Article considers the broader role of deterrence in systemic legitimacy and more complex stakeholder interests, such as a company’s interest in deterring cost-saving but rights-abusing practices by its competitors. The Article concludes that deterrence considerations could add critically-needed fuel to stalled existing efforts by IHR and BHR tribunals to more fully appreciate the multiple dimensions of harm caused by human rights abuse, and it argues that if BHR remedies are to deliver a justice that will be respected by

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stakeholder communities—and deliver corresponding finality and relationship benefits to companies—BHR may have to move past IHR precedent and more explicitly embrace deterrence considerations as an integral part of just compensation.

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“For the object and purpose of human rights treaties to be achieved, much more attention should be given to compensatory damages that truly provide redress.”

—Dinah Shelton¹

I. INTRODUCTION

The “Business & Human Rights” (BHR) framework established by the U.N. Guiding Principles on Business & Human Rights (UNGPs)² has achieved impressive levels of corporate

1. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (3d ed. 2015) 376 [hereinafter SHELTON, REMEDIES 3d ed.].

2. Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereafter UNGP Text]; see also U.N. Office of the High Commissioner of Human Rights [OHCHR], *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UNGP Pamphlet]. The UNGPs were developed through a stakeholder engagement process from 2004 to 2011 by U.N. Special Representative to the Secretary-General, Harvard Professor John Ruggie, and were endorsed by the UN Human Rights Council in June 2011. See, e.g., John Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights* (Harv. Univ. John F. Kennedy Sch. of Gov’t, Corporate Responsibility Initiative Working Paper Ser. No. 67, 2017), <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1564> [hereinafter RUGGIE, SOCIAL CONSTRUCTION]. For more on the relationship of BHR to “corporate accountability” and other related discourses, see Aaron Marr Page, *The Alchemy of “Business & Human Rights” (Part I): The BHR Boom Years*, HUFFINGTON POST (last visited 26 Feb. 2018), http://www.huffingtonpost.com/aaron-marr-page/recalibrating-the-busines_b_9540850.html?1459267563 [hereinafter Page, *Alchemy Part I*]. See generally Aaron Marr Page, *Blog Series: The Alchemy of Business & Human Rights (Parts I-V)*, http://www.huffingtonpost.com/aaron-marr-page/blog-series-the-alchemy-o_b_9908856.html (last visited 26 Feb. 2018); Jena Martin Amerson, “*The End of the Beginning?*”: A Comprehensive Look at the U.N.’s Business and Human Rights Agenda from a Bystander Perspective, 17 FORDHAM J. CORP. & FIN. L. 871 (2012); Larry Catá Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights: Be-*

participation in its first seven years.³ As described by Professor Ruggie:

The UNGPs are built on a three-pillar “Protect, Respect and Remedy” framework: (1) states have a *duty to protect* against human rights abuses . . . ; (2) business enterprises have an independent *responsibility to respect* human rights . . . ; (3) where individuals’ human rights are harmed, they should have *access to effective remedy*, and both states and enterprises have a role to play in enabling this to occur.⁴

tween Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All, 38 *FORDHAM INT’L L.J.* 457 (2015).

3. See, e.g., John G. Ruggie and John F. Sherman III, *The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: Reply to Professors Bonnitza and McCorquodale* at 1 (forthcoming in the *EUROPEAN JOURNAL OF INTERNATIONAL LAW*), available at <https://ssrn.com/abstract=2997128> [hereinafter Ruggie & Sherman] (reciting endorsements of UNGPs); John G. Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* 1 (Harv. Univ. John F. Kennedy Sch. of Gov’t, Jan. 23, 2015), <http://ssrn.com/abstract=2554726> [hereinafter Ruggie, *Global Public Domain*] (discussing UNGPs “authoritative stature” and “uptake by other international standard setting bodies”). An estimated thirty-four percent of FTSE 100 companies now have policies in place that expressly reference or otherwise reflect UNGP principles. A recent call for detailed human rights-related information by the Business and Human Rights Resource Centre (BHRRC), a leading BHR promoter and information portal, elicited an over fifty percent response rate, and the BHRRC’s incident-based calls for responses from corporations now have an over eighty percent response rate. See *About Us*, *BUS. & HUM. RTS. RESOURCE CTR.*, <https://business-humanrights.org/en/about-us> (last visited 26 Feb. 2018); *Action Platforms*, *BUS. & HUM. RTS. RESOURCE CTR.*, <https://business-humanrights.org/en/company-action-platform/in-sights-and-analysis> (last visited 26 Feb. 2018).

4. RUGGIE, *SOCIAL CONSTRUCTION*, *supra* note 2, at 1. The legal character of the corporate “responsibility to respect” is contested. Professor Ruggie has described it as a “a transnational social norm, not an international legal norm.” Ruggie & Sherman, *supra* note 3, at 4. *But see id.* (the responsibility “exists ‘over and above’ all applicable legal requirements”); *Frequently Asked Questions About The Guiding Principles On Business And Human Rights*, Office of the High Commissioner on Human Rights, HR/PUB/14/3 at 30 (2014), available at http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf (last visited 26 Feb. 2018) (“[T]he corporate responsibility to respect human rights exists above and beyond the need to comply with national laws and regulations protecting human rights.”); Lucy Amis, *A Guide for Business: How to Develop a Human Rights Policy*, The Global Compact Office and the Office of the United Nations High Commissioner for Human Rights, available at <http://www.ohchr.org/Documents/Publications/Devel>

While attractively simple, the process of crafting the framework, Ruggie “confess[es],” often “involved politics.”⁵ In particular, while the facially non-legal “responsibility to respect” is relatively comfortable territory for corporations,⁶ corporate obligations under the remedy pillar raise far more controversial issues related to fault, liability, and uncertain economic consequences.⁷ One part of the package deal of the UNGPs is that “remedy” is understood to embrace a wide variety of procedural mechanisms and remedial outcomes, including not just traditional national court-based lawsuits but also “operational-level grievance mechanisms” (OGMs). OGMs are non-judicial, company-created processes for hearing complaints and, where merited, issuing compensation in response to allegations of human rights abuses arising from particular incidents, operations, or the company as a whole.⁸

opHumanRightsPolicy_en.pdf (last visited 26 Feb. 2018) (“The responsibility to respect human rights is not a legal duty imposed on companies by treaty, but it is not a law-free zone either.”).

5. Ruggie, *Global Public Domain*, *supra* note 3, at 1.

6. *See, e.g.*, Ruggie, SOCIAL CONSTRUCTION, *supra* note 2, at 14 (arguing that “corporate responsibility to respect human rights is a transnational social norm because the relevant actors acknowledge it as such, including businesses themselves in their corporate responsibility commitments”).

7. *See, e.g.*, Ruggie, SOCIAL CONSTRUCTION, *supra* note 2, at 8 (describing how an earlier effort “to impose human rights obligations on business enterprises directly under international law” was more “far-reaching” than the UNGPs and led to “vehement[] oppos[ition] by the international business community”); John G. Ruggie, *Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises*, in BUSINESS AND HUMAN RIGHTS: BEYOND THE BEGINNING 46 (Cesar Rodriguez-Garavito ed. 2017) [hereinafter Ruggie, *Hierarchy or Ecosystem*]; Sara McGrath, *Fulfilling the Forgotten Pillar: Ensuring Access to Remedy for Business and Human Rights Abuses*, INST. FOR HUM. RTS. & BUS. (Dec. 15, 2015), <https://www.ihrb.org/other/remedy/fulfilling-the-forgotten-pillar-ensuring-access-to-remedy-for-business-and> (last visited 26 Feb. 2018) (highlighting “the need for frank and critical conversations about what’s working when it comes to remedy, what’s not, and why”).

8. *See, e.g.*, UNGP Pamphlet, *supra* note 2, at 31; Page, *Alchemy Part I*, *supra* note 2. OGMs are attractive for companies as a replacement for legal liability in judicial processes such as lawsuits. The UNGPs are careful to state that OGMs should be viewed as a “complement” and “should not be used . . . to preclude access to judicial or other non-judicial grievance mechanisms.” UNGP Pamphlet, *supra* note 2, at 31–32. *See also* Sarah Knuckey & Eleanor Jenkin, *Company-created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?*, 19 INT’L J. HUM. RTS. 801, 802 (2015).

How OGMs should operate to comply with the UNGPs remains hotly disputed.⁹ This is reflected in the heated debate surrounding the first prominent instances of OGMs explicitly referencing the UNGPs—in particular the “Porgera Joint Venture Remedy Framework,” established by Barrick Gold Corporation for survivors of sexual violence inflicted by Barrick’s security guards and other employees at the company’s operations in Porgera, Papua New Guinea.¹⁰ Commentators, critics, and the company’s paid but technically independent reviewer have all offered a variety of critiques, encomiums, and “lessons learned” on an array of topics areas.¹¹ Of these, none has been as controversial as the issue of appropriate monetary compensation: when, what form, and, most bluntly, how much?

This Article suggests that some of this controversy arises from a lack of consensus on deeper underlying principles. It seeks to more fully engage one such area of disagreement: the proper role of the deterrence rationale in the calculation of OGM and other BHR compensation awards. While such awards are clearly designed to compensate individual victims or affected rights-holders, many also see them through a policy

9. *E.g.*, MAY MILLER-DAWKINS ET AL., BEYOND EFFECTIVENESS CRITERIA: THE POSSIBILITIES AND LIMITS OF TRANSNATIONAL NON-JUDICIAL REDRESS MECHANISMS 6 (2016), http://corporateaccountabilityresearch.net/s/NJM01_beyond-effectiveness-criteria.pdf (last visited 26 Feb. 2018); MININGWATCH CANADA & RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT, PRIVATIZED REMEDY AND HUMAN RIGHTS: RE-THINKING PROJECT-LEVEL GRIEVANCE MECHANISMS 5 (2014), https://miningwatch.ca/sites/default/files/privatized_remedy_and_human_rights-un_forum-2014-12-01.pdf (last visited 26 Feb. 2018).

10. BARRICK GOLD CORP., THE PORGERA JOINT VENTURE REMEDY FRAMEWORK 2-3 (2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf>; MILLER-DAWKINS ET AL., *supra* note 9, at 4.

11. *See* COLUM. L. SCH. HUM. RTS. CLINIC & HARV. L. SCHOOL INT’L HUM. RTS. CLINIC, RIGHTING WRONGS? BARRICK GOLD’S REMEDY MECHANISM FOR SEXUAL VIOLENCE IN PAPUA NEW GUINEA 1, 29 (2015) [hereinafter COLUMBIA/HARVARD]; YOUSUF AFTAB, ENODO RIGHTS, PILLAR III ON THE GROUND: AN INDEPENDENT ASSESSMENT OF THE PORGERA REMEDY FRAMEWORK 4 (2016) [hereinafter AFTAB, ON THE GROUND]; REBECCA M HENDERSON & NIEN-HE HSIEH, PUTTING THE GUIDING PRINCIPLES INTO ACTION: HUMAN RIGHTS AT BARRICK GOLD (2016) (on file with the author) (using the events as a Harvard Business School Case Study); Elizabeth McSheffrey, *Mining Violence Survivors Demand Justice in Toronto*, NAT’L OBSERVER (Apr. 25, 2017), <http://www.nationalobserver.com/2017/04/25/news/mining-violence-survivors-demand-justice-toronto> (last visited 26 Feb. 2018).

lens as tools aimed at deterring potential future tortious conduct by the same or similar actors. As described below, many others are inattentive to this dimension of awards or would even consider it illegitimate.¹² International human rights (IHR) law sources reveal some articulate debate on this difference, but it mostly passes as inarticulate, unstated tension.¹³

BHR emerges from IHR but operates according to its own distinct underlying premises and its own unique, rapidly-developing culture.¹⁴ This Article proposes that BHR scholars and practitioners need to consider the dimensions of compensation awards beyond just compensation and more articulately discuss the role of the deterrence rationale in award formulation. The Article will use recent public clashes on the compensation issue in the context of the Porgera OGM as a backdrop to the analysis. After examining the Porgera OGM disputes in Section II, Section III expands to look at broader objections to the use of the deterrence rationale in the civil damages context. Section IV considers how the deterrence purpose has been utilized in IHR authorities and considers in turn a handful of factors that have been suggested as reasons for why deterrence may not be useful or achievable in the IHR context. Section V refocuses on BHR specifically, first, considering whether the factors discussed in Section IV apply with the same force, and second, engaging at a more general level the question of whether BHR needs deterrence given other tools that are more widely accepted in BHR practice, such as the threat of negative publicity. Section V also looks at the dignity dimension to remedy and deterrence specifically, and considers the complex mix of interests at stake in the deterrence analysis. Section VI considers what deterrence-oriented “BHR damages”—compensation awards issued under OGMs or other UNGP-derived mechanisms—might realistically look like. The Section emphasizes the conceptual overlap between “cost internalization” models of deterrence and the core IHR mandate that remedies must endeavor to make victims “whole.” The Article concludes by arguing that deterrence considerations could add critically-needed fuel to stalled existing efforts by IHR and BHR tribunals to more fully appreci-

12. See *infra* Section IV.A.

13. See *id.*

14. See, e.g., *infra* Section V.A; Page *Alchemy Part I*, *supra* note 2.

ate the multiple dimensions of harm caused by human rights abuse and that if BHR remedies are to deliver a justice that will be respected by all stakeholder communities—and deliver the corresponding finality and relationship benefits that companies seek—BHR may have to move past IHR precedent and more explicitly embrace deterrence considerations as an integral part of just compensation.

II. ILLUMINATING THE DEBATE: THE PORGERA OGM

The Porgera OGM established by Barrick Gold Corporation has garnered significant attention in its relatively short lifespan, especially in the “lessons learned” phase. Barrick itself commissioned and published an “independent” assessment by human rights consultant Yousuf Aftab, while prominent international human rights clinics at Columbia and Harvard prepared and published a separate independent—including financially independent—assessment.¹⁵

In January 2016, an online exchange was published between Barrick’s consultant, Yousuf Aftab, and Marco Simons, legal director at Earthrights International (ERI), a U.S.-based legal organization which represented some Porgera rape survivors in achieving compensation from Barrick by way of threatened litigation and an out-of-court settlement, separate and apart from the OGM process.¹⁶ Although it addressed a number of issues, the exchange focused most intently on whether the amount of compensation provided by the Porgera OGM to survivors (roughly USD 8,000 each) was, as Aftab had

15. See AFTAB, ON THE GROUND, *supra* note 11; COLUMBIA/HARVARD, *supra* note 11.

16. Marco Simons, *Many Valuable Lessons from Barrick’s Remedy Framework; “It’s Cheaper to Rape Poor Women” Should Not Be One of Them*, EARTHRIGHTS INT’L (Jan. 22, 2016), <https://www.earthrights.org/blog/many-valuable-lessons-barricks-remedy-framework-its-cheaper-rape-poor-women-should-not-be-one> [hereinafter Simons, *Many Valuable Lessons*]; Marco Simons, *International Human Rights Law Does Not Support Giving Less Compensation to Claimants from Poorer Countries*, EARTHRIGHTS INT’L (Jan. 29, 2016), <https://www.earthrights.org/blog/international-human-rights-law-does-not-support-giving-less-compensation-claimants-poorer> [hereinafter Simons, *International Human Rights Law*]. Aftab has taken down the blogs he posted in response to Simons and has re-posted them as a single document at Enodo Rights, *The Principles of Remedy: A Discussion with EarthRights International*, ENODO RIGHTS (last visited Nov. 18, 2017), <http://www.enodorigths.com/assets/pdf/a-response-eri.pdf> [hereinafter AFTAB, RESPONSES].

claimed in his report, “rights-compatible,” or consistent with awards issuing from public international human rights bodies like the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR).¹⁷

In response, Simons argued that Aftab’s award valuation methodology—which adjusted compensation benchmarks drawn from wealthier countries downwards on the basis of relative income—left in place an economic incentive structure that made it “cheaper to rape poor women.”¹⁸ Aftab acknowledged that his methodology should have been “more clearly expressed” and equivocated about the importance of relative income as an adjustment factor *per se*.¹⁹ Nonetheless, he defended his approach as an appropriate calculation under the primary governing principle of *restitutio in integrum*, which aims to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed.”²⁰ Both Simons and Aftab relied heavily on the *Remedies in International Human Rights Law* treatise by Professor Dinah Shelton.²¹ Indeed, both parties solicited her views, and Simons represented that Shelton indicated she “would expect a tribunal to give the same award for non-pecuniary damage to someone from a poor country as

17. AFTAB, ON THE GROUND, *supra* note 11, at 105–06.

18. Simons, *Many Valuable Lessons*, *supra* note 15. The dispute began as a challenge to Aftab’s suggestion in his report that he adjusted the benchmark damages award (awarded by the IACHR to a Mexican survivor) only for Purchasing Power Parity (PPP). In fact, Simons pointed out that “[t]he comparison that Enodo actually did was to compare the size of the award to average incomes in Mexico and PNG.” *Id.* Because PNG incomes are dramatically much lower than Mexican incomes, the adjusted award appeared “compatible,” whereas a true PPP adjustment, which “should only reflect how much that amount of compensation can purchase in the relevant country, not the relative poverty of the victims,” would have revealed that the Porgera awards were actually one-tenth the amount of the IACHR award and thus not “compatible” in the slightest. Simons argued that the Aftab approach effectively said that “a PNG woman [could be] awarded one-sixth of what a Mexican woman is awarded for rape [because] people in PNG are six times poorer than people in Mexico.” *Id.* See generally AFTAB, RESPONSES, *supra* note 16.

19. AFTAB, RESPONSES, *supra* note 16, at 2

20. *Id.* (quoting *Factory at Chorzów (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13)).

21. SHELTON, REMEDIES 3d ed., *supra* note 1.

someone from a rich country.”²² Anything else “would be contrary to the basic notion of human dignity, because it would be treating some individuals’ rights, dignity and values as more valuable (in a monetary sense) than others.”²³ But the exchange reached an unsatisfactory draw when it came to *how* this would be achieved under strict application of *restitutio in integrum*. Aftab pushed back that “local economic circumstances” (reflected in income level) was an articulated factor in ECHR jurisprudence and was plainly determinative regarding domestic civil awards. Furthermore, local economic circumstances were relevant, if not determinative, at the subjective level as to the quantum necessary for the survivor (and her community) to feel that she had been “made whole” or that the consequences of the violation had been “wiped out”—within the limits of possibility for serious violations such as rape.²⁴

With some sense of frustration at the incompleteness of an exclusively compensatory approach, Simons elaborated his critique based on the economic incentives left in place by a compensation regime derived primarily based on relative income. In passing, he highlighted Professor Shelton’s conclusion from the second edition of *Remedies in International Human Rights Law* that international human rights tribunals generally “may need to consider awarding far higher amounts of damages than have heretofore been adjudged” if they hope “to deter violations through the adjustment of damage awards.”²⁵ Rather than engage the deterrence questions directly, in his response Aftab focused on the fact that the exchange referenced a “BHR tribunal” instead of an IHR tribunal more broadly, dismissing a deterrence-driven analysis as having “no bearing on what the Guiding Principles—voluntary standards for corporate conduct—mean or should be interpreted to mean.”²⁶

This Article more carefully considers the analyses within the last part of this exchange. Particularly, how has IHR law

22. Simons, *International Human Rights Law*, *supra* note 16.

23. *Id.*

24. AFTAB, RESPONSES, *supra* note 16, at 12–14.

25. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 19 (2d ed. 2006) [hereinafter SHELTON, REMEDIES 2d ed.].

26. AFTAB, RESPONSES, *supra* note 16, at 15.

approached the deterrence question? Do IHR tribunals need to issue significantly greater awards if they hope to deter human rights abuses? Because IHR tribunals issue awards against States, is the situation different for awards issued against non-State (corporate) misfeasors? And is it true—wise, desirable, or inevitable—that deterrence should have “no bearing” on the compensation analysis in BHR practice?

Some of the controversy on these questions comes from entrenched but divergent national perspectives. It is hard to overestimate how deeply deterrence runs in the American conception of the role of the civil justice system. Judge Richard Posner has famously said that whereas “criminal law is designed primarily for the non-affluent; the affluent are kept in line, for the most part, by tort law.”²⁷ Professor Arthur Miller speaks of the discipline imposed by damages awards as providing “an indispensable satellite regulatory system that augments and sometimes serves as a substitute for the work of official governmental agencies that typically are under resourced, captured by the industries they are expected to regulate, or ossified by internal regulation.”²⁸ Simons’s approach to the Porgera OGM immediately gravitates to what larger economic incentives are established and views those incentives as the OGM’s most “deeply troubling” legacy.

But the role of deterrence in IHR law and other legal systems is varied and significantly different than the U.S. experience. The trend in these jurisdictions is to de-emphasize fault, while simultaneously escalating the right to a full remedy—to be “made whole”—to a higher, more protected status.²⁹ In IHR law, the deterrence purpose has appeared but only in close proximity to these principles. Fault-focused articulations of deterrence, like punitive damages, are relatively rare, whereas articulations linked to actual harm, such as the notion that deterrence emerges when a remedy forces “the wrongdoer . . . to [fully] internalize the costs of causing harm in

27. Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1204–05 (1985).

28. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 301 (2013). See also *Cipollone v. Liggett Grp.*, 505 U.S. 504, 521 (1992) (“The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”).

29. See *infra* Section IV.A.

order to [give him or her] the optimum incentive to avoid injuring others,” are emphasized.³⁰ Turning to more BHR-specific sources, deterrence is not explicitly discussed anywhere in the “Third Pillar” Guiding Principles pertaining to remedy or the accompanying commentary³¹ (though at times, as described in Section V.C, it lies just below the surface).³² There is little or no discussion of deterrence in many of the leading civil society reports on Third Pillar remedies,³³ nor in the few academic articles that give the Third Pillar a close look.³⁴ It is

30. SHELTON, REMEDIES 3d ed., *supra* note 1, at 315. *See also id.* at 22 (“If the ‘price’ of violation is set high enough, if anticipated damages accurately reflect the true cost of the violations and the sanction is certain, the ‘product’ will be priced off the market. This requires full and accurate compensation for each victim of each incident.”).

31. U. N. HUM. RCTS. OFFICE OF THE HIGH COMM’N, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS ‘PROTECT, RESPECT AND REMEDY’ FRAMEWORK, HR/PUB/11/04 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. “Prevention” of human rights violations—“through, for example, injunctions or guarantees of non-repetition”—is discussed in the Pillar III article commentary as well as throughout the commentary to the other Pillars. *Id.* at 27. Here, the distinction between “prevention” and “deterrence” is examined in *supra* Section III.A.

32. *See infra* Section IV.A.

33. *See, e.g.*, GWYNNE SKINNER ET AL., THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS 76 (2013), <https://icar.squarespace.com/s/The-Third-Pillar-FINAL1.pdf> (last visited 26 Feb. 2017) (obliquely referencing deterrence rationales, though not by name, in analysis of growing adoption of collective redress mechanisms outside the United States, which mechanisms “may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices”); CAITLIN DANIEL ET AL., OECD WATCH, REMEDY REMAINS RARE: AN ANALYSIS OF 15 YEARS OF NCP CASES AND THEIR CONTRIBUTION TO IMPROVE ACCESS TO REMEDY FOR VICTIMS OF CORPORATE MISCONDUCT 18 (2015) (referencing a deterrence consequence as hopefully arising not from a damages award but rather from a public apology, which “can contribute to a fuller understanding of the facts and a validation of the complainants’ concerns,” leading to “[i]mprovement of corporate policies and due diligence procedures . . . that will hopefully prevent future impacts but that do not address the harm raised in the current complaint”).

34. *See, e.g.*, Jonathan Drimmer & Lisa J. Laplante, *The Third Pillar: Remedies, Reparations, and the Ruggie Principles*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 316, 316–47 (Jena Martin & Karen Bravo eds. 2016); Jonathan Kaufman & Katherine McDonnell, *Community-Driven Operational Grievance Mechanisms*, 1 BUS. & HUM. RTS. J. 127, 127–132 (2016); Tara J. Melish, *Putting “Human Rights” Back into the UN Guid-*

referenced only marginally in the Columbia/Harvard assessment of Porgera.³⁵

Thus, it comes as no surprise that the operation and assessment of the Porgera OGM would be plagued by confusion and disagreement on this question. If award-based deterrence should legitimately play a role in BHR compensation practice, future OGMs will need a much clearer consensus on how deterrence can and should operate in the unique BHR context. The following Sections III-IV seek to flush out the underlying disputes on the role of deterrence in compensation analysis before turning to a more forward-looking analysis in Sections V-VI of the proper role for deterrence in BHR.

III. DETERRENCE AND ITS DISCONTENTS

A. *Deterrence Versus Prevention*

The contours of “deterrence” as examined in this Article merit some initial attention. While the deterrence rationale is not specifically mentioned in the UNGPs and is rarely discussed in BHR practice and academic materials, the larger goal of “prevention” is commonplace. Deterrence can be seen as one among many tools which can prevent future human rights abuses. Both States and corporations have multiple “prevention” obligations in the First and Second UNGP Pillars respectively.³⁶ A State’s prevention, or “protect against” obliga-

ing Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights, in *BUSINESS AND HUMAN RIGHTS: BEYOND THE BEGINNING* 76, 76–98 (César Rodríguez-Garavito ed. 2017)); Jamie Darin Prenekert & Scott J. Shackelford, *Business, Human Rights, and the Promise of Polycentricity*, 47 *VAND. J. TRANSNAT’L L.* 451, 451–500 (2014).

35. See *COLUMBIA/HARVARD*, *supra* note 11, at 29 (“The right to a remedy has several purposes in international human rights law, including compensating losses, attempting to restore the position of the harmed party, expressing condemnation towards wrongdoers, promoting truth, and deterring future violations.”) (citing *DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 10–14 (2d ed. 2005)).

36. See, e.g., UNGP Pamphlet, *supra* note 2, at 3 (discussing Principle 1’s insistence that States must “tak[e] appropriate steps to prevent” human rights abuse); *id.* at 13 (discussing Principle 11 commentary noting that businesses must “tak[e] adequate measures for [the] . . . prevention” of adverse human right impacts); *id.* at 14 (discussing Principle 13 that businesses must “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services”).

tion, includes enforcing its relevant laws,³⁷ “[p]rovid[ing] effective guidance to business enterprises,”³⁸ and requiring businesses owned or controlled by the State to conduct human rights due diligence.³⁹ A business’s prevention obligation includes having “[a] policy commitment” in place,⁴⁰ conducting human rights due diligence,⁴¹ and “integrat[ing] the findings from their impact assessments across relevant internal functions and processes.”⁴² The remedy-specific articles also speak of “the prevention of harm through, for example, injunctions or guarantees of non-repetition.”⁴³

However, these obligations operate differently than the deterrent or ex ante effect of remedies generally and of compensation specifically. Professor Pammela Saunders writes that “[a] deterrence rationale is related but distinct from the motive of obtaining legal reform of some sort, *e.g.*, of an industry or a legal standard.”⁴⁴ Prevention and reform obligations refer to policies and practices that affirmatively direct conduct. While they may be phrased in mandatory language, typical policies and practices do not impose a clear remedial sanction for non-compliance; rather, non-compliance is expected to be met with increased effort to ensure future compliance. In other words, these policies operate in a constantly forward-looking manner. Prevention obligations do “deter” violations that might have occurred absent having the policy or best practice in place; and to the extent they are implemented in compulsory terms together with a penalty for violation, they should exert a deterrent effect in the same manner as compensation regimes.

37. *Id.* at 3-4 (Principles 1, 3(a)).

38. *Id.* (discussing Principle 3(c)).

39. *Id.* at 6 (discussing Principle 4).

40. *Id.* at 15-16 (discussing Principles 15(a) and 16).

41. *Id.* at 16, 17-18 (discussing Principles 15(b), 17).

42. *Id.* at 20 (discussing Principle 19).

43. *Id.* at 27 (discussing Principle 25 commentary).

44. Pammela Q. Saunders, *Rethinking Corporate Human Rights Accountability*, 89 TUL. L. REV. 603, 626 (2015). Some BHR practitioners have divided the concept of “remedy” into “three components—cessation of the violation, reparation of harm that has occurred, and adoption of measures to prevent future violations,” explicitly separating the reparations component of remedy from a more designed and directed preventative component. DANIEL ET AL., *supra* note 33, at 17.

Compensation liability significantly changes the deterrence calculus in ways that have been both celebrated and challenged. The threat of having to pay compensation creates a deterrent effect that typically applies immediately and broadly: actors know they will be held accountable for causally-linked harms under some sort of reasonableness standard and are immediately incentivized to take steps to avoid any connectable harm, rather than seek safe harbor in the substantive or temporal scope of the preventative policy.⁴⁵ Through the mechanism of extra-compensatory damages, discussed further in Section III.C, compensation regimes can address or minimize incentives based on the likelihood of non-enforcement. More generally, compensation regimes can be adjusted to desired levels of deterrence—for example, to balance deterrence of human rights abuse with other legitimate policy aims. However, the deterrent breadth of compensation regimes has also been criticized for its lack of certainty and the practical competence of courts (and civil juries in the United States) to set optimum levels of deterrence (even assuming agreement on such levels).⁴⁶ With respect to preventative policy, adjusting what conduct is and is not allowed is a task of direct articulation in the policy language, whereas regulating conduct by way of generic liability rules lacks the same precision and threatens to more easily produce over- or under-inclusive results.⁴⁷ More generally, deterrence is often understood to operate somewhat mysteriously, even in the style of an “invisible hand.”⁴⁸

As *ex ante* approaches, both preventative policies and compensation regimes are challenged by the reality of unfore-

45. However, an actor focused on technical defenses or gamesmanship has other tools at its disposal in the compensation context, such as resisting causation or the applicable duty of care.

46. See *infra* Section III.C.

47. See, e.g., Alan Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2187-88 (2012) (discussing issues “calibrating damages” to achieve deterrence outcomes).

48. Brian J. Love & Christopher B. Seaman, *Best Mode Trade Secrets*, 15 YALE J. L. & TECH. 1, 20 (2013) (discussing the “invisible hand of deterrence”); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 318 (1988) (observing that “the mechanisms of deterrence are largely invisible and resist empirical verification” and citing additional research).

seen facts and circumstances that can reveal gaps in the intended regulatory scope or produce perverse results vis-à-vis the ex ante intention. A pure policy-based regime is arguably fairer to the regulated actor because—even apart from the typical lack of any express penalty—it protects the actor from the consequences of such unforeseen circumstances. A compensation regime, however, is arguably fairer to regulatory beneficiaries because it is less likely—depending on the applicable standard of care—to leave them with the burden of such consequences.

Consider the following example: a telecom company, operating in a country governed by a regime known to torture dissidents, complies with an informal government request for geolocation data of certain known dissidents who are then seized and tortured by government agents. The company points to its existing policy directing that its officers shall “cooperate with law enforcement as requested for the investigation and prosecution of crime.” The company insists that it followed its policy, while acknowledging that this resulted in unintended adverse human rights consequences. It promises to revise its policy to include exceptions and safeguards. With respect to the incident that occurred, a constantly forward-looking, policy-based regulatory regime leaves the situation at that and leaves the dissidents without a remedy. A compensation regime, by contrast, opens up at least the possibility that the affected rights-holder, the tortured individual, could receive compensation, depending on the other circumstances of the case. It is at least capable of “looking backward” and reallocating some of the burden of the unintended consequences of the company’s strict compliance with its own policy.

B. *Challenges to Civil Liability-Based Deterrence*

In both the civil and criminal justice systems of the United States, the deterrence rationale is both essential and controversial. On the one hand, “[t]he social utility of liability must be judged by its capacity to alter behavior constructively—by its ability to generate useful incentives for the avoidance of harmful acts.”⁴⁹ Indeed, the criminal system would run into

49. Sykes, *supra* note 47, at 2182; see also Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation To Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, 60 L. & CONTEMP. PROBS. 185, 185

real foundational trouble without the deterrence rationale, given that the alternative or complementary rationales of punishment and retribution are far more difficult to square with enlightened public policy.⁵⁰ Nonetheless, even in the criminal context, there remains some discomfort with the deterrence rationale. This is illustrated, for instance, by the rule barring prosecutors from arguing to a jury that a criminal conviction will “send a message” to the community that the charged acts are intolerable.⁵¹ The rule prevails even though it can be argued that the sending of just such a message is the central purpose of public prosecution, which after all does not materially compensate the affected rights-holders in the U.S. system.⁵²

Moreover, shifting the deterrence analysis from criminal penalties to civil damages awards involves at least two additional controversial steps: (1) monetization and (2) a shift from the criminal to the civil sphere. With punishment under criminal law, the defendant is made to suffer to provide the deterrent force, but no one correspondingly gains, at least materially. Rather, society must pay for the individual’s incarceration, providing a natural check on the exercise of the power. Second, and more profound, the shift from the criminal sphere to the civil sphere replaces the theoretically publicly-accountable public prosecutor with a “private attorney general” plaintiff who has a distinct personal and material stake in the outcome. Of course, if the goal is to motivate people to vindicate their rights—for both the individual and the deter-

(1997) (“According to conventional theory, the tort liability system serves two objectives: compensating injured persons, and causing other persons to internalize the costs of their errors and thus to guard against them in the future.”).

50. This would seem to be particularly the case regarding corporations, because “the diffuse shareholders of a modern public corporation generally bear no culpability and are not an appropriate target of ‘punishment.’” Sykes, *supra* note 47, at 2182.

51. *See, e.g.,* Campbell v. State, 679 So.2d 720, 724 (Fla. 1996) (criticizing “message to the community” arguments); Commonwealth v. DeJesus, 860 A.2d 102, 113–19 (Pa. 2004) (vacating a sentence where a prosecutor argued: “When you think of the death penalty, there are messages to be sent. There’s a message on the street saying, look at that, he got death, you see that, honey, that’s why you live by the rules, so you don’t end up like that.”).

52. Indeed, absent a strong role for deterrence, the foundation of the criminal law would rely more exclusively on punishment and retribution purposes and would be much more difficult to square with enlightened public policy.

rent benefit to society—material gain can be positively perceived as the quintessential motivator. But while scholars have celebrated the civil justice system’s power to “enforce[] public norms,”⁵³ the introduction of material gain does raise legitimate concerns of private interest-driven excessive enforcement and the possibility of abusive enforcement. An additional important concern regarding the shift to the civil justice system is the removal of the “beyond a reasonable doubt” burden of proof, which can raise serious fairness concerns for defendants.

In reality, the processing of these objections in the United States has been driven less by legal analysis and more by intense political and economic interest-driven reaction to highly-publicized examples of multi-million dollar punitive and pain-and-suffering damages verdicts, portrayed as the product of “sympathetic” juries and issued irrespective of genuine corporate fault. The U.S. Chamber of Commerce and its Institute for Legal Reform, in particular, have invested heavily in publicity and lobbying efforts on this issue under the rubric of “tort reform.”⁵⁴ As one author has described:

During the last ten to twenty or more years, the availability of damages remedies under U.S. law for human rights violations—both transnational and purely domestic—has been under pressure and, in some respects, in decline Amid sharp and deepening political polarization in the United States, clashing ideologies and policy agendas have been part of the story. Liberal preferences for expansive remedies through litigation have faced successful conservative opposition. That opposition has been coupled with a campaign for ‘tort reform’ that por-

53. Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2144–45 (2000).

54. What We Do, INST. FOR LEGAL REFORM, U.S. CHAMBER OF COM., <http://www.instituteforlegalreform.com/about-ilr/what-we-do> (last visited 26 Feb. 2018); see also Mission, Am. Tort Reform Assoc., <http://www.atra.org/about/mission/> (last visited 26 Feb. 2018); see also Jacques deLisle, *Damages Remedies for Infringements of Human Rights Under U.S. Law*, in *DAMAGES FOR VIOLATIONS OF HUMAN RIGHTS* 395, 423 (Ewa Baginska ed. 2016). For more on debates under the “tort reform” rubric, see *infra* Section III.C.1.

trays damage awards as excessive and out of control⁵⁵

The inflammatory nature of the “tort reform” movement in the United States can hardly be overstated: damages awards are “a threat to the rule of law and, thus, the free enterprise system;”⁵⁶ they “destroy jobs,”⁵⁷ “hurt the economy,”⁵⁸ and “hurt [American] global competitiveness.”⁵⁹ Yet simultaneous with this rhetoric, many legal scholars have been arguing that the extent of the problem is vastly overstated.⁶⁰ Professor Anthony Sebok has demonstrated that the three main claims about “out-of-control” punitive damages awards in particular—that they have dramatically increased in frequency, size, and unpredictability since the 1980s—are demonstrably false.⁶¹ Re-

55. Jacques deLisle, *Damages Remedies for Infringements of Human Rights Under U.S. Law*, in *DAMAGES FOR VIOLATIONS OF HUMAN RIGHTS* 395, 423 (Ewa Baginska ed. 2016).

56. INST. FOR LEGAL REFORM, U.S. CHAMBER OF COM., *Why Lawsuit Lending Left Unchecked Is a Threat to Free Enterprise* (Mar. 31, 2015), <http://www.instituteforlegalreform.com/resource/why-lawsuit-lending-left-unchecked-is-a-threat-to-free-enterprise> (last visited 26 Feb. 2018).

57. INST. FOR LEGAL REFORM, U.S. CHAMBER OF COM., *The Trial Lawyers’ New Merger Tax: Corporate Mergers and the Mega Million-dollar Litigation Toll on Our Economy* 1, 8 (2012), www.instituteforlegalreform.com/uploads/sites/1/M_and_A.pdf (last visited 26 Feb. 2018).

58. *Id.*

59. INST. FOR LEGAL REFORM, U.S. CHAMBER OF COM., *Lawsuits Hurt Foreign Direct Investment, Experts Conclude* (July 31, 2007), www.instituteforlegalreform.com/resource/lawsuits-hurt-foreign-direct-investment-experts-conclude (last visited 26 Feb. 2018).

60. See, e.g., Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 962-97 (2007) (rebutting multiple aspects of the claim that “the doctrine of punitive damages has spun out of control”); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285 (1993) [hereinafter Rustad & Koenig, *Historical Continuity*] (“There is simply no empirical evidence supporting [ten-recent public figure claims] that there is a punitive damages crisis warranting the radical revamping of the [punitive damages] remedy”). Thomas Koenig & Michael Rustad, “Crimtorts” as Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289, 335-38 (1998) (discussing “social psychological research [that] finds no evidence that juries are unfavorably disposed toward corporations”); cf. CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA* (2001).

61. Sebok, *supra* note 60, at 962-76; *id.* at 964 (“Six major [academic, think tank, and government] surveys reviewing punitive damages since 1985 reveal that, on an absolute basis, factfinders have awarded punitive damages in 2%-9% of all cases where plaintiffs won, and an average of the studies

cently, Scott DeVito and Andrew Jurs assembled and analyzed a database of state court filing data consisting of nearly fourteen million cases over twenty-five years and found that while “tort reform” efforts like damages caps did suppress filings to an extent, they did not produce the “clear secondary effects” that were promised, such as reduction of insurance rates and increase in physician supply.⁶² This leaves “tort reform,” in their view, as simply an “anti-litigation political tool,” the benefits of which are unlikely to offset “the negative externalities tort reform itself creates.”⁶³

C. *The Role of Punitive Damages*

It is worth noting that much of the U.S.-based debate on civil-liability-based deterrence questions has focused specifically on punitive damages, the most blunt and controversial civil tool of deterrence.⁶⁴ But the larger deterrence question

suggests a rate on the low end of the range.”); *id.* at 970–71 (“Studies in the 1980s and 1990s placed the median for punitive-damages awards between \$38,000 and \$52,000 per award . . . [and] studies show that median punitive-damages awards have not grown over time.”); *id.* at 973–75 (acknowledging that non-pecuniary damages are indeed “unpredictable” but that “studies predictably have correlated punitive-damages amounts to a number of factors,” the most significant of which, of course, is the size of the compensatory award).

62. Scott DeVito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 STAN. J. COMPLEX LITIG. 62, 65 (2015).

63. *Id.* at 115 (citing Scott DeVito & Andrew Jurs, *Doubling Down for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN. ST. L. REV. 543, 592–96 (2014)); see generally Lucinda Finley, *The Hidden Victims of Tort Reform*, 53 EMORY L.J. 1263 (2004) (finding evidence of under-compensation and discriminatory compensation in the wake of imposed damages caps).

64. Narrower still, much of the debate has focused specifically on the competence of the civil jury, especially in the context of complex medical and products liability cases. See, e.g., CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 241 (2002) (calling civil jury results “unreliable, erratic, and unpredictable”); see also Sebok, *supra* note 60, at 979–89. The U.S. Supreme Court’s gravitation towards the punishment purpose for punitive damages may reflect its understanding that this is more compatible with the function and competency of juries, namely and “to express society’s outrage at the misdeeds of the tortfeasor.” Sebok, *supra* note 60, at 976–77. By contrast, deterrence, when defended on the basis of more nuanced theories of efficient or optimal deterrence—which require a more delicate balancing of competing claims of social utility, see *infra* Section III.C.3—is less obviously within the jury’s competence. See Sebok, *supra* note 60, at 984 (“Judges, sen-

should not be conflated with the unique tool of punitive damages. As Professor Anthony Sebok has argued:

[B]eing skeptical about punitive damages . . . does not entail being skeptical about efficient deterrence and tort law in general. It might be the case, for example, that in general, the tort system is capable of promoting efficient outcomes through deterrence because the tort system's practice of awarding compensatory damages is well-suited for that task, but that punitive damages, which make up such a small portion of the tort system overall, are epiphenomenal to the question of social welfare.⁶⁵

Nonetheless, punitive damages do add important historical and analytical dimensions to the deterrence analysis. Punitive damages are familiar: common law courts have for centuries used exemplary or punitive civil damages judgments to effect deterrence by “sending a message,” or “for the sake of public example.”⁶⁶ These damages have traditionally served two interrelated and yet critically distinct rationales: (1) punishment of the tortfeasor and condemnation of the conduct at bar, and (2) deterrence—or “repression,” as it is sometimes termed in the international context—of the conduct as to potential future actors, non-parties to the case at bar.⁶⁷ While the concepts are certainly interrelated—it is the punishment of the tortfeasor at bar that effects the deterrence of future conduct⁶⁸—the failure to recognize their simultaneous distinct-

tencing commissions, and regulators have the advantage that they may base their choices on a broad range of information, as well as feedback from other quarters that allows for a certain degree of refinement. Juries—at least as currently configured—do not.”)

65. Sebok, *supra* note 60, at 982–83.

66. *Milwaukee & St. Paul Ry. v. Arms*, 91 U.S. 489, 493 (1875); Rustad & Koenig, *Historical Continuity*, *supra* note 60, at 1287–1304.

67. Ewa Baginska, *Damages for Violations of Human Rights: A Comparative Analysis*, in *DAMAGES FOR VIOLATIONS OF HUMAN RIGHTS*, *supra* note 54, at 443, 459 (identifying the three main tort law rationales as “compensation (reparation), deterrence (prevention), [and] punishment (reparation)”).

68. See, e.g., Shekhar Kumar, *One Size Fits All? An Analysis of the Civil, Criminal, and Regulatory Justifications for Punitive Damages*, 13 J. CONSUMER & COM. L. 46, 48 (2010) (“The hope is that a large punitive damages verdict will keep the defendant from repeating conduct similar to that which lead to the trial and also will be a signal to others that such conduct comes with significant costs; thus deterring parties unrelated to the trial, as well.”).

ness is a cause for confusion and limitation by some IHR authorities.⁶⁹

As described in Section IV.A, the specific troubling feature of punitive damages from an IHR law perspective is the underlying punishment rationale. But as the U.S. Supreme Court has steadily retrenched the availability of punitive damages in the U.S. legal system over the last two decades, it has done so primarily at the expense of the deterrence rationale, leaving the punishment rationale considerably more intact.⁷⁰ In earlier punitive damages cases, the Supreme Court acknowledged both the “State’s legitimate interest in punishing unlawful conduct and [in] deterring its repetition.”⁷¹ But in *Philip Morris USA v. Williams*, the Court held that a large punitive damages award against Philip Morris was impermissible to the extent it encompassed the jury’s finding of wider liability to non-party victims (i.e., the millions of others endangered by smoking).⁷² This is not precisely analogous to the case of an award calculated with reference to deterrence of non-party potential tortfeasors, but the parallel is evident. Moreover, the Court conspicuously failed to cite the deterrence rationale along with the punishment rationale in its review of the foundations of the doctrine, leading some scholars to interpret the case as “reject[ing] the deterrence purpose of punitive damages as a whole.”⁷³

69. See *infra* Sections IV.A, C.

70. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

71. *BMW of N. Am. Inc.*, 517 U.S. at 568; see also *State Farm Mut. Auto. Ins.*, 538 U.S. at 416 (“[P]unitive damages serve a broader function; they are aimed at deterrence and retribution.”).

72. *Philip Morris USA v. Williams*, 549 U.S. 346, 354–55 (2007).

73. Jill Wieber Lens, *Justice Holmes’s Bad Man and the Depleted Purposes of Punitive Damages*, 101 Ky. L.J. 789, 804 (2013). Some scholars have used *Philip Morris* to advance a more “limited interpretation [of deterrence that] looks more like a specific deterrence theory because of its focus on the particular plaintiff and defendant[,]” and the fact that it considers only the deterrence necessary to neutralize “the likelihood that the defendant would escape liability for the tortious conduct to that particular plaintiff.” *Id.* at 804; cf. *Commonwealth v. DeJesus*, 580 Pa. 303, 325 (2004) (noting that while “a prosecutor may not exhort a jury to send a message to the judicial system, he may urge them to send a direct message to the defendant”). This conception may be more defensible from existing challenges, but, strictly understood, the narrowness of only deterring the party before the court dramatically limits the rationale’s utility. It could be well-suited to the case of a

Trending in the opposite direction, many scholars have sought to defend punitive damages by distancing them from the “morality-based punishment purpose” that the Supreme Court appears to still accept.⁷⁴ Indeed, many scholars prefer the term “extra-compensatory” damages, arguing that “punitive” is “a misnomer [because they] are set not for the purpose of ‘punishment’ but for the purpose of ensuring that [tortfeasors] bear the full costs of the harms that they cause, *on average*.”⁷⁵ Most prominently, extra-compensatory damages are defended on the grounds that they are necessary to compensate for the likelihood of under-enforcement and of not getting caught.⁷⁶ According to Professor Berman, “if juries are not allowed to consider the impact on non-parties when fashioning punitive damages awards, the defendants will almost by definition be under-deterred (because not nearly all of those harmed by the conduct will bring their own lawsuits).”⁷⁷

Another articulation of extra-compensatory damages is the notion of “compensatory societal damages” which are “assessed to redress widespread harms caused by the defendant,

particularly intransigent defendant, who might otherwise be suspected of walking out of court and re-engaging in wrongful conduct despite having just been found liable. It might be more applicable in the IHR context, where the defendants—States—are repeat players and serially before the IHR tribunals.

74. Wieber Lens, *supra* note 73 at 805.

75. Sykes, *supra* note 47, at 2187 (emphasis added); *see also* Ciruolo v. City of New York, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) (“The term ‘punitive damages’ . . . fails totally to explain the not unusual use of such damages in situations in which the injurer, though liable, was not intentionally or wantonly wrongful.”); *id.* at 245 n.5 (“Punitive damages have frequently been awarded in strict products liability cases in which the premise for liability is the design and distribution of a defective product, rather than fault.”); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890-91 (1998) (“[T]he adjective ‘punitive’ may sometimes be misleading . . . [E]xtracompensatory damages may be needed for deterrence purposes in circumstances in which the behavior of the defendant would not call for punishment.”).

76. Polinsky & Shavell, *supra* note 75, 954 (“Punitive damages should be set at a level such that the expected damages of defendants equal the harm they have caused, for then their damage payments will, in an average sense, equal the harm. This implies a simple formula for calculating punitive damages, according to which harm is multiplied by a factor reflecting the likelihood of escaping liability.”).

77. Micah L. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 BROOK. L. REV. 1, 57 (2009).

harms that reach far beyond the individual plaintiff before the court.”⁷⁸ This notion finds support in the split recovery statutes in several states, which require fifty to seventy-five percent of any punitive damages verdict to go to the state, on the theory that the “plaintiff is a fortuitous beneficiary of a punitive damages award simply because there is no one else to receive it.”⁷⁹

D. *Gain Elimination and Cost Internalization*

Whereas the under-enforcement justification of punitive damages discussed above seeks to impose an accurate cost on the defendant by way of statistical averages, an alternative approach—more compatible with non-U.S. and IHR civil justice practice—seeks to reach the same accuracy through a more thorough investigation into the misconduct and its attendant harms. Scholars working in this direction see deterrence-focused awards (which may or may not be extra-compensatory) as necessary to (a) eliminate the gains of wrongful conduct, and/or (b) internalize the full costs of conduct to the actor, i.e. ensuring that the actor’s presumptively rational cost-benefit decision reflects the full range of potential consequences. The gain elimination approach is also referred to as complete deterrence, because the elimination theoretically removes any positive incentive for the actor to engage in the wrongful conduct; while the latter is called efficient or optimal deterrence, because it internalizes costs only to a level matching actual social costs. Optimal deterrence requires a more precise calculation of “aggregate tortious loss”—a difficult, if not theoretically impossible, calculation.⁸⁰ It also has a more liberal flavor in that it would not by itself deter conduct that was profitable notwithstanding full internalization of social costs, even if the conduct was considered “wrongful” by society (or part thereof) on other grounds.

Optimal deterrence raises the concept of over-deterrence, whereby actors “undertake excessive precautions [and] pass

78. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347, 389 (2003).

79. *Id.* at 375–80 (quoting *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 869 (Iowa 1994)).

80. Sharkey, *supra* note 78, at 365.

on the costs of these precautions to consumers.”⁸¹ At its extreme, over-deterrence will result in actors “choos[ing] to not engage in [an] activity even though it is socially desirable.”⁸² Gain elimination is prescriptive with respect to over-deterrence—it explicitly seeks to deter, entirely, an activity that has normatively been determined as undesirable. Cost internalization leaves in place differing normative conceptions of what precautions are “excessive” and what is socially desirable. Consider, for example, a liability regime for workplace injuries that raises the cost of production to the point that the factory closes. This situation could be seen as reflecting an otherwise hidden lack of social utility—considering all costs—of the factory. It could also be seen as over-deterrence because it eliminates a socially desirable job and tax-generating activity. On the other hand, consider a liability regime that leads a company not to adopt certain safety practices because the cost of liability is less than the cost of slowed production. This could be seen as a reflection of optimal deterrence, which allows for an activity that some might consider wrongful on other grounds. The activity in question (arguably “wrongful” but not inefficient, such as a labor practice that causes an “excessive” number of injuries, the compensation cost of which does not off-set the gains of the practice) might be otherwise directly regulated, but would not necessarily be precluded by a liability regime. Indeed, the cost-internalization analysis is largely inattentive to fault⁸³—which, while arguably problematic from a “purist” human rights perspective—increases its compatibility with civil justice presumptions in IHR law. As described below, IHR law approaches the same task from a purer compensation-oriented direction, seeking to make the affected rights-holder “whole” and provide “full” reparation.⁸⁴ The central challenge in the analysis is ensuring that “whole” is truly whole: fully understanding the multiple dimensions of harm suffered by an injured worker, for example, so as to allow the cost of such

81. Lens, *supra* note 73, at 796.

82. *Id.*

83. Indeed, cost-internalization analysis was most robustly developed in the context of accident analysis. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 68–94 (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

84. See *infra* Section IV.C.

harm to be incorporated in the analysis and internalized to the economic decision-maker.

A collateral insight here is that deterrence-based liability regimes do not necessarily predetermine any policy approach. While these regimes are available as tools for human rights advocacy—for whomever might want to use them, including potentially business competitors⁸⁵—they are better understood as platforms for weighing social utility that can support a variety of approaches, as they have at the domestic level, while also serving a necessary social role with respect to justice in individual cases.

E. *Fear of “BHR Damages”*

Turning to the unique and developing field of BHR, a number of concerns can be anticipated. The very notion of compensation liability grounded in BHR—“BHR damages”—may be unsettling for some participants because of their faith in the non-legal character of the core business “respect” obligation under the UNGPs.⁸⁶ However, scholars have begun to elaborate how various components of the “respect” obligation could feed into the reasonableness analysis in most existing tort liability frameworks and thus result in liability linked in some degree to UNGP compliance.⁸⁷ The scope of what would be counted as “BHR damages” will also be potentially concerning to some participants because the remedy requirements in the Third Pillar principles are not limited to civil claim-making processes like courts and OGMs, but include “labour tribunals, national human rights institutions [NHRI], National Contact Points under the Guidelines for Multinational Enterprises of the OECD, many ombudsperson offices, and Government-run

85. See *infra* Section V.D.3.

86. See *supra* note 4; UNGP Pamphlet, *supra* note 2, at 1 (“Nothing in these Guiding Principles should be read as creating new international law obligations.”).

87. See, e.g., SKINNER ET AL., *supra* note 33, at 91 (“All home States of multinational enterprises should therefore make it clear that a business can be found civilly liable for human rights impacts where it has not complied with a legal duty to carry out due diligence to prevent such impacts from occurring.”); Douglass Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 BUS. & HUM. RTS. J. 179, 179 (2016).

complaints offices,” among others.⁸⁸ As BHR continues to grow, so will the body of awards rendered by judicial or non-judicial bodies making significant reference to the UNGPs or even issued “under” the broader authority of the UNGPs, such as the Porgera OGM. These awards, to varying degrees, will need and be expected to be assessed at least in part by their compatibility with UNGPs.

What these awards will ultimately come to look like is still unknown but hotly anticipated. The debate appears to be driven by fears or “bogeymen” on both sides. The business community bogeyman is the “plaintiff lawyer” and the allegedly “out of control” tort system in the United States, as described above.⁸⁹ But many on the traditional human rights advocacy side of BHR are also driven by their own bogeyman, referenced by Professor Shelton in the epigraph to this Article and arising from the practice of low-quantum damage awards issued against State defendants by international human rights bodies like the ECHR and IACHR. The fear is not just that these awards are smaller than U.S. awards on corresponding facts—human rights professionals rarely defend the U.S. civil justice system in all its aspects—but, more specifically, that they are inadequate to effect any deterrence.

Both “sides” here may be concerned that their respective bogeymen will appear in the emerging practice of BHR compensation awards.⁹⁰ Yet, fear need not and should not drive this conversation. A new framework can draw strength from BHR’s fresh alliances and compromises, as well as from research and analysis on the compensation question that has developed over the years despite the surrounding controversies.

88. UNGP Pamphlet, *supra* note 2, at 28.

89. *Supra* notes 55-59 and related text.

90. *Cf.* Merris Amos, *Damages for Violations of Human Rights Law in the United Kingdom*, in *DAMAGES FOR VIOLATIONS OF HUMAN RIGHTS*, *supra* note 54, at 371, 385 (observing that with respect to awards practice under the UK Human Rights Act (HRA), public authorities and others “are wary of courts adjudicating on HRA claims having the opportunity to further develop the principles applied when making such awards [and particularly] that the level of damages awarded will increase, perhaps outpacing the awards possible at common law, and encourage new victims to come forward.”). U.K. courts deciding pursuant to the HRA consider themselves to be applying ECHR principles and precedent, and thus the limited jurisprudence from these UK cases is fairly considered within the body of IHR damages cases. *Id.* at 378–79.

Although empirical data has been difficult to assemble—and often politicized immediately upon assembly⁹¹—there are now well-developed theories available to guide the understanding of how deterrence operates, and what the real costs and benefits are. These theories should guide understanding of what would work best in realizing the letter and spirit of the UNGP Third Pillar principles.

Finally, it should be acknowledged that deterrence is also attainable through non-monetary forms of compensation, ranging from the non-material (e.g., apologies, injunctions), to the indirectly material (e.g., provision of community services such as health care centers, legal service centers, schools, micro-credit institutions), to the material but non-monetary (e.g., direct provision of non-monetary household goods, individualized credits for health care, housing, education).⁹² To the extent these forms of compensation do not impose a direct financial cost on the misfeasor (such as apologies), they may raise their own controversies.⁹³ But, they also avoid many of the controversies at the heart of this Article and thus will not be included in the principle part of the analysis. To the extent they do impose a direct financial cost, these non-monetary forms of compensation are sufficiently functionally similar to monetary remedies for purposes of this Article. Thus, they are included in the understanding of the term “damages” as used herein, except where their non-monetary nature raises some specific basis for differentiation—such as in the discussion of the implications of monetization in Section III.B.

91. See, e.g., Sykes, *supra* note 47, at 2164 (arguing that the “economic effects of [corporate ATS] liability rests on unverifiable empirical conjectures”); Meltzer, *supra* note 48, at 318.

92. See, e.g., AFTAB, ON THE GROUND, *supra* note 11, at 102; SHELTON, REMEDIES 3d ed., *supra* note 1, at 377 (“[I]nternational law has long viewed restitution as the preferred remedy in the law of state responsibility, and it has become part of IHR law, as well.”).

93. See, e.g., SHELTON, REMEDIES 3d ed., *supra* note 1, at 383 (“Opinion is divided on the ability of international decision-makers to issue non-monetary remedial orders.”).

IV. DETERRENCE IN IHR LAW

A. *An Emerging Attention*

While the proper role of the deterrence rationale in civil justice awards is hotly debated in U.S. court decisions and scholarship,⁹⁴ discussion of the role of deterrence in IHR practice has been muted until recently. The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, drafted by M. Cherif Bassiouni and Theo Van Boven as Special Rapporteurs to U.N. Commission on Human Rights, conspicuously makes no mention of deterrence whatsoever.⁹⁵ In the Second Edition of Professor Shelton's treatise, published in 2005, she observes that "[n]either the [ECHR] nor the [IACHR] has to this point awarded compensation as punitive damages," and that the leading attempt to do so was rejected "without discussion."⁹⁶ In its practice directive still in force, the ECHR rejects bluntly the punishment rationale and indeed any rationale beyond pure compensation:

The purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, until now, considered it inappropriate to accept claims for damages with labels such as 'punitive', 'aggravated' or 'exemplary'.⁹⁷

Nonetheless, even the Second Edition of Professor Shelton's treatise establishes that "[l]ike remedies in private law cases, human rights remedies *must* aim to deter wrongful behavior."⁹⁸ It acknowledges the notion of "specific deterrence," but suggests that deterrence in IHR is general in na-

94. See, e.g., *supra* notes 48, 60, 62, 64, 76, 78.

95. G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006) [hereinafter Basic Principles].

96. SHELTON, REMEDIES 2d ed., *supra* note 25, at 360 (citing *Silver v. United Kingdom*, [1983] A.C. 1129 at 1226).

97. EUR. CT. H.R., RULES OF THE COURT- PRACTICE DIRECTIONS 61 (Sept. 19, 2016), http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf; see also Amos, *supra* note 90, at 383.

98. SHELTON, REMEDIES 2d ed., *supra* note 25, at 14 (emphasis added).

ture, as it “seeks to influence the behavior of all potential actors, not just the future conduct of a particular defendant.”⁹⁹ Similarly, it recognizes the concept of overdeterrence and the need to fine-tune “how much deterrence is desired.”¹⁰⁰ In particular, the deterrent sanction must be set at a level where “actors are [not just] deterred [but also] not permitted to purchase an option to continue violating human rights.”¹⁰¹ In her treatise, Professor Shelton notes that the compensatory, retributive, and deterrent components in remedial awards are interwoven, making it difficult to individually calibrate them: “The sum required to make the victim whole,” for example, “may be too severe or too lenient to deter or admonish the wrongdoer.” Shelton advocates that “[t]he allowance of punitive, exemplary, or aggravated damages” can thus be seen as a tool to fine-tune the appropriate sanction level in the interests of justice, because it “partially [] separate[s] compensation from sanction and deterrence.”¹⁰²

In the more recent Third Edition of *Remedies*, Professor Shelton is able to report on a distinct “shift [at least by regional human rights tribunals] towards considering exemplary or aggravated damages, if not punitive measures.”¹⁰³ Scholars had already observed that the ECHR would depart from the “conservative” approach stated in its practice directive and award more in both pecuniary and non-pecuniary damages in cases “where it disapproved of the conduct of the State in question or where there had been repeated infringements.”¹⁰⁴ In 2012, the ECHR itself acknowledged that this “latitude (or ‘margin of discretion’) available to the court in awarding damages for non-pecuniary loss” may approach the practice of punitive or aggravated damages, though remaining “in principle . . . compensatory rather than punitive.”¹⁰⁵ A more striking step was taken in *Cyprus v. Turkey* in 2014, in which two judges concurring in an ECHR award of €60M to Cyprus expressly

99. *Id.* at 13.

100. *Id.* at 18, 13-14.

101. *Id.* at 18, 13-14.

102. *Id.* at 355.

103. SHELTON, *REMEDIES* 3d ed., *supra* note 1, at 410.

104. Amos, *supra* note 90, at 384.

105. Amos, *supra* note 90, at 384 (*El Masri v. Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Eur. Ct. H.R. (2012), <https://hudoc.echr.coe.int/eng?i=001-115621>).

argued that the ECHR not only could and should award punitive damages, but that it had been doing so for years in at least seven distinct types of cases that the concurring judges then described in detail.¹⁰⁶ Professor Shelton also cites the *Myrna Mack Chang v. Guatemala* case for the proposition that “[t]he idea of ‘aggravated’ violations is now accepted in the Inter-American Court and can be the avenue for various new forms of non-pecuniary remedies.”¹⁰⁷ Additionally, whereas the discussion of punitive damages in the Second Edition of *Remedies* cited American and English sources almost exclusively, the Third Edition cites case law and statutory provisions on punitive and aggravated damages from Uganda, India, the Philippines, Brazil, Ethiopia, South Africa, Zimbabwe, and other jurisdictions and forums.¹⁰⁸

Remedies also provides abundant support for the notion of compensation generally, and deterrence specifically, as a remedy for dignitary harms, noting that “[v]iolations such as torture or rape cause more than physical suffering, because they involve a negation or devaluation of the person” and that “[t]he dignitary harm occasioned by human rights violations is a recognized injury.”¹⁰⁹ Dignitary remedies “serve to indicate that society understands and acknowledges the pain and humiliation experienced by victims, as well as their sense of injustice.”¹¹⁰ Echoing the notion of “compensatory social damages” mentioned previously, Shelton notes that this harm may be suffered, and needs redress, at the broader societal level beyond just the individual:

Harm can be collective as well as individual Society as a whole may be harmed. Even if wrongful conduct does not cause provable material injury, it none-

106. SHELTON, *REMEDIES* 3d ed., *supra* note 1, at 412-13; *Cyprus v. Turkey*, App. No. 25781/94 Eur. Ct. H.R., Judgment (Just Satisfaction) (2014), <http://hudoc.echr.coe.int/eng?i=001-144151> (last visited 28 Feb. 2018). *But see* SHELTON, *REMEDIES* 3d ed., *supra* note 1, at 348-49 (“The award of moral damages is influenced by the government’s conduct, but excessive amounts will not be awarded in the nature of aggravated or punitive damages.”) (citing *Loizidou v. Turkey*, 20 Eur. Ct. H.R. 99 (1995)).

107. *Id.* at 417.

108. SHELTON, *REMEDIES* 2d ed., *supra* note 25, at 354-57; SHELTON, *REMEDIES* 3d ed., *supra* note 1, at 403-05.

109. *Id.* at 14-15.

110. *Id.*

theless concerns the public because it attacks core values by which the society defines itself. . . . [Along with criminal prosecution,] [t]ort law and remedies also serve the purpose of constituting an expression of condemnation.¹¹¹

Deterrence, specifically, responds to the “[c]oncern for the potential impact of a wrong *on a community* [which] calls for a response that will deter the wrongdoer from repeating the injurious act and deter others from emulating what was done.”¹¹²

The developments outlined above suggest that attention to the deterrence rationale by leading IHR tribunals is flourishing. The underlying tension, or muted nature of the discussion, still exists. Despite her argument for the use of punitive damages as a way of separating and fine-tuning the deterrence component of an award, Professor Shelton fails to identify any IHR cases that actually do this. Rather, many tribunals still prefer to rest in the assumption that “[o]rdinary compensatory damages” will “also contribute to [the] deterrent function,” without further analysis of how that function will operate in the circumstances.¹¹³ The hope appears to be that the natural or “merely incidental” deterrent effect of a compensatory damages award will suffice and that calculated adjustment or fine-tuning would be a step too far.¹¹⁴

Indeed, IHR law remains wary of attaching the “punishment” label to compensation awards. This is unsurprising in light of the diverse national origins and influences of IHR, such as German law, which has effectively “abolished” the notion of “punishment through private law;”¹¹⁵ or French law,

111. *Id.* at 14.

112. *Id.* at 402 (emphasis added).

113. Sharkey, *supra* note 78, at 365.

114. *Mosley v. United Kingdom*, 53 Eur. Ct. H.R. 30, para. 26 (2011) (reviewing of a predecessor domestic court tort decision in which, as the ECHR described, the judge “considered it questionable whether deterrence should have a distinct, *as opposed to a merely incidental*, role to play in the award of compensatory damages, noting that [deterrence] was a notion more naturally associated with punishment”) (emphasis added).

115. Madeleine Tolani, *U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public*, 17 ANN. SURV. INT’L & COMP. L. 185, 186 (2011). See also SHELTON, REMEDIES 3d ed., *supra* note 1, at 407 (“The main objection raised to punitive damages is that they are criminal or quasi-criminal in nature and have no place in a civil action . . . [S]ome argue

which has experienced “a transformation from a philosophy of civil responsibility based on the *debt* of the responsible party to make reparation to a philosophy based on the *credit* of the injured party for indemnification.”¹¹⁶ In another example, Shelton quotes a text on basic principles of Chinese law, which states that “[t]he purpose of compensation is to facilitate the injured person’s ability to get well soon and to restore his ability to manage his own affairs and to work, by means of medical treatment and nourishment.”¹¹⁷ The sensibility at work across all these developments is to incentivize individuals not to see themselves as victims or, as another source puts it, to “look back in anger,” but rather to dust themselves off and get back to work.¹¹⁸ Even in the United States, which has traditionally emphasized fault in the operation of its robust tort law system, many advocate for a similar de-emphasis of fault as a more modern and efficient approach.¹¹⁹

that punitive damages violate the principle of *nullum crimine sin lege*, by establishing criminal penalties with a lower burden of proof than is required by criminal law.”¹¹⁶); *id.* at 408 (noting further objections arising from concern over a “windfall” to the plaintiff).

116. David Corbé-Chalon & Martin A. Rogoff, *Tort Reform à La Française: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France*, 13 COLUM. J. EUR. L. 231, 248 (2007).

117. SHELTON, REMEDIES 3d ed., *supra* note 1, at 319 (quoting W.C. JONES, BASIC PRINCIPLES OF CIVIL LAW IN CHINA 188 (1989)).

118. Chinese law allows full recovery of lost wages but does not allow for loss of earning capacity, “on the theory that the injury will prevent him or her from receiving promotions or otherwise advancing his or her career.” SHELTON, REMEDIES 3d ed., *supra* note 1, at 318 n.16. Again, the principle at work here could be seen as trying to motivate people not to accept an injury or a perceived consequence of victimhood. *See also* Graziella Romeo, *Looking Back in Anger and Forward in Trust: The Complicated Patchwork of the Damages Regime for Infringements of Rights in Italy*, in DAMAGES FOR VIOLATIONS OF HUMAN RIGHTS, *supra* note 54, at 217.

119. Perhaps the most explicit manifestation of this is found in the adoption of “no-fault” collision liability and insurance schemes by many U.S. states. *See, e.g.*, Marc A. Casale, *More Than a Headache: How the Application of New York’s No-Fault Threshold has Effectively Eliminated Head Injury Plaintiffs’ Chances of Recovery*, 23 ALB. L.J. SCI. & TECH. 445, 448 (2013) (“A no-fault system provides for a person injured in an automobile accident to receive payment from the other driver’s insurance and/or his/her own insurance to cover medical expenses as well as lost wages up to a certain point without proving fault of a third party. This allows an injured person to receive payments much faster than would be possible through the lengthy process of proving fault. This benefit of the no-fault system comes with a trade-off. The people in the jurisdiction must give up their right to sue the wrongdoer in

An important final observation regarding IHR law in this area is that in its drive to distance itself from punishment rationales and focus on individual remedial rationales, IHR law (and similar-minded national jurisdictions) have elevated this remedial principle from merely an aspect of larger fairness or social utility considerations to the level of an articulate and even “absolute” right,¹²⁰ a position it arguably does not enjoy in the U.S. civil justice system.¹²¹ For the most part, interna-

the accident.”); Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 622–37 (2000). While there are several motivating factors behind the laws, the underlying premise is that except in extreme circumstances of recklessness or intoxication (addressed by the criminal law), no one sets out on a commute with the goal of inflicting harm on his or her fellow commuters. Schwartz, *supra* note 119, at 637–53. Traffic participants are essentially given the benefit of the doubt; accidents are understood as just that—accidental. This context might seem simplistic compared to the problem of human rights violations, which are not accidental but rather reflect the pursuit of political, financial, or other “personal” gain at the expense of the rights of others. But the no-fault perspective on traffic accidents is a choice, given that fault of some sort (e.g., driver distraction, poor judgment) could be assigned in all but the most inadvertent cases. Traditional accident regimes were attuned to these dimensions of fault and sought to deter it by way of liability. No-fault regimes are better seen as applying a margin of inattention to otherwise available fault considerations to achieve systemic efficiency.

120. Basic Principles, *supra* note 95, art. 11(b) (describing “victim’s right . . . as provided for under international law [to] [a]dequate, effective and prompt reparation for harm suffered”); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14(1), Dec. 10, 1984, 1465 U.N.T.S. 85 (“Each State Party shall ensure in its legal system that the victim . . . obtains redress and has an enforceable right to fair and adequate compensation.”); International Covenant on Civil and Political Rights, arts. 2(3), 9(5), 14(6), Dec. 16, 1966, 999 U.N.T.S. 171 (ensuring remedies and compensation for wrongful convictions and imprisonment); G.A. Res. 217(III) A, Universal Declaration of Human Rights, art. 8 (Dec. 10, 1948) (“Everyone has the right to an effective remedy . . . for acts violating the fundamental rights granted him.”); Baginska, *supra* note 54 (reviewing the constitutionalization of the right to remedy across seventeen countries and the European Union); Corbé-Chalon & Rogoff, *supra* note 116, at 248–49 (describing the “constitutionalization” in France of a victim’s right to reparation).

121. Interestingly, economics-based legal scholars can be outright hostile to the notion of restoration as the primary goal of the legal system because [C]ivil litigation is an extremely expensive mechanism for shifting money around from one person’s pocket to another. If the law did nothing more than move money around it would simply engage in what economists term ‘transfers’ and would do so at considerable

tional courts have treated the right to a remedy “as an absolute one and have adopted a set of strong specific remedial rules to implement it in particular situations.”¹²² These rules usually purport to require *restitutio in integrum*—“damages that to the fullest extent possible makes the victim whole.”¹²³ As described below, this robust remedy right accords neatly with the cost-internalization theory of deterrence, which by itself is largely inattentive to—or capable of leaving in place—questions of fault and moral condemnation.

B. *Potential Limiting Factors*

The foregoing Section reveals a hesitancy in IHR law to fully embrace the role of the deterrence rationale in the calculation of compensation remedies. As noted, the hesitancy appears to have roots in the conflicting approaches of national jurisdictions, but it is also born of the experience of IHR law and tribunals themselves. That is, Shelton and other authorities suggest a number of specific reasons why IHR tribunals may have tended to discount the efficacy or feasibility of a fo-

cost to society. The general view of law and economics scholars is that other, more efficient mechanisms exist for achieving an appropriate income distribution generally and for compensating those injured by tortious acts in particular.

Sykes, *supra* note 47, at 2181–82; see also Naima Farrell, *Accountability for Outsourced Torts: Expanding Brands’ Duty of Care for Workplace Harms Committed Abroad*, 44 GEO. J. INT’L L. 1491, 1507 (2013) (“Although liability may also serve the important purpose of compensating individuals for injuries suffered after the fact, it is generally an inefficient means of distributing the costs of social harms.”).

122. Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 694 (2008).

123. *Id.* The exception is the ECHR, which applies a unique “just satisfaction” jurisprudence derived under art. 41 of the European Convention and that is arguably “distinct from the approach in common law where a claimant is entitled, so far as money can achieve this, to be restored to the position he or she would have been in had the violation of Convention rights not occurred.” Amos, *supra* note 90, at 375 (citing *Anufrijeva v. Southwark London Borough Council* [2003] EWCA (Civ.) 1406, [2004] QB 1124 [55] (Eng.)). *But see* Baginska, *supra* note 54, at 460 (quoting *R v. Inland Revenue Comm’rs* [2005] UKHL 30, [2005] 1 WLR 1718, a House of Lords interpretation of “just satisfaction” under parallel interpretation of the UK Human Rights Act [HRA] that “the general principle applied to affording just satisfaction was to put the applicant as far as possible in the position in which he/she would have been if the State had complied with its obligations under the HRA”).

cus on deterrence in IHR award practice. Many of these reasons arise from the fact that IHR institutions deal almost exclusively with sovereign State defendants—an important difference when it comes to reconsider the situation in the context of BHR.

1. *Governments as Imperfect Rational Actors*

A core premise of deterrence is that “rational actors weigh the anticipated costs of transgressions against the anticipated benefits.”¹²⁴ Scholars across disciplines have challenged this premise as it applies to individuals both generally and in a range of more specific situations.¹²⁵ Further, scholars have looked specifically at whether governments behave as rational actors in response to deterrence signals—especially in the context of government responses to civil rights damages judgments—and have found significant gaps. According to Professor Daryl Levinson, while governments certainly have financial interests, they fundamentally “respond to political incentives, not financial ones.”¹²⁶ As amalgams of institutions, govern-

124. See, e.g., SHELTON, REMEDIES 3d ed., *supra* note 1, at 22.

125. See, e.g., Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006) (exploring the impact of system justification motive on decision-making); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CAL. L. REV. 1063, 1064-65 (2006) (describing “behavioral realism”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1069 (2000) (“[A]ctors often fail to maximize their expected utility, but instead make suboptimal choices among competing options given a set of preferences and use a range of heuristics—rules of thumb—rather than complex cost-benefit analysis. This ‘bounded rationality’ results from the high cost of processing information, the cognitive limitations of human beings.”); Herbert Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955). The efficacy of the deterrent effect of criminal sanctions on criminal conduct has been debated particularly intensely. See, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 950-52 (2003); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765 (2010); see generally *Discussion of Recent Deterrence Studies*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/discussion-recent-deterrence-studies> (last visited Nov. 17, 2017).

126. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000). See also

ments are exposed to and then respond to varied and often contradictory sets of incentives. These varied incentives may cause governments to directly oppose, in overt and subtle ways, even such normatively powerful directives as observance of human rights. As Professor Peter Schuck noted:

The political environment may countenance or even reward lawbreaking that appears to advance important programmatic or ideological goals such as crime control, intelligence-gathering, or preservation of neighborhood schools. Bureaucratic needs—for example, to preserve employee morale or to maintain order within a custodial institution—may induce agencies to wink at illegal behavior.¹²⁷

At a structural level, governments often lack consistent command chains necessary for an incentivized part of government to exert meaningful pressure on a different part's conduct. Even more profoundly, governments can lack the basic internal communication and coordination necessary to translate an incentive into concerted action.¹²⁸ Apart from the research, many IHR tribunals have significant familiarity with the governments that appear before them, given that governments are repeat players in the system. Moreover, many IHR tribunals often interface with governments in depth as part of the process of compiling human rights reports, and many judges are nationals who have often served in government in their

Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 845–46 (2001).

127. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 125 (1983).

128. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1045–52 (2010) (finding that most police departments did not even keep any notation of a lawsuit filed against an officer in the officer's personnel file and that results of lawsuits were not recorded or analyzed by any department); see generally HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* (1998), <https://www.hrw.org/reports/pdfs/u/us/usp986.pdf>. Holding individuals in government accountable arguably improves deterrence uptake considerably, but has limits and can raise fairness concerns in many situations. See, e.g., Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 596–600 (2000) (arguing that the costs of settlements and judgments should be allocated between police departments and officers).

respective countries. IHR tribunals may be reluctant to issue deterrence-focused awards if they have a sense that the signal will not be received with due influence by the particular departments or individuals who hear it.

2. *Costs Borne Directly by Society*

A feature of IHR awards that has both substantive and political dimensions is that awards are generally rendered against States, and thus borne by all members of society, or as is often put, by the taxpayers.¹²⁹ IHR tribunals may be sensitive both to the issue of burden and to the political vulnerability it represents. Typically, tort damages awards are not significant enough in relation to national budgets to raise much concern—as opposed to, for example, economic damages assessed against States in the investment arbitration context.¹³⁰ In the U.S. context, when tort damages do individually or collectively rise to significant levels, such as U.S. civil rights awards against municipalities for victims of police brutality,¹³¹ public reaction can be mixed. On the one hand, the awards can be used as evidence of deeper systemic problems in need of attention.¹³² On the other, the legitimacy of the awards and the issuing institutions can be attacked.¹³³ As the U.K. Court of Appeal

129. Beth Stephens, *Book Review and Note: Remedies in International Human Rights Law*, by Dina Shelton, 95 AM. J. INT'L L. 257, 257 (2001) (“[D]etermining an appropriate level of compensation is complicated by the fact that holding the state responsible forces all members of society to share the burden of an award of damages.”).

130. An often discussed example is the \$353 million arbitration award won by cosmetics billionaire Ralph Lauder against the Czech Republic, an amount “roughly equal to the country’s entire health care budget.” GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 7 (2007).

131. See, e.g., Zusha Elinson & Dan Frosh, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J., (July 15, 2015), <http://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834>; *Police Abuse Cases Forced NYC To Pay \$428,000,000 in False Arrest and Civil Rights Settlements*, COUNTER CURRENT NEWS (Oct. 19, 2014), <http://countercurrentnews.com/2014/10/police-abuse-cases-forced-nyc-to-pay-428000000-in-false-arrest-and-civil-rights-settlements/>.

132. See, e.g., Nick Wing, *We Pay A Shocking Amount For Police Misconduct, And Cops Want Us Just To Accept It. We Shouldn't*, HUFFINGTON POST (May 29, 2015), http://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements_n_7423386.html.

133. See, e.g., Radley Balko, *A New GOP Bill Would Make it Virtually Impossible to Sue the Police*, WASH. POST (May 24, 2017), <https://www.washingtonpost.com>.

stated in applying the U.K. Human Rights Act to certain claims made by asylum-seekers:

Resources are limited and payments of substantial damages will deplete the resources available for other needs of the public including primary care. If the impression is created that asylum seekers whether genuine or not are profiting from their status, this could bring the Human Rights Act into disrepute.¹³⁴

3. *Governments' Ability to Absorb Costs*

A related concern is that because States have such sizeable treasuries and budgets, they have the capacity to “pay” for violating human rights without feeling much pressure to change the underlying patterns of conduct. Shelton addresses this issue, noting that “[t]he level of award that would serve to deter an individual is unlikely to be adequate when the state is the defendant, because any compensation awarded will be paid from the public treasury which has resources far beyond those of individual wrongdoers.”¹³⁵ If IHR tribunals perceive this to be the case, they could see the exact amount of the award as unimportant and instead focus on its symbolic value irrespective of quantum. Of course, an alternative approach would be to increase award amount until the State takes notice, or as Shelton suggests, “to augment the level of the remedy when there is corporate or institutional rather than individual responsibility.”¹³⁶ However, it is likely that IHR tribunals take a dim view of the practicality of larger damages awards in light of already existing difficulties in getting States to respect their judgments.

com/news/the-watch/wp/2017/05/24/a-new-gop-bill-would-make-it-virtually-impossible-to-sue-the-police/?utm_term=.8c06a723bcc1; Elinson & Frosh, *supra* note 131, (quoting a police officers' association: “You could have Mother Teresa running a police department and you're still going to have lawyers out there saying she's not to be trusted and we're going to sue.”).

134. *Anufrijeva v. Southwark London Borough Council* [2003] EWCA (Civ.) 1406, [2004] QB 1124 [75] (Eng.).

135. SHELTON, *REMEDIES* 3d ed., *supra* note 1, at 22.

136. *Id.*

4. *Enforceability*

IHR tribunals would be justified in worrying that higher quantum or deterrence-focused damages awards could trigger the State to refuse to pay. As Professor Shelton has written, “The international legal system lacks not only a legislature but a developed court system, and it has only weak enforcement powers.”¹³⁷ Non-payment of an award is not only an additional injustice to the affected rights-holder, but it undercuts the legitimacy of the award-rendering body, especially if the non-payment is not met by public or peer condemnation. Professor James Cavallero reports that as of 2007, the IACHR reported full compliance in only 11.57% of resolved cases.¹³⁸ While the ECHR in its early decades enjoyed high rates of compliance, Cavallero suggests this was due to the “climate of entrenched rule of law and the frequently minor nature of violations seen in Western Europe,” whereas today’s IHR tribunals (including the ECHR given its expanded jurisdiction) “are unlikely to enjoy the automatic implementation of their decisions, particularly when these decisions call for a significant political or financial commitment or implicate endemic human rights problems.”¹³⁹ That said, it has also been observed that States are far more likely to comply with an order to pay damages than with other injunctive or restitution orders.¹⁴⁰

5. *Competence/Sovereignty*

IHR tribunals are also sensitive to existing challenges to the scope of their role in the international legal order. National courts, rooted in concepts of general jurisdiction, are on

137. Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 *LAW & INEQ.* 467, 470 (2007); see also Naomi Rohrt-Arriaza, *Reparations Decisions and Dilemmas*, 27 *HASTINGS INT’L & COMP. L. REV.* 157, 157–58 (2004) (looking at problems behind rare reparations payments for mass atrocities).

138. James L. Cavallero & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 *AM. J. INT’L L.* 768, 786 (2008); see also Dragoljub Popovic, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, 42 *CREIGHTON L. REV.* 361, 388 (2009) (noting that ECHR judgments “sometimes remain unenforced” though more due to “ill-functioning of the domestic judiciary system” than overt State intransigence).

139. Cavallero & Brewer, *supra* note 138, at 770.

140. *Id.* at 785–86.

a very different footing when it comes to issues of awards designed—by way of deterrence—to shape conduct and relations in society. While IHR law asserts a form of general jurisdiction with regards to a set of IHR norms as universal, controversy has dogged the use of IHR law to inform normative and legal decision-making on human rights issues that impact domestic “social legislation” or parallel domestic interpretations of rights.¹⁴¹ Common law courts and civil juries have already been criticized for lacking sufficient expertise and democratic accountability commensurate with their role in setting social and economic rules through liability regimes.¹⁴² IHR tribunals are justified in worrying about similar challenges should they too overtly seek to regulate conduct by way of damages awards.

While States do not have a prerogative to violate human rights, they do have prerogatives in areas that often lead to allegations of human rights abuse, such as natural resource development. Sorting out the legitimate scope of the law in these areas has been at the root of many recent controversies. The

141. See *European Court of Human Rights ‘Risk to UK Sovereignty,’* BBC NEWS (Dec. 28, 2013), <http://www.bbc.com/news/uk-politics-25535327> (reporting comments by Lord Judge, the former Lord Chief Justice of England and Wales, that the ECHR “was overstepping itself in attempting to dictate rather than influence the social legislation of member states”); Theresa May, U.K. Home Secretary, Speech on the UK, EU and Our Place in the World, Address to the Institute of Mechanical Engineers (Apr. 25, 2016), <https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world> (“This is Great Britain—the country of Magna Carta, Parliamentary democracy and the fairest courts in the world—and we can protect human rights ourselves in a way that doesn’t jeopardise national security or bind the hands of Parliament. A true British Bill of Rights—decided by Parliament and amended by Parliament—would protect not only the rights set out in the Convention but could include traditional British rights not protected by the ECHR, such as the right to trial by jury.”). Long-standing attacks on the ECHR in British politics may have played a significant role in the lead-up to the “Brexit” referendum vote on June 23, 2016. See, e.g., *Theresa May: UK Should Quit European Convention on Human Rights,* BBC NEWS (Apr. 25, 2016), <http://www.bbc.com/news/uk-politics-eu-referendum-36128318> (reporting on political implications of May’s “qualified support” for the “Remain” vote in light of her ECHR stance); John Henley, *Why is the European Court of Human Rights Hated by the UK Right?,* GUARDIAN (Dec. 22, 2013), <https://www.theguardian.com/law/2013/dec/22/britain-european-court-human-rights>.

142. See, e.g., Sebok, *supra* note 60, at 984 (“[T]here are important differences between a jury and the experts who advise legislators and regulators.”).

most powerful example is Brazil's response to the Inter-American Commission's issuance of precautionary measures in 2011. Specifically, the Commission ordered a halt to construction of the country's largest hydroelectric dam project, Belo Monte, until the State's compliance with international consultation and consent requirements could be properly assessed.¹⁴³ Brazil responded by "recalling its delegate to the organization, suspend[ing] payment of dues to the Commission, and with[holding] its ambassador to the OAS in protest."¹⁴⁴ Far from paying a political price for this intransigence, other States supported Brazil, perhaps not liking the idea of their own infrastructure projects facing similar obstacles in the future. The Bolivarian Alliance for the Americas (ALBA) "formed a working group in the OAS to 'reflect' on how to adapt the IACHR to 'new times,'" ultimately issuing reform proposals that would gut key powers of the Inter-American human rights system.¹⁴⁵ The Commission quickly rescinded its order by reinterpreting the underlying petition.¹⁴⁶ IHR tribunals may understandably be careful of intruding on core areas of sovereign prerogative unless they are acting with the full thrust of their legitimacy—for example, reflecting on the Belo Monte situation, pursuant to a judgment rendered on a full record as opposed to a precautionary measures order issued essentially *ex parte*.

143. Indigenous Communities of the Xingu River Basin, Pará, Brazil, Precautionary Measures, PM 382/10, Inter-Am. Comm'n H.R. (Apr. 1, 2011), <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp#382/10> (granting modification of precautionary measures); Dinah Shelton, *Whiplash and Backlash—Reflections on A Human Rights Approach to Environmental Protection*, 13 SANTA CLARA J. INT'L L. 11, 21 (2015) ("The widely reported reaction of the government of Brazil to the precautionary measures requested in the case of the Belo Monte dam were unprecedented in their hostility to a human rights monitoring body.").

144. *The Dangers of the Hemisphere Operating Without the IACHR's Guidance*, COUNCIL ON HEMISPHERIC AFF. (July 25, 2012), <http://www.coha.org/the-dangers-of-the-hemisphere-operating-without-the-iachrs-guidance/>.

145. Rodrigo Uprimny Yepes & Nelson Camilo Sanchez, *Human Rights: New Threats in the Hemisphere*, AM. Q., Fall 2012, at 129.

146. Imelda Carranza Ureño, *The Waiver of National Sovereignty: The Economic and Environmental Implications of the Transoceanic Canal of Nicaragua*, 25 TRANSNAT'L L. & CONTEMP. PROBS. 205, 223–24 (2015).

C. *Are Human Rights Damages Awards Adequate to the Task of Deterrence?*

International human rights damages awards are often considered low, relative to practice not only in the United States but also in many other national jurisdictions. Though U.S. damages awards are consistently higher than awards in other jurisdictions,¹⁴⁷ research suggests that many jurisdictions are trending in the direction of American practice.¹⁴⁸ Some

147. See Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DEPAUL L. REV. 399, 399 (2006). This is not to say that the disparity is not paradoxical, especially with regards to European countries which maintain equivalent or higher standards of living and presumably place equivalent or higher value on human life—yet those values are not translated into compensation awards. The explanation is surely as complex as the complexity of differences between the relevant cultures and legal systems. Scholars have looked at a range of issues, from seemingly “petty” status issues within the legal profession, see, e.g., Claudio Ceriani, Italy—Personal Injury Overview, ANN.2000 ATLA-CLE 2097 (2000) (“Italy is a country in which personal injury law in favor of the victims is considered by many to be worthy of only second-class lawyers . . . there are very few attorneys specialized exclusively in personal injury law, almost no one specializes in work either for plaintiffs or defendants, and, of these, nearly none speak English.”), to more profound structural power difference, see, e.g., Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations From Japan and the United States*, 150 U. PA. L. REV. 527, 565 (2001) (describing “institutional restrictions [that] ensure that virtually no active [securities] plaintiffs’ bar exists in Japan”).

148. See, e.g., Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1109 (2015) (“Recent developments in foreign courts have undermined the conventional wisdom that transnational litigation has no other place to go. Political science scholars in particular have begun to document the adoption of many American-style procedures in foreign courts.”); *id.* at 1110 (“[D]amages awards abroad are not yet reaching (and may never reach) U.S.-style levels, but they are growing and will likely continue to grow.”); Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 UC IRVINE L. REV. 127 (2013) (noting brighter prospects for human rights litigation in non-U.S. courts than in U.S. courts); Ryan Conlin & Frank Portman, *The Gloves Come Off: Sky High Damages in Human Rights Cases*, STRINGER LLP (June 4, 2014), <http://www.stringerllp.com/gloves-come-off-sky-high-damages-in-human-rights-cases>; *Holidaymaker Speared Through the Eye by Parasol in Line for Huge Compensation Payout*, TELEGRAPH (June 17, 2015), <http://www.telegraph.co.uk/news/uknews/law-and-order/11681588/Holidaymaker-speared-through-the-eye-by-parasol-in-line-for-huge-compensation-payout.html> (noting estimates of a £5M recovery in the U.K., whereas his recovery in Spain would have been “limited” to £600,000); Fiona Govan, “Spain’s thalidomide victims denied compensation after appeal rejected,” *The Local*, Sept. 23, 2015, at <https://www.thelocal.com>.

have even suggested that IHR damages awards are so low as to be ineffective or even demeaning.¹⁴⁹ Shelton writes that even as of 2015, the ECHR “appears to have set a base line of £10,000 pounds for non-pecuniary damage for loss of life,” an amount well below most European national awards regarding the same, and that “a review of the [ECHR]’s jurisprudence reveals that it has not been very generous or coherent regarding compensation for non-pecuniary damage, at least compared to the IACHR.”¹⁵⁰ The IACHR, however, hardly seems much better. Shelton notes that today the IACHR issues

es/20150923/spain-thalidomide-victims-lose-appeal-for-compensation (last visited 27 Feb. 2018) (noting trial court decision awarding “damages of €20,000 for every percentage point of disability in each case of the 186 [thalidomide] victims who brought the class action”); Nazia Parveen, *Huge £800,000 Payout: Teaching Assistant’s Award After Tripping on a Wheelchair*, DAILY MAIL (Nov. 21, 2012), <http://www.dailymail.co.uk/news/article-2236412/Huge-800-000-payout-Teaching-assistants-award-tripping-wheel-chair.html> (reporting—with indignation—on a large settlement paid to a teacher for finger injury and related harm).

149. See, e.g., Baginska, *supra* note 54, at 454 (“[A] relatively low level of damages awarded by the [ECHR] encourages applicants from some countries to seek full damages in domestic courts.”); EUR. PARL. ASSEMB., *Motion for a Resolution on Enforced Disappearances Presented by Mr. Pourgourides and Others*, Doc. No. 10679 (2005), para. 66, <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11021> (“Sums only in the thousands of euros for the loss of children, husbands or fathers are in my view an insult to the victims and risk undermining the authority of the Court in the eyes of the perpetrators and the Governments responsible for such deeds.”).

150. SHELTON, *REMEDIES* 3d ed., *supra* note 1, at 325. See also Amos, *supra* note 90, at 387 (describing ECHR awards for torture and inhuman or degrading treatment or punishment as “modest”); Aydin v. Turkey, App. No. 23178/94, 25 Eur. H.R. Rep. 251 (1998) (£25,000 for rape in detention); Del Rio Prada v. Spain, App. No. 42750/09, Eur. Ct. H.R., Grand Chamber Judgment (2013), <https://hudoc.echr.coe.int/eng?i=001-112108> (_30,000 for five years’ unlawful detention). In *Armoniene v. Lithuania*, the applicant brought an Article 8-Privacy claim against Lithuania after her family received “the derisory sum” of approximately _3,000 in compensation after winning a domestic invasion of privacy lawsuit based on the disclosure of HIV+ status. *Armoniene v. Lithuania* (No.2), App. No. 36919/02, Eur. Ct. H.R., Judgment (2008), <https://hudoc.echr.coe.int/eng?i=001-89823>. The ECHR found an Article 8 violation but rejected the applicant’s claim for _26,000 as unjustified and instead ordered _6,400 in non-pecuniary damages. *Id.* But see *Centro Europa 7 S.R.L v. Italy*, App. No. 38433/09, Eur. Ct. H.R., Grand Chamber Judgment (2012), <http://hudoc.echr.coe.int/eng?i=001-111399> (€10M award to corporate entity for “uncertainty in the conduct of its business and feelings of helplessness and frustration” as well as “anxiety and inconvenience caused to the members of the management team”).

awards for non-pecuniary damages associated with loss of life “‘based upon the principles of equity’ considering the ‘special circumstances of the case,’”¹⁵¹ but that not long ago it appeared to establish a fixed amount of \$20,000 per victim, even though the Commission—which tries claimants’ cases for them before the IACHR—was asking for \$125,000 per victim.¹⁵² These amounts are considered low not just in relation to their ability to properly make the victim “whole,” as the right to remedy purportedly requires, but also to achieve any deterrence effect. Professor Shelton argues directly that “in calculating the amounts needed to uphold a treaty regime by adequately deterring State misconduct . . . international tribunals may need to consider awarding far higher amounts of damages than have heretofore been adjudged.”¹⁵³ Additional considerations in the IHR context about how tribunals might go about this task are considered in the following sections.

1. *Pecuniary Versus Nonpecuniary Harm*

Awards can fall into three categories: (1) nominal (“a small sum awarded to symbolize the vindication of rights”); (2) pecuniary (“monetary loss or harm suffered”); and (3) moral (“compensation for dignitary violations, including fear, humiliation, mental distress”).¹⁵⁴ In practice, IHR tribunals and other courts will often use “non-pecuniary” harm in place of moral damages, yet the parameters of “non-pecuniary” harm are less precise. Shelton observes that [s]ome states consider pain and suffering under the heading ‘pecuniary harm’ while others consider pain and suffering as part of intangible losses, compensated by moral damages.”¹⁵⁵

151. SHELTON, REMEDIES 3d ed., *supra* note 1, at 351 (quoting Velásquez-Rodríguez, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 27 (1990) (discussing compensatory damages) and *El Amparo v. Venezuela*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 28, ¶ 37 (1996) (discussing reparations)).

152. *Id.* at 352.

153. SHELTON, REMEDIES 3d ed., *supra* note 1, at 30.

154. *Id.* at 316. All these categories of damages are “compensatory,” whereas the label “extra-compensatory” damages refers to punitive, exemplary, aggravated, or other deterrence-based or punishment-based award, to the extent that awards exceed what is understood to be full compensation.

155. *Id.* at 316–17.

The labels matter because many courts such as the ECHR impose strict proof standards prior to awarding pecuniary harm, but award non-pecuniary harm at the court's discretion and in an amount that seems "equitable."¹⁵⁶ This has led to the perhaps counter-intuitive result that the ECHR has issued vastly more awards of non-pecuniary damages than pecuniary damages, which are denied in the majority of cases.¹⁵⁷ This practice attempts to draw a line between damages that are categorically provable—a characterization that tends to support the imposition of an inordinately strict standard of proof—or categorically unprovable—a characterization that may dispense with the standard of proof, but gives weight to the idea that such damages are "impossible" to compensate for anyway. In *Oyal v. Turkey*, a majority of the court essentially threw up its hands in defeat at the impossibility of the task of awarding meaningful non-pecuniary damages to meet the suffering of parents of a baby negligently infected by HIV in a blood transfusion and later denied health services by the State, holding that "the sorrow and pain suffered by the [applicants] cannot be compensated even if huge amounts were awarded."¹⁵⁸ The Court used this reasoning to award the parents €78,000, although they had requested €2M.¹⁵⁹ On the non-pecuniary side, the majority awarded a sum for future medical expenses but was excoriated by a dissent because it did not require "re-

156. *Id.* at 321.

157. *Id.* at 324–25.

158. *Oyal v. Turkey*, App. No. 4864/05, Eur. Ct. H.R., Judgment (2010), <http://hudoc.echr.coe.int/eng?i=001-97848>.

159. *Id.* For contrast, Westlaw's Jury Verdicts and Settlements service (which relies on reporting and lawyer submission of case data) reports the following case resolution numbers and amounts for wrongful death cases in U.S. courts since 2007:

Award Range	Verdicts/Settlements
\$1 - \$49,999	227
\$50,000 - \$99,999	184
\$100,000 - \$199,999	258
\$200,000 - \$499,999	453
\$500,000 - \$999,999	381
\$1M - \$1,999,999	453
\$2M - \$4,999,999	413
\$5M+	418

Source: Author compilation from Westlaw Database of Jury Verdicts and Settlements

cept[s] for actual treatment” and instead estimated costs from published drug prices.¹⁶⁰

2. *Underutilized Tools of Damages Calculation*

In fact, “the line between pecuniary and nonpecuniary harms is fuzzy.”¹⁶¹ Even the most abstract and personal “moral” damages such as dignitary harm need not be picked out of the mists of equity arbitrarily. Rather, they can and should be supported, established, or even proven by reference to particular facts.¹⁶² Just as environmental damages assessments have grown in sophistication in modern times—expanding beyond quantification of superficial clean-up costs to broader assessments of the sorts of “ecosystem services” that are often part of the environmental impact¹⁶³—more sophisticated and rigorous tools are called for regarding human rights damages. Consider the practice with respect to damages for loss of consortium (i.e., the “ability to render care, affection, assistance, and advice”¹⁶⁴). For example, in the case of a wrongful death of a spouse, U.S. courts will direct juries not to

160. *Oyal v. Turkey*, App. No. 4864/05, Eur. Ct. H.R., Judgment (2010) (Sajó, J., partly concurring and partly dissenting), <http://hudoc.echr.coe.int/eng?i=001-97848>.

161. Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 69 n.23 (1993). Radin notes, “For example, loss of a wife’s consortium was historically thought of as an economic harm to her husband, because the law focused on the services she owed him; but in a modern understanding, the emotional component of the loss is more important.” *Id.* See Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 95 (1993) (challenging “the ability to categorize the vast and complex spectrum of losses into a dichotomy between pecuniary and nonpecuniary losses”).

162. SHELTON, REMEDIES 3d ed., *supra* note 1, at 326 (critics have “urged the [ECHR] to publish its criteria”).

163. See, e.g., *Gulf of Mexico Ecosystem Services*, GULF OF MEXICO ALL., <http://www.gulfofmexicoalliance.org/2014/09/gulf-of-mexico-ecosystem-services> (last visited Nov. 17, 2017) (“The concept of ecosystem services has been on the rise in some professional circles but poorly understood by the general public. Humans benefit from a variety of products and services provided naturally by the environment. These can be critical to society well-being but are rarely considered in decision making. The contribution of natural ecosystems are un-quantified and unmeasured, but their importance includes food, medicine, and the resources to conduct daily lives.”).

164. James L. Isham, *Excessiveness or Adequacy of Damages Awarded for Noneconomic Loss Caused by Personal Injury or Death of Spouse*, 61 A.L.R. 4th Art. 1, § 2(d) (1988).

issue an award from their collective “gut,” but to specifically consider—in addition to basic factors such as age, health, and life expectancy—factors such as

the closeness of the relationship that had existed between the spouses; the length of their continuous relationship; the common interests they shared; the deceased spouse’s participation in family activities; his or her devotion to and interest in the family community; and his or her disposition and ability to render care, affection, assistance, and advice.¹⁶⁵

Appellate courts or trial judges scrutinizing awards for fairness have upheld high levels of damages where the plaintiff established that an injured spouse became “so irritable that family members could not go near him,”¹⁶⁶ or where evidence showed that a woman killed by a bus had demonstrated particular “[f]rugality, industry, usefulness, attention, and tender solicitude of wife and mother.”¹⁶⁷ For the affected rights-holder, the comparable category of damages is loss of enjoyment of life,¹⁶⁸ or loss of established course of life. For example, in a domestic U.S. case, a severely injured professional snowmobiler won a \$1.28M federal court award, arguing that in addition to his injuries, he had lost key aspects to his personhood and his “established course of life.”¹⁶⁹

On the issue of damages for rape—which, as noted above, so bedeviled Aftab and Simons in the exchange described in Section II—it is true that U.S. courts generally award amounts

165. *Id.* The actual decisive importance of such factors is illustrated, by one source, with the case of *Stanford v. McLean Trucking Co.*, 506 F. Supp. 1252 (E.D. Tex. 1981):

[A] case involving the death of two wives in a fiery automobile crash, in which one of the surviving husbands was awarded \$100,000 for loss of consortium, while the other was awarded \$75,000 for the same loss where it was shown that while both husbands relied on their wives for counsel, personal services, advice, care, attention, and moral support, the husband recovering the smaller amount was apparently shown not to have been particularly supportive of the marriage relationship.

Id. Art. I, § 2(h).

166. *Id.* Art. I, § 2(f).

167. *Tulewicz v. S. Pa. Transp. Auth.*, 606 A.2d 425, 426 (Pa. 1991).

168. 49 AM. JUR. PROOF OF FACTS 3D *Damages for Loss of Enjoyment of Life* (2017).

169. *Oberson v. United States*, 311 F. Supp. 2d 917, 945 (D. Mont. 2004).

vastly greater than either the amount paid by Porgera OGM (~\$10,000) or the amount ordered by the IACHR in the main human rights “benchmark” case (\$50,000).¹⁷⁰ But, U.S. courts and juries are also typically presented with a much more comprehensive set of relevant facts about both the victim’s related expenses and the pain and suffering endured. Indeed, U.S. courts and juries will typically consider the survivor’s pain and suffering in light of the dimensions of Rape Trauma Syndrome, a sub-diagnosis of Post-Traumatic Stress Disorder “consisting of specific behavioral, somatic, and psychological reactions caused by a rape or sexual assault” that is subject to professional scrutiny and elaboration apart from the particular case.¹⁷¹ Tort lawyers in the United States are trained through experience to develop and present less obvious categories of claims for pecuniary loss (such as claims for the future cost of home care, occupational therapy or training, or sleep therapy) and non-pecuniary loss (such as loss of enjoyment of life).¹⁷² The recent increase in scientific attention to the topic of happiness may give damages experts new and sufficiently reliable tools to use in establishing damages that might earlier have been dismissed.¹⁷³

170. Westlaw’s Jury Verdicts and Settlements reports the following resolutions in rape cases since 2007:

Award Range	Verdicts/Settlements
\$1 - \$49,999	20
\$50,000 - \$99,999	5
\$100,000 - \$199,999	18
\$200,000 - \$499,999	35
\$500,000 - \$999,999	44
\$1M - \$1,999,999	33
\$2M - \$4,999,999	41
\$5M+	64

Source: Author compilation from Westlaw Database of Jury Verdicts and Settlements

171. 12 AM. JUR. PROOF OF FACTS 3D *Rape Trauma Syndrome* § 1 (2017).

172. See, e.g., Cass Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S159–160 (2008) (citing “hedonic damages” cases).

173. David E. DePianto, *Tort Damages and the (Misunderstood) Money-Happiness Connection*, 44 ARIZ. ST. L.J. 1385, 1392 (2012) (“The empirical study of well-being has, over the last few decades, generated a stream of research sufficiently steady and large to declare happiness research a sort of sub-discipline unto itself.”).

It is not clear to what extent this level of sophistication regarding damages exists in IHR practice. Shelton cites cases awarding damages for the major categories of pain and suffering, mental anguish, loss of enjoyment of life, loss of consortium, loss of love and companionship, and loss of services in the home, society, and sexual relations.¹⁷⁴ The cases specifically seek to redress suffering in the form of “anxiety, distress, ‘isolation, confusion and neglect,’ abandonment, feelings of injustice, impaired way of life, ‘harassment and humiliation,’ and other suffering.”¹⁷⁵ Yet, she notes that there is an “on-going absence of awards for the value of personal services” in the Inter-American system, which, combined with “the admittedly ‘extremely conservative’ calculation of lost revenues, has led to substantially less being claimed and awarded in material damages than was actually suffered, resulting in a consistent undervaluing of life.”¹⁷⁶ Shelton also notes that there is some degree of damages expert practice before IHR tribunals,¹⁷⁷ including cases where tribunals have requested or appointed experts themselves.¹⁷⁸ Still, she finds that “[a]pplicants have often failed to present detailed claims of legal arguments to support their demands for compensatory damages,” and urges that “[a]ttorneys representing victims of human rights abuses must be more attentive to the remedial phase of proceedings to ensure that the outcome affords redress to their clients.”¹⁷⁹ She feels the need to urge human rights attorneys to explicitly “refer to the deterrent and sanctioning functions of damage awards.”¹⁸⁰

174. SHELTON, REMEDIES 3d ed., *supra* note 1, at 347.

175. *Id.* at 348; *see also id.* at 324.

176. *Id.* at 336.

177. *See id.* at 349 (describing the Velásquez-Rodríguez, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7 (1990) and Godínez-Cruz v. Honduras, Interpretation of Compensatory Damages, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 10 (1990) cases, where private attorneys assisted the Commission in presenting expert psychiatric testimony on suffering at a special hearing, leading to a relatively substantial award).

178. *See id.* at 363 (discussing IACHR’s own request for expert assistance from a national medical school as psychological harm in Loayza Tamayo v. Peru, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 43 (1998) and appointment of an actuary in Neira-Alegria v. Peru, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 29 (1998)).

179. *Id.* at 375.

180. *Id.*

What appears is not so much a foundation of bad law or a lack of opportunity, but an attitudinal problem, both with judges and claimants' attorneys, that is exploited by respondents and results in low damage awards.¹⁸¹ This situation can be seen with respect to pecuniary damages in the form of the "high standard of proof" and restrictive scope of proximate cause imposed by the ECHR and other bodies.¹⁸² Justice arguably requires that once liability is established, "the risk of uncertainty of lack of proof [should] be shifted to the wrongdoer."¹⁸³ In other words, the wrongdoer bears the burden to rebut damages that can otherwise be inferred from the facts or from incomplete supporting evidence. Shelton asserts that damages should be provable "in any manner which is reasonable under the circumstances" and "with whatever definiteness and accuracy the facts permit."¹⁸⁴ This implies that the effective standard of proof might be higher or lower for different categories of damages, or even for different claimants—a sophisticated, record-keeping organization versus an impoverished family, for example. Instead, as noted above, the ECHR maintains its high standard of proof and rejects most pecuniary claims, addressing pressure in favor of justice to the affected rights-holder through awards of non-pecuniary damages set under a relatively standard-less equitable principle.

With reference to non-pecuniary harm, Shelton observes that the ECHR "seems more influenced by its own view of the

181. In ECHR practice, for example, governments invariably claim not only that applicant damages claims are "excessive" but that "the finding of a violation [should] constitute in itself sufficient just satisfaction." *See, e.g., Mocanu and Others v. Romania*, App. Nos. 10865/09, 45886/07 and 32431/08, Grand Chamber Judgment, paras. 372–76 (2014), <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-146540&filename=001-146540.pdf> (concerning a situation where the government claimed the award itself should constitute satisfaction where the applicant, a political protester, suffered craniocerebral and other injuries after being severely beaten by police; eventually the ECHR rejected the applicant's claim of _200,000 and awarded €15,000 in non-pecuniary damage); *M.C. v. Bulgaria*, App. No. 39272/98, 40 Eur. Ct. H.R. 20, para. 192 (2003) (concerning a situation where the government claimed the applicant's request for €20,000 for psychological trauma from the State's failure to prosecute rape and victimization from a flawed investigation was excessive; eventually the ECHR awarded €8,000).

182. SHELTON, *REMEDIES* 3d ed., *supra* note 1, at 360, 375.

183. *Id.* at 355.

184. *Id.*

unfairness of the proceedings and the character of the applicant than by available proof of harm.”¹⁸⁵ Shelton heralds the IACHR’s recognition of *proyecto de vida* or life plan damages in the *Loayza Tamayo* case, where a university professor was raped, tortured, and humiliated for days in unlawful detention, and provided a wealth of testimonial, documentary, and expert evidence concerning a range of mental and physical health problems following her experience that, among other factors, left her unemployed and estranged from her family.¹⁸⁶ Indeed, the IACHR acknowledged that

It is obvious that the violations committed against the victim in the instant Case prevented her from achieving her goals for personal and professional growth, goals that would have been feasible under normal circumstances. Those violations caused irreparable damage to her life, forcing her to interrupt her studies and to take up life in a foreign country far from the context in which her life had been evolving, in a state of solitude, poverty, and severe physical and psychological distress. Obviously this combination of circumstances, directly attributable to the violations that this Court examined, has seriously and probably irreparably altered the life of Ms. Loayza-Tamayo, and has prevented her from achieving the personal, family and professional goals that she had reasonably set for herself.¹⁸⁷

Nonetheless, the IACHR concluded that despite all the available evidence, “neither case law nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms. Hence, the Court is refraining from quantifying it.”¹⁸⁸ The IACHR thus awarded no life plan damages whatsoever; a dissenting opinion that would have awarded such damages would have awarded only \$25,000.¹⁸⁹

185. *Id.* at 358.

186. SHELTON, REMEDIES 3d ed., *supra* note 1, at 350; *Loayza Tamayo v. Peru*, (1998) Series C No. 41, at ¶¶ 71, 74-87, at http://www.corteidh.or.cr/docs/casos/articulos/seriec_42_ing.pdf (last visited 27 Feb. 2018).

187. *Id.* (*Loayza Tamayo*), at ¶¶ 152-53.

188. *Id.* at ¶ 153.

189. *Id.* (Partially Dissenting Opinion of Judge Carlos Vicente de Roux-Rengifo).

3. *Perfect as Enemy of the Good*

Some of the resistant attitude toward damages may trace back to the sense of the impossibility of full compensation “even if huge amounts were awarded,” as the ECHR majority stated in *Oyal v. Turkey*.¹⁹⁰ Similarly, in the *Mosley* case, the ECHR again let the predecessor U.K. domestic court tort decision do the talking on this point, quoting it extensively as follows:

Notwithstanding [the seriousness of the privacy violation and the likelihood of its repetition as to future victims], it has to be accepted that an infringement of privacy cannot ever be effectively compensated by a monetary award. Judges cannot achieve what is, in the nature of things, impossible. That unpalatable fact cannot be mitigated by simply adding a few noughts to the number first thought of. Accordingly, it seems to me that the only realistic course is to select a figure which marks the fact that an unlawful intrusion has taken place while affording some degree of solatium to the injured party. That is all that can be done in circumstances where the traditional object of *restitutio* is not available. At the same time, the figure selected should not be such that it could be interpreted as minimising the scale of the wrong done or the damage it has caused.¹⁹¹

This attitude is strikingly callous as to the multiple layers of significance, dignity, and comfort that affected rights-holders might see in those “few noughts.” It fails to consider a notion of restitution as restoration of the individual not to identical factual circumstances but to a similar “position of relative satisfaction” as he or she occupied before the violation.¹⁹² Further, it is casually dismissive or ignorant of the tools and methods

190. App. No. 4864/05, Eur. Ct. H.R., Judgment, para. 106 (2010), <http://hudoc.echr.coe.int/eng?i=001-97848>; see also SHELTON, REMEDIES 3d ed., *supra* note 1, at 336 (discussing *Aloboetoe v. Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15 (1993)). In *Aloboetoe*, the court “mentioned” the issue of damages to family members for loss of services of the deceased “but did not consider the pecuniary value of such, perhaps because it considered it too subjective of difficult to calculate.” *Id.*

191. *Mosley v. United Kingdom*, *supra* note 114.

192. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 196 (7th ed. 2007).

available to more precisely understand and calculate (1) the effect of the privacy violation on the applicant's life and (2) the cost of remedial options that would at least get closer to the goal of full restitution, even if perhaps not fully achieving it. While "[v]aluation of loss is nearly always imperfect," nonetheless "[d]amage awards . . . supply the means to enjoy whatever part of the former life and projects remain possible and may allow for new activities."¹⁹³ Numerous torts scholars have engaged this problem. Judge Posner has noted the problem is "most acute in a death case" because "[m]ost people would not exchange their lives for anything less than an infinite sum of money."¹⁹⁴ While theorists must ultimately "back away" from the problem of "whole" compensation in death and serious injury cases, and while "the departure from full compensation leaves both the corrective justice and economic models in considerable disarray," the "doctrinal answer" has not been to give up the goal of full compensation entirely but rather to pursue partial and "reasonable" compensation that is feasible under the circumstances.¹⁹⁵ This means that "a very large amount of money will frequently be necessary" in many severe injury cases because the injury is not only devastating, but "reduces the amount of pleasure that can be purchased with a dollar."¹⁹⁶ Impossibility "should not afford a pretext for awarding minimal or no compensation."¹⁹⁷

It is somewhat surprising that IHR law does not work harder toward achieving genuinely "whole" compensation given that *restitutio in integrum* lies at the heart of the very well-established right to remedy. The *Chorzów Factory* case, "the cor-

193. SHELTON, REMEDIES 3d ed., *supra* note 1, at 315.

194. POSNER, *supra* note 192, at 196.

195. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 167 (4th ed. 2010).

196. POSNER, *supra* note 192, at 196. One can also consider jury instructions, which typically advise that "No definite standard or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering," yet direct the jury to render an award which "must be just and reasonable in the light of the evidence." Cal. Civ. Jury Instr. § 14.13.

197. SHELTON, REMEDIES 3d ed., *supra* note 1, at 325. Moreover, one reassuring thing about this "impossibility" is that it leaves an inevitable safe distance from the point where genuine moral hazard would set in (i.e., where a rights-holder would indeed choose the compensation over not being injured).

nerstone of international claims for reparations,”¹⁹⁸ was explicit on this in 1928:

The essential principle . . . is that reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. [It must consist of r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.¹⁹⁹

With such sweeping language as the “cornerstone” of the authority for remedies in IHR law, it is surprising that tribunals are not more aggressively inquiring into and ordering compensation for human rights injuries. It is also noteworthy, if not actually surprising, that tribunals have not better explored in their decisions how *restitutio in integrum* may accomplish deterrence according to the cost-internalization approach. The same perfect compensation which would make an affected rights-holder “whole” would also perfectly internalize costs unfairly borne by the holder and reallocate them to the wrongdoer for use as guidance in making future decisions. Shelton makes this link, noting that deterrence “requires full and accurate compensation for each victim of each incident,” and that only if “anticipated damages accurately reflect the true cost of the violation . . . [will] the ‘product’ [violations] be priced off the market.”²⁰⁰ Yet as set forth above, the cases are far more likely to reveal tribunals despairing at the impossibility of the task.

Shelton’s exhortation to more explicitly refer to “the deterrent and sanctioning functions of damage awards” may be more profound than it first appears.²⁰¹ Tribunals seem to understand the possible jurisprudential avenues to better “wipe out all consequences of the illegal act,” but lack the will to deploy them or to deploy them with sufficient force—such as

198. Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT’L L. 833, 836 (2002).

199. *Factory at Chorzów (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13); see also Shelton, *supra* note 198, at 835 (calling this passage from *Chorzów* “[o]ne of the most oft-quoted passages in international law.”).

200. SHELTON, REMEDIES 3d ed., *supra* note 1, at 22.

201. *Id.* at 375.

failing to quantify *proyecto de vida* damages in *Loayza Tamayo*. Into this impasse, a cost-internalization theory of deterrence could serve as additional fuel for the effort to understand the consequence of damages sufficient to make the affected rights-holder whole—and force the defendant to internalize the full range of costs. This analysis of the potential for the deterrence rationale in IHR law generally will be useful as this Article considers BHR more specifically in the next section.

V. DETERRENCE IN BHR

This Article now turns to the role of compensation-based deterrence in the world of BHR. The conversation in BHR regarding deterrence is perhaps even more complicated than it is in IHR generally. No shortage of BHR participants are uncomfortable with the notion of a strong deterrence rationale—at least one provided by compensation awards—in BHR practice. Their concerns should be met squarely. BHR deserves some latitude in setting its own course on the deterrence question and other issues. After exploring the scope of this latitude, this Section proceeds by first reconsidering whether the factors that have potentially limited the perceived usefulness of deterrence in IHR practice, as discussed in Section IV.B.1-5 above, can play a similar limiting role in BHR. This Section then examines whether the UNGP text speaks to the issue of deterrence. It then heads into more overtly normative waters, contemplating whether BHR remedies need to consider deterrence to achieve their underlying effectiveness and legitimacy goals.

A. *The New Culture of BHR*

BHR emerges from and exists as a sub-discipline of IHR law. BHR institutions and results must be benchmarked against the norms and expectations of IHR, and there is widespread agreement that BHR remedies—though they can and should take inspiration from the full range of remedies available in IHR practice²⁰²—must ultimately be “compatible” with

202. See, e.g., Valeska David, *The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter-American Court*, 3 BRIT. J. AM. LEGAL STUD. 259, 281–82 (listing remedies ordered by the UN Human Rights Commission, including “the nullification of a conviction and refund of a fine paid by the victim; restraint from enforcement and revoca-

the nature and degree of remedies provided at IHR law.²⁰³ While there remains uncertainty as to how much IHR tribunals rely on various conceptions of the deterrence rationale in the formulation of their awards, it is sufficiently clear that some do, to an extent—making the deterrence rationale at least *available* to BHR.

Moreover, BHR is necessarily more inter-linked with national legal systems, given that it does not have its own established practices and authoritative institutions like the IHR tribunals. Much of the content of the UNGPs directs States to enforce and reform their own laws, and repeatedly emphasizes a business's obligation to fully comply with the laws of both its home State and any State in which it may be operating (i.e., "host state"),²⁰⁴ as well as imposing obligations more grounded in IHR.²⁰⁵ With respect to remedies, the UNGPs anticipate reliance as appropriate on both home and host State judicial and non-judicial mechanisms,²⁰⁶ as well as more IHR-based mechanisms²⁰⁷ and OGMs. While OGMs are directed to comply with eight criteria listed in Principle 31,²⁰⁸ there is no

tion of an expulsion order; a public apology; commutation of a death sentence; early consideration for parole; retrial under due judicial guarantees; protection from threats; information on the fate of a disappeared person and prosecution, trial and punishment of those deemed responsible; restitution of a victim's property; grant of permission to leave the country; issuance of a passport; providing the victim with medical care; and a guarantee that similar violations will not occur in the future.").

203. *See, e.g.*, UNGP Pamphlet, *supra* note 2, at 34; AFTAB, ON THE GROUND, *supra* note 11, at 3, 101; COLUMBIA/HARVARD, *supra* note 11, at 69–90.

204. *See, e.g.*, UNGP Pamphlet, *supra* note 2, at 13, 25.

205. *See, e.g., id.* at 13 (Principle 12: "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.").

206. *See, e.g., id.* at 28–29. Regarding use of home State courts, the Commentary to Article 26 characterizes a situation where individuals "cannot access home State courts regardless of the merits of a claim" as a potentially illegitimate "legal barrier," at least where "claimants face a denial of justice in a host State."

Id. at 29.

207. *See, e.g., id.* at 28 (referencing the role of "international and regional human rights mechanisms").

208. *Id.* at 33–35.

specific direction as to where the various necessary laws, procedures, and standards should come from, except for the “rights-compatibility” requirement that OGM “outcomes and remedies accord with internationally recognized human rights.”²⁰⁹ OGMs thus appropriately rely on a mix of authority from relevant national jurisdictions, IHR law, and other “best practices” type sources. In sum, BHR is bound to IHR law, but not too tightly. As it continues to develop its character, it can and should evolve its own conception of what role, if any, deterrence should play in the determination and assessment of remedies.

In light of the uncertain progress in other project areas of corporate accountability, BHR deserves a measure of autonomy to develop its own culture and normative expectations if it is going to fully develop its alternative approach. I have written in the past on the new “culture” at work behind the vigorous earlier years of the BHR field:

At the risk of oversimplifying, “corporate accountability” was built from an antagonistic perspective, reflecting what the advocates who built the field knew in their bones: that the corporations they were battling were guilty as sin, and rich because of it, and that the only meaningful question was whether our systems of justice and society at large would one day stop letting them get away with it. By contrast, BHR emerged at a time when the fight for human rights and environmental justice suddenly became less lonely; when major companies seemed to be talking more about social responsibility in their annual reports and ad spend than about their products or profit margins. The rhetorical warmth of “business *and* human rights” is as obvious as the antagonism in “corporate accountability.” Everybody is on the same side and everybody is “part of the solution.”²¹⁰

This proposed new culture is not an easy swallow for many with experience in seeking to impose corporate accountability. Professor Beth Stephens, who has four decades of real-world experience facing off against corporations in court, writes:

209. *Id.* at 34.

210. Page, *Alchemy Part I*, *supra* note 2.

A major problem with the existing system is its reliance on voluntary measures that largely depend on corporate good will and on requests that they be good corporate citizens. Corporations are designed to produce profit for their owners. Expecting them to voluntarily choose to be responsible social actors, despite the cost, is naive. As John Ruggie wrote recently, ‘Forty years of pure voluntarism should be a long enough period of time to conclude that it cannot be counted on to do the job by itself’. Ruggie was writing about one particular remedial procedure, but his indictment of voluntary mechanisms applies broadly. They do not work.

Corporations do not merely decline to volunteer to comply with human rights norms, including the right to an effective remedy. They also actively work to undermine enforcement measures. Through their outsized influence on domestic and international decision-makers, corporations have been able to dictate the terms of their relationship with the societies in which they operate. Using both lawful political pressure and unlawful, corrupt persuasion, corporations have sidetracked efforts to impose binding, enforceable human rights obligations and to obtain favorable procedural and substantive protection for their operations.²¹¹

These profoundly different perspectives on how corporations should be understood as IHR actors—and their *bona fides* more generally—will return to exert a powerful impact on how the policy and normative issues around deterrence are understood in the following sections. While a more accepting view of corporate motivations results in very different prescriptions

211. Beth Stephens, *Making Remedies Work: Envisioning a Treaty-Based System of Effective Remedies*, in BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS 412–13 (Surya Deva & David Bilchitz eds., 2017) (quoting John G. Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* 21 (Corp. Soc. Responsibility Initiative, Working Paper No. 66, 2017), <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper.66.oecd.pdf>).

of the necessary role for deterrence, the differences do not necessarily fall along traditional interest group lines.

B. *Potential Limiting Factors Revisited*

While later sections will engage the normative question of whether BHR should embrace the deterrence rationale, it has been suggested that IHR's muted embrace of deterrence may be explained by limitations inherent in the context of IHR and IHR institutions.²¹² The question arises of whether the same factors limit the perceived effectiveness and desirability of deterrence in the BHR context. This Article thus re-engages with each of these potential limiting factors before turning directly to the deeper normative questions.

1. *Corporations as (More) Rational Actors*

Corporations are often seen as the archetypal rational actor because, presumptively, their incentives are economic in nature. They are without the emotional, political, or other factors that have been identified as confounding the rational actor premise as to individual and government decision-making.²¹³ “[K]ey corporate actors, including directors, managers, employees, and investors, are [assumed to be] rational wealth maximizers,” and to the extent these individuals are inclined, as human individuals, to experience motivation from non-economic sources, such as emotion or conscience, corporate law can be understood as “curbing” these influences “in order to protect and preserve the wealth of those who contribute to the corporate enterprise.”²¹⁴ To the extent such premises are sound, deterrence-calculated awards are less likely to run into the confounding influences discussed in Section IV.B.1, regarding the difficulties of fitting State behavior into the rational actor model.

However, some scholars have challenged the rational choice model as applied to corporations.²¹⁵ Many corpora-

212. See *supra* Section IV.B.1–5 (reviewing potential limiting rationales).

213. See Renee M. Jones, *The Irrational Actor in the CEO Suite: Implications for Corporate Governance*, 41 DEL. J. CORP. L. 713, 717 (2017) (noting the broad application of the rational actor theory to corporate law problems).

214. *Id.* at 714.

215. E.g. Jones, *supra* note 213, at 724 (“[T]he policies recommended by rational actor theorists have failed to produce the predicted results.”); see

tions still maintain bureaucracies and internal divisions that rival the most sclerotic state, and some have argued that deterrence directed at the corporate entity (such as awards payable by the company) may not “have a deterrent effect on the individual corporate agent, who may be incentivized to participate in [misconduct] for reasons having to do with compensation schemes or culture.”²¹⁶ Others are less convinced and have dismissed some attempts to “dismember the rational actor model” as ideologically motivated.²¹⁷ While this particular dispute is beyond the scope of this Article, it remains persuasive that corporations have less political and “personal” interference in the economic incentive structure behind their decision-making than do States. To the extent that is true, the perceived futility in effecting deterrence through damages awards should be correspondingly diminished. Indeed, a more common criticism of damages awards against corporations, especially at extra-compensatory levels, is that they will result in over-deterrence, thereby “chilling beneficial conduct.”²¹⁸ A more exact measure of how responsive corporations are to damages awards may be necessary when it comes to figuring out how forceful extra-compensatory damages should be and in what circumstances they will be most effective.²¹⁹

also Jesse W. Markham, Jr., *The Failure of Corporate Governance Standards and Antitrust Compliance*, 58 S.D. L. REV. 499, 538 (2013) (“[I]t is highly doubtful, and anyway empirically unsupported, that corporations or their agents conduct the sort of ‘rational actor’ mathematical analysis ascribed to them by economists.”).

216. Markham, *supra* note 215, at 507.

217. Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437, 438 (2010) (reviewing June Carbone & Naomi Cahn, *Behavioral Biology, the Rational Actor Model, and the New Feminist Agenda*, in 24 RESEARCH IN LAW AND ECONOMICS: LAW AND ECONOMICS: TOWARD SOCIAL JUSTICE 189, 190 (Dana L. Gold ed., 2009)).

218. Nickolai G. Levin, *Weyerhaeuser’s Implications for Punitive Damages Litigation*, 4 HASTINGS BUS. L.J. 37, 38 (2008); see A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1470–72 (2010).

219. For example, Professor Sykes observes that the “economic benefits [of liability] turn heavily on the corporation’s ability to monitor the [relevant] agent effectively.” Sykes, *supra* note 47, at 2182. This insight could lead to award calculation taking into consideration the nature of the parent-sub-sidiary or joint venture relationships in assessing awards against particular defendants.

2. *Ultimate Bearer of Costs*

The issue of taxpayers ultimately bearing the burden of awards is less of a problem—or at least a different problem—for an award directed at a corporation, rather than a State. While it can be argued that consumers will bear the cost in the form of higher prices for the company’s product, that argument relies on a number of assumptions. First, it assumes that the company’s product price is not otherwise limited by consumer ability and/or willingness to pay. If the price is so limited, then the costs of award compliance would have to outstrip the economic consequences (e.g., lost customers) of deviation from the original optimal price point. It also assumes a price unchecked by competition. Having to pay an award does not give a company a free pass vis-à-vis its market competitors, such that in reality the company itself is more likely to absorb the burden of the award than to attempt to pass it on to its customers. Thinking more systemically, it is possible that the widespread implementation of BHR remedies will lead to higher costs across an entire market segment. However, such consistency would reflect an *ex ante* status quo where human rights violations are so “built into the system” that the entire segment becomes vulnerable to BHR liability—in other words, it is not the case of a few “bad apples.” These economies surely exist. The “fast fashion” garment industry is a prominent example. A core focus of existing BHR practice has been to pressure for change in this particular sector, and many fast fashion companies have undertaken steps to move their supply chains into compliance with core human rights obligations.²²⁰ At least some of the costs of these improvements have likely been passed to consumers—unless they failed to outstrip customer ability to pay, as noted above—but neither businesses nor consumers have thus far raised consumer price-based objections in this area.

220. See, e.g., “Report by Clean Clothes Campaign details poverty wages & poor working conditions in garment factories producing for global brands,” BHRRC, at <https://www.business-humanrights.org/en/ukraine-serbia-hungary-report-by-clean-clothes-campaign-details-poverty-wages-poor-working-conditions-in-garment-factories-producing-for-global-brands-incl-core-sponsors> (last visited 27 Feb. 2018) (describing civil society advocacy report and providing company responses and explanations to facilitate dialogue).

3. *Corporations' Ability to Absorb Costs*

At first glance, it is not clear that there is much relevant difference between the government treasury and the reserve fund of at least the larger multinational corporations when it comes to the viability of deterrence through damages awards. Both are sizeable enough to absorb the cost of at least an occasional award without changing behavior. Indeed, Professor Shelton treats them similarly in her treatise, arguing that “it may be necessary to augment the level of the remedy when there is corporate *or institutional* rather than individual responsibility.”²²¹ As to both governments and large multinational corporations, an IHR award-rendering body might legitimately perceive that the size of the award necessary to grab the attention and change the behavior of such deep-pocketed entities is greater than the body could order without suffering political consequences. But there is a distinction between government and corporate actors, again based on the assumption that corporations are less distracted from their economic incentives by the sorts of political and interest group considerations with which States typically contend. Corporations are more fundamentally economically-motivated than more variably-motivated States, and thus may on average be more willing to adapt their policies and practices in response to the market force of deterrence-calculated awards. Consider the example of a mining operation intruding on indigenous ancestral territory without adequate free, prior, and informed consultation (FPIC), a right increasingly enshrined in IHR law.²²² An award against a corporate entity could be calculated to offset at least some of the efficiency gains of the failure to consult, such that the company could incorporate the liability risks into future project planning and choose to engage in FPIC for purely economic reasons. While this ideal course could fail just as well in the corporate context—for example, the corporation sees a risk that an FPIC process will lead to the project being blocked entirely—the potential interfering factors appear far more nu-

221. SHELTON, REMEDIES 3d ed., *supra* note 1, at 22 (emphasis added).

222. See, e.g., James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries and Indigenous Peoples*, U.N. Doc. A/HRC/24/41 (July 1, 2013); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

merous in the context of a State actor. A State actor may be more likely to operate without engaging in FPIC, even at an economic loss, based on interest group-driven politics or sovereignty concerns, for example. On the other hand, a State might be easier to coax into FPIC-compliant practice if the national level politics already lean in that direction. Again, this Article does not aim to establish an exact analysis of how awards should be calculated, which may be largely a case-by-case exercise, but rather observes that there appears to be a better foundation for relying on the economic tool of damages awards in cases against corporations than in cases against States.

4. *Enforceability*

For the most part, the enforceability of a human rights award against a corporation will be less difficult than enforcing against a sovereign—notably, as a baseline matter, for reasons of sovereign immunity. More specifically, the enforceability concerns highlighted in Section IV.B.4 were interlinked with the difficulty of asking IHR bodies to issue awards against the same States that provide for those bodies' operating budgets. An IHR tribunal could still be hesitant to award large damages against a powerful corporation out of fear that an aggressive corporate defendant would use its resources to whip up public opposition to the award or the tribunal, or that the corporation would use collateral litigation mechanisms to resist paying the award. However, there would also be significant countervailing public pressure on a corporate defendant faced with an adverse human rights judgment. While tribunals with the most established legitimacy to resist such attacks—such as the ECHR and IACHR—would not, per their current practice, issue awards payable directly by corporations, the very voluntariness of the kinds of BHR tribunals that might do so could add significant award compliance pressure. Specifically, if a corporation helped create or otherwise committed itself to an OGM process and then refused to pay adverse awards issued by the OGM tribunal, the public pressure flowing from that hypocritical position could off-set the vulnerability of “new” OGM tribunals without an established legitimating history like the ECHR or IACHR.

5. *Competence/“Sovereign” Prerogative*

Section IV.B.5 raised the concerns—and backlash—felt by IHR institutions when the mandate of remedy ventures into areas of traditional sovereign prerogative and arguably outside of the core competencies of the judicial function. Shifting the focus to corporate defendants, the difference is considerable. While many corporations are indeed powerful on a scale that matches States, they do not pose anywhere near the same degree of a legitimacy threat to IHR tribunals. As noted above, States politically constitute tribunals in the first instance and fund their operations—levers of influence which were jerked quite unobtrusively by the perturbed states in the Belo Monte situation. Generally, when IHR law moves in directions that potentially overlap with areas of “traditional” corporate prerogative, the result in terms of public perception is only positive,²²³ perhaps because of a general sense that with respect to multinational corporations no one else is really “minding the shop.”²²⁴

And yet, actors in IHR are also undoubtedly aware of a legitimacy threat that could be waiting in the wings. That threat is the “tort reform” rubric—the familiar package of economic and policy theories, allegations of lawyer greed and plaintiff malingering, and economic fear-mongering described briefly in Section III.B. Irrespective of what one thinks of the substance of tort reform advocacy, one cannot doubt its power when deployed with the kind of coordinated messaging from media, think tank, academic, industry, and “grassroots” interest groups, and sympathetic government platforms that corporate interest groups have shown they are capable of mustering.

223. See, e.g., John Vidal, *World’s Largest Carbon Producers Face Landmark Human Rights Case*, *GUARDIAN*, (July 27, 2016), <https://www.theguardian.com/environment/2016/jul/27/worlds-largest-carbon-producers-face-landmark-human-rights-case> (last visited 27 Feb. 2018) (largely celebrating a move by the Commission on Human Rights of the Philippines to take a case seeking to hold the 47 largest global companies linked to carbon emissions “accountable for the effects of their greenhouse gas emissions”).

224. See, e.g., John G. Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights*, Hum. Rts. Council, ¶ 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (“How to narrow and ultimately bridge the [governance] gaps in relation to human rights is our fundamental challenge.”).

The worlds of tort reform/trial lawyers and IHR law are as of now sufficiently separated that this may seem fanciful. But in fact, the U.S. Chamber's Institute for Legal Reform has already responded to the slightest indications of the emergence of "U.S.-style" damages in the domestic legal systems of other countries with its typical rhetorical flourish—warning of litigation "pandemics," "floods," and unchecked "breeding"²²⁵—and has even shown some express willingness to apply this rhetorical framework to IHR law.²²⁶ It is not at all hard to imagine this sort of attention emerging if features like a robust deterrence rationale were to emerge in the IHR or BHR space. Even human rights professionals who have no sympathy for the substance of the tort reform rubric may nonetheless be wary of such a development.

Reflecting on the review of all five factors as applied to the BHR space, it appears that many factors that had explanatory potential for the limited articulate role of deterrence in IHR are less applicable when the focus shifts to BHR and corporate conduct. Yet, other factors unique to corporations emerge. In

225. See, e.g., *The Litigation Pandemic: The Rapid Spread of US-Style Litigation Around the Globe*, U.S. CHAMBER OF COM.: INST. FOR LEGAL REF. (Oct. 24, 2013), <http://www.instituteforlegalreform.com/resource/the-litigation-pandemic—the-rapid-spread-of-us-style-litigation-around-the-globe> (last visited 27 Feb. 2018); *Before the Flood: An Outline of Oversight Options for Third Party Litigation Funding in England & Wales*, U.S. CHAMBER OF COM.: INST. FOR LEGAL REF. (Apr. 18, 2016), <http://www.instituteforlegalreform.com/research/before-the-flood-an-outline-of-oversight-options-for-third-party-litigation-funding-in-england—wales> (last visited 27 Feb. 2018); *Increasingly Americanised Litigation System Breeding Third Party Litigation Funding* U.S. CHAMBER OF COM.: INST. FOR LEGAL REF. (Sept. 17, 2015), <http://www.instituteforlegalreform.com/resource/increasingly-americanised-litigation-system-breeding-third-party-litigation-funding-> (last visited 27 Feb. 2018); *Painting an Unsettling Landscape: Canadian Class Actions 2011-2014*, U.S. CHAMBER OF COM.: INST. FOR LEGAL REF. (Mar. 23, 2015), <http://www.instituteforlegalreform.com/research/painting-an-unsettling-landscape-canadian-class-actions-2011-2014> (last visited 27 Feb. 2018); see generally JUSTICE NOT PROFIT, <http://www.justicenotprofit.co.uk/about-us> (last visited 27 Feb. 2018) (providing information about an advocacy group, funded by the U.S. Chamber of Commerce, pushing "tort reform" in the United Kingdom).

226. See, e.g., Jonathan Drimmer, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases*, U.S. CHAMBER OF COM.: INST. FOR LEGAL REF. (June 2010), <http://www.instituteforlegalreform.com/research/think-globally-sue-locally-out-of-court-tactics-employed-by-plaintiffs-their-lawyers-and-their-advocates-in-transnational-tort-cases> (last visited 27 Feb. 2018).

the end, the role of deterrence in IHR award practice need not be constrained by the question of whether BHR should or will embrace deterrence. IHR law certainly provides an adequate foundation: it accepts deterrence as a purpose, albeit not a primary one, and embraces the principle of “whole” reparation in a manner consistent with deterrence theories of cost internalization. It may be that the question of whether a deterrence rationale should be embraced by BHR practice will need to be answered by reference to other sources, such as the UNGPs and underlying normative considerations, which are explored in the following sections.

C. *The UNGPs and Deterrence*

Given the UNGPs’ unique role as the foundational text of BHR, a preliminary question is whether the UNGPs themselves speak to the issue of deterrence-calculated awards as remedies. The initial impression is that they do not. This leads to the argument that deterrence-calculated awards are incompatible with the UNGPs, on the premise that the business community very carefully negotiated the contours of its role in the framework during the lengthy stakeholder engagement and drafting process that led to the final document accepted by the Human Rights Council.²²⁷ The business community agreed to accept certain obligations and not others, effectively in exchange for not undermining the process, as it demonstrated it could do with the earlier U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Entities.²²⁸ To now infuse the UNGPs with a robust role for deterrence-focused remedies, despite a lack of endorsement of deterrence in the document itself, would be unfair, or so the argument goes.

But deterrence is not necessarily absent from the UNGPs. The leading provision on remedies in the UNGPs is found at Principle 25:

227. See, e.g., Ruggie, *Hierarchy or Ecosystem*, *supra* note 7, at 7 (“I seriously doubt that a [more express role for non-governmental organization in the UNGP framework] would have survived the UN political process of getting the UNGPs approved.”).

228. See Amerson, *supra* note 2, at 897 (describing the “defeat” of the more binding U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights, which were largely opposed by business interests).

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.²²⁹

The framing of this Principle is at odds with the notion that remedies are exclusively about compensation to individual affected rights-holders. Here, remedies are framed as derivative from the States' obligation to "protect against business-related human rights abuse" in the future. The Principle subsequently addresses obligations that result "when such abuses occur," but this remedial, compensatory purpose is provided essentially as a mechanism to achieve the primary "protect against" purpose, not as the preeminent goal in itself. Principle 25 thus appears to instruct that effective remedy is a function of the deterrence purpose. At minimum, it cannot be read to exclude the deterrence purpose. Similarly, the Commentary to the same Principle provides:

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.²³⁰

Again, this all but rejects a purely compensatory model focused only on actual victim harm. A failure in one instance may *reflect* the weakness of a protection system, but how does it *render* those efforts "weak or even meaningless"? It does so by undermining the deterrent effect that Principle 25 appears to presume a functioning redress system would otherwise impose. If the UNGPs only understood the "protect against" obligation to reference the sorts of policy-based prevention obligations discussed above,²³¹ the remedy principles would more simply direct States to (1) implement and continually improve preventative systems, and (2) compensate those individuals who are nonetheless harmed.

229. UNGP Pamphlet, *supra* note 2, at 27.

230. *Id.*

231. See *supra* Section III.A (discussing the difference between prevention obligations and a deterrence regime).

Instead, the linkage between the current affected rights-holder's harm and the effectiveness of the system is complex, as seen in the broader IHR context. But once again, recognizing that deterrence *at some level* is an automatic, "incidental" function of compensation may not necessarily imply authority to take the next step of recognizing it as a "distinct" function and to adjust compensation beyond actual rights-holder harm in an attempt to achieve greater or lesser levels of deterrence.²³² There appears to be little guidance on this question, both because of limited articulate discussion of deterrence in IHR and because common law sources simply presume the authority to adjust compensation in light of the common law tradition. But, the argument against presuming such authority seems hard to grasp. If one accepts that deterrence results from compensation and that it is part of the complex way that compensation achieves more systemic and future-looking justice, why would one not want tribunals to more articulately direct how and to what extent that deterrence is achieved? The "natural" level of deterrence that results from compensation at a level set by the affected rights-holder's subjective needs and expectations could just as well be arbitrary in relation to the economic drivers of the conduct, upon which the inherent deterrence of compensation will need to bear. The larger point here is not to say that there should be more or less deterrence, but just that since it is already in the system, its likely effectiveness ought to be articulately addressed as part of the award-setting process.

Finally, looking past the UNGP text to the commentary and practice closely surrounding it, there is significant evidence that deterrence imposed by damages awards was understood as a necessary part of the overall BHR package. UNGP architect John Ruggie has repeatedly explained that the UNGPs were designed to work with an existing "polycentric" governance framework, of which one of the circles of influence was the threat of damages lawsuits.²³³ The BHRRC maintains profiles on such lawsuits and since 2012 has published

232. See, e.g., SHELTON, REMEDIES 3d ed., *supra* note 1, at 22 (recognizing the concept of overdeterrence and the need to fine-tune "how much deterrence is desired"); *Mosley v. United Kingdom*, *supra* note 114 (noting trial court's hesitancy to consider deterrence effect beyond what is "merely incidental" to compensation).

233. See Ruggie, *Global Public Domain*, *supra* note 3, at 2.

quarterly and annual updates on them. And yet, the BHRRC practice also reflects the tension in BHR on this issue, in that it categorizes “corporate legal accountability” as a separate “issue” alongside substantive issue areas such as modern slavery, digital freedom, and threats to human rights defenders, rather than as an umbrella term for its approach to those issues.²³⁴ As described above, the issue of legal accountability versus non-legal voluntary compliance may be seen as controversial enough,²³⁵ such that questions of deterrence and damages awards would be counter-productive in BHR efforts at this point in time. The following section more thoroughly engages the question of whether, despite the inevitable resistance and controversy, BHR remedies need to incorporate the deterrence rationale to be truly effective for all BHR participants, not just affected rights-holders.

D. *Do BHR Remedies Need a Deterrence Rationale?*

Vulnerable communities and their advocates tend to view the delivery of financial consequences through damages as the only realistic way to “speak” to corporations in a way they will understand and respect, while business leaders tend to view such awards as an abuse-prone feature of the failed corporate accountability efforts that BHR has thus far successfully transcended. The following sections cannot comprehensively address all the aspects and nuances of this debate, but will attempt to squarely present the leading arguments on both sides and consider the possibility that there is more interest group overlap than is commonly assumed. These arguments and insights will be used in the subsequent section to frame an exploration of general feasibility and specific possibilities regarding the deterrence rationale in present BHR practice.

1. *Remedy-based Deterrence as Unnecessary in Light of Other Pressures*

The business community’s central argument in opposition to remedial deterrence is that it is unnecessary in light of far more powerful tools that are available, which are less prone to abuse and more respectful of the more positive, cooperative

234. See *Discover Big Issues*, Bus. & Hum. Rts. Resource Ctr., <https://business-humanrights.org/en/discover-big-issues> (last visited 27 Feb. 2018).

235. See *supra* Section V.A.

role for corporations that has breathed such life into the earlier years of BHR activity. The main such alternative tool is appeal to reputational interest and the deterrent power of threats to a company's brand, at least for companies with "consumer-facing" brands.²³⁶ Companies are sensitive to, indeed panicked by, the reputational risks posed by allegations of human rights abuse, and this deterrent lash, the argument goes, is feared far more than the prospect of even significant damages awards. Indeed, such awards not only lack deterrent power but raise collateral controversies—such as potentially "enriching" affected rights-holders (either with openly extra-compensatory damages or with "full" damages that appear excessive by traditional standards) and the attendant suspicions of opportunism and malingering. Additionally, as a dignitary matter, damage awards can arguably reduce elevated conceptions of rights and freedoms to "crude" monetary substitutes.

This is certainly a legitimate argument, but the predicates are not as easy to establish as the above summary may suggest. Efforts are underway to more empirically establish whether commitment to BHR leads to meaningful improvement in human rights outcomes,²³⁷ and in the meantime, there does seem to be powerful anecdotal evidence that, thus far, many corporations are using the extra human rights "leash" given to them to responsible ends.²³⁸ At the same time, it is not the

236. See, e.g., Aaron Marr Page, *The Alchemy of Business & Human Rights (Part V): The Culture of Change*, HUFFINGTON POST, https://www.huffingtonpost.com/aaron-marr-page/the-alchemy-of-business_b_10224964.html (last visited 27 Feb. 2018) [hereinafter Page, *Alchemy Part V*].

237. See, e.g., *Corporate Human Rights Benchmark*, <https://www.corporatebenchmark.org/> (last visited 26 Feb. 2018).

238. Unilever is often highlighted as an important early adopter of the UNGPs to establish a "human rights culture" at levels throughout the company. See John Morrison, *How Elephants Can Dance: Unilever's Human Rights Report Sets a New Benchmark for Business*, BUS. & HUM. RTS. RESOURCE CTR. (June 30, 2015), <https://www.ihrb.org/focus-areas/benchmarking/how-elephants-can-dance-unilevers-human-rights-report-sets-a-new-benchmark> (noting that respect for human rights "is reflected throughout the management structure—human rights are not siloed into the portfolio of an overworked and underpaid CSR manager and [Unilever's reporting] is evidence of this fact"). Of course, there are anecdotal examples that cut the other way. In a recent essay, I highlighted the example of Coca-Cola, which responded to challenges made by Oxfam in its high-profile "Behind the Brand" (BTB) campaign to become, in 2013, "the first ever company to adopt a 'zero tolerance' policy against land grabs that applies to its suppliers." Page, *Alchemy*

case that sensitivity to reputational risks is a new phenomenon. Rather, it has been highlighted and lies at the core of the anti-sweatshop movement and other precursor movements going back decades. The record on these—while again there is a lack of comprehensive data—is mixed and potentially bleak. HBO host John Oliver discovered as much in one of his most famous segments which traces sequentially through thirty years of “shocked” public relations responses by fashion companies who discover, again and again, to their constant surprise, child labor in their supply chains.²³⁹ The companies make dramatic public promises to do something about it, but then it happens again, often involving the same company, just as shocked as before.²⁴⁰

Sophisticated BHR practice recognizes this history and aims to couple the possibilities raised by corporate public relations sensitivity with more concrete operational tools for “embedding” respect for human rights into a company’s opera-

Part V; see generally Behind the Brands, OXFAM, <http://www.behindthebrands.org/> (last visited 27 Feb. 2018). However, more than three years later, Coca-Cola is still doing business with a supplier that committed an egregious land grab in Cambodia—as confirmed by decisions issued by Thailand’s Human Rights Commission—and has refused to pay compensation to the victims, instead returning the land to the government and attempting to wash its hands of the situation. Page, *Alchemy Part V*, *supra* note 236; *see also* Peter Zsombor, *Thai Human Rights Body Says Plantations Stole Land*, *CAMBODIA DAILY* (Aug. 14, 2014), <https://www.cambodiadaily.com/archives/thai-human-rights-body-says-plantations-stole-land-66456/>. Rather than pressure Coca-Cola (i.e., the “consumer-facing” brand name company), Oxfam has adopted Coca-Cola’s messaging that the situation is “complicated,” and that “solutions in Sre Ambel will be driven by community leaders like Sok Phoeurn, Khon Kaen Sugar Industry—the company most directly involved—and by the Cambodian government,” not Coca-Cola. OXFAM, *THE JOURNEY TO SUSTAINABLE FOOD 17* (2016), https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-journey-to-sustainable-food-btb-190416-en.pdf. Indeed, Coca-Cola, which improved its BTB “score” on “land rights” from a 1 to an 8 merely by its declaration of a “zero tolerance” policy, has continued to enjoy and tout its high BTB scores. *See, e.g.*, Ben Jordan, “Oxfam Report Shines Light On Agricultural Supply Chains,” *Unbottled* (Coca-Cola Blog), Apr. 21, 2016, at <http://www.coca-colacompany.com/coca-cola-unbottled/sustainability/2016/oxfam-report-shines-light-on-agricultural-supply-chains> (last visited 27 Feb. 2018)

239. *Last Week Tonight with John Oliver: Fashion* (HBO television broadcast Apr. 26, 2015), <https://www.youtube.com/watch?v=VDLf4fihP78>.

240. *Id.*

tions and relationships.²⁴¹ Leading BHR figures, including its architect Professor John Ruggie, have shown some willingness to be publicly skeptical of the motivations behind at least some degree of corporate participation in BHR-linked projects.²⁴² Nonetheless, BHR relies at a deeper level on the logic that corporations have no inherent inclination or incentive to abuse human rights; rather, corporations follow economic incentives and demands that can and should be untangled from human rights issues and addressed in a non (or less) judgmental fashion. To the extent human rights abuses are intertwined in existing supply chains and profit-making modalities, those abuses are also intertwined with complex national and cultural differences and multiple layers of stakeholder interest—such as the interest of less affluent retail consumers in affordable goods. Corporations should be respected for engaging these complex situations as best they can, and in fact they are the actors best positioned to take prudent steps in a rights-respecting direction without causing more broadly painful disruptions. From these premises, the imposition of fault-heavy and liability-

241. A leading BHR non-profit, The Shift Project, together with the for profit legal and accounting services firm Mazars, have created a UNGP “Reporting Framework” to guide companies through the process of preparing UNGP-compliant reporting both for public relations purposes and to comply with the increasing number of mandatory reporting regimes. See *UN Guiding Principles Reporting Framework*, SHIFT & MAZARS LLP, <http://www.ungpreporting.org/> (last visited Nov. 18, 2017); see generally CSR EUROPE, BLUEPRINT FOR EMBEDDING HUMAN RIGHTS IN KEY COMPANY FUNCTIONS (2016), http://www.csreurope.org/sites/default/files/uploads/Human_Rights_Blueprint_0.pdf; SHIFT, EMBEDDING RESPECT FOR HUMAN RIGHTS WITHIN A COMPANY’S OPERATIONS: SHIFT WORKSHOP REPORT NO. 1 (2012), https://www.shiftproject.org/media/resources/docs/Shift_embedding2012.pdf; Richard Karmel, *Why Companies Should Use The UNGP Reporting Framework to Demonstrate that They Respect Human Rights*, BUS. & HUM. RTS. RESOURCE CTR., <https://business-humanrights.org/en/why-companies-should-use-the-ungp-reporting-framework-to-demonstrate-that-they-respect-human-rights> (last visited Nov. 18, 2017).

242. Ruggie recently publicly scolded a prominent business community initiative for being “quick to jump to promotional initiatives, skipping the essential starting point of reducing [corporations’] negative impacts on people associated with their own business activities and value chains.” Open Letter from John G. Ruggie, Shift Chair, to the heads of the Global Commission on Business and Sustainable Development (Feb. 15, 2016), <http://www.shiftproject.org/news/john-ruggie-sustainable-development-goals-and-un-guiding-principles>.

based deterrence mechanisms would be unhelpful at best and lead to distorted consequences at worst.

2. *The Role of Remedy and Deterrence in Preserving Dignity*

There are other dimensions to the role of compensation, and deterrence specifically, that are arguably critical to how any system of dispute resolution achieves justice and legitimacy. Rights-holder autonomy and empowerment is an important goal of any system,²⁴³ and it is particularly important in the BHR context as a counterweight to the enhanced role of companies. This is even more so in regards to OGM processes where companies are crafting their own remedy systems. Empowerment and *voluntary* acceptance of the legitimacy of the system by affected rights-holders and other stakeholders is critical not just in principle, but in an immediate practical sense. Novel BHR systems do not rest on long-standing and democratic foundations of legitimacy as do (most) national justice systems; and when they fail in terms of legitimacy, their usefulness utterly collapses, for both companies and communities.

The extent to which the provision of compensation is integral to the challenge of sustaining perceived legitimacy is debated and uncertain. Professor Bassiouni notes that international criminal justice tribunals, for example, essentially dodged the issue by purporting to devolve the question of compensation back to national justice systems, even in cases where inadequacy of those systems to address liability questions has been established.²⁴⁴ Others have emphasized the legitimizing importance of compensation awards in a dimension that is intertwined with, yet symbolically independent from, the many important ways that economic redress can make an affected rights-holder whole. Professor Andrew Popper argues that an award “sends messages about [the recipient’s] worth,” and further considers the extent to which deterrence itself

243. See, e.g., M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203, 219 (2006) (“[P]erhaps the most important goals of [the international criminal justice] process are the ‘re-humanisation’ of victims and their restoration as functioning members of society.”).

244. *Id.* at 242–43 (“[T]he structure of the tribunals pre-supposes individual access to national courts on the part of individual victims and leaves the ultimate decision on whether to provide compensation to a victim to national justice systems.”).

provides this symbolic value to the individual rights-holder.²⁴⁵ He continues: “Prevention of future harm is a powerful public expectation and basic motivation for those injured by wrongful acts or defective products.”²⁴⁶ In this sense, deterrence could be a component of the individual right to a remedy. The injured party’s request that the legal system “prevent repetition of [her] tragedy” is part of her legitimate claim for relief.²⁴⁷

As much as a satisfactory award can redress dignitary harms, an unsatisfactory one can exacerbate them. As the Columbia/Harvard assessment of the Porgera OGM reported, most survivor-claimants were deeply upset and even insulted by the Framework awards, seeing them as woefully inadequate in proportion to the harm suffered. Responses to the awards included:

- “The amount given to us is not fair—it is not good enough. The pain and trauma is big. There was no option, so I took it These are lifetime injuries we are going through.”²⁴⁸
- “I was unemployed, four kids, jobless husband. My only way was to say yes. If during that time I had money, I would have told Barrick to get lost. It’s peanuts, it [] doesn’t compensate my life.”²⁴⁹
- “This framework is just like a mother buying a crying child a small snack. The company set up the framework so they can just pay us small money.”²⁵⁰
- “We have been abused by the company and we have been badly raped by the company’s security and the company treated us like pigs and dogs. . . . [W]hat the company is doing is just buying twisties [a snack] for women.”²⁵¹

Barrick and its consultant Aftab worked hard to minimize the importance of compensation amounts to participant satisfac-

245. Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 198 (2012).

246. *Id.* at 182.

247. *Id.*

248. COLUMBIA/HARVARD, *supra* note 11, at 76.

249. *Id.*

250. *Id.*

251. *Id.* at 77.

tion, even though Aftab acknowledged that a dramatic ninety-five percent of Porgera claimants came to “believe they were treated unfairly and that they did not receive the remedies they were promised.”²⁵² Aftab studiously avoids linking the acknowledged dissatisfaction with award quantum, instead denigrating the notion of monetary compensation generally and claiming that there was consensus by unnamed “experts” during the operation of the OGM “that the Framework should avoid paying cash compensation.”²⁵³ Yet, Aftab simultaneously acknowledges that the women themselves vociferously and continuously advocated for monetary and close-equivalent compensation.²⁵⁴ Aftab instead blames the dissatisfaction in full on the fact that civil society groups, working independently of the Framework, subsequently negotiated with Barrick and achieved a vastly superior result—thought to be just over \$100,000—for a small handful of claimants. The argument asserts that had the claimants *been kept in ignorance* of what Barrick was willing to pay, they would have been happy with what they got.²⁵⁵

There are certain indignities as well as inaccuracies in this argument. The survivor feedback comments reported above were taken from interviews conducted *before* news of the civil society settlement was disseminated (i.e., when they did not know about the separate settlement figure). Aftab further repeatedly characterizes claimants’ attention to the civil society settlement as somehow unsavory, suggesting the claimants are unjustified in considering “relative equity.”²⁵⁶ Yet, relative eq-

252. AFTAB, ON THE GROUND, *supra* note 11, at 5. This “vast majority” of ninety-five percent may understate the level of dissatisfaction. The Columbia/Harvard report suggests that *all* 120 survivor-claimants were dissatisfied and upset with the results. COLUMBIA/HARVARD, *supra* note 11, at 77.

253. AFTAB, ON THE GROUND, *supra* note 11, at 53.

254. AFTAB, ON THE GROUND, *supra* note 11, at 6 (“*Claimants themselves* first applied the pressure” for the OGM “to issue cash compensation” and “pressure from international stakeholders *and claimants* led the PRFA to make cash the lion’s share of all remedy packages”) (emphasis added).

255. *Id.* at 26 (discussing claimants’ “anger at the relative inequity of their remedy packages compared to those of the ERI Claimants was inescapable”); *see also id.* (“The ERI settlement remained top of mind in each and every claimant interview.”); *id.* at 27 (“Had we conducted our research in late 2014 or early 2015, it is likely that our interview results would have differed markedly from our current findings.”).

256. *Id.* at 56.

uity is among the foundational principles of law,²⁵⁷ and “[t]he principle of treating like cases alike” is fundamentally a protection of “individuals’ moral equality.”²⁵⁸ Aftab’s criticism of monetary compensation culminates in a recommendation that future OGMs take monetary compensation entirely “off the table”—in part specifically because it makes “every award easily comparable” and companies cannot “rely on confidentiality” to keep award amounts secret.²⁵⁹

A response to all this is that a more adequate compensation figure would not demand confidentiality, and that Porgera claimants felt deceived in the wake of news of the civil society settlement because they were, in truth, deceived. The OGM effectively told them Barrick was unwilling to go any higher in terms of compensation to meet the claimants’ own beliefs about the just level of compensation. In fact, where power dynamics were more balanced, where claimants had independent and competent lawyers acting directly on their behalf, Barrick was indeed willing to pay an amount consistent with IHR standards head-on, that is, without the profound adjustments for relative income that raised the controversy examined in Section II. This willingness was revealed even more profoundly when, in the wake of the civil society settlement, Barrick promptly issued a “top-up” to every plaintiff of an amount over 100% of what was awarded through the OGM.²⁶⁰

At least some of claimants’ dissatisfaction with the Porgera OGM likely traces to the claimants’ appreciation that the amount they ultimately received was a pittance compared to the likely gains Barrick enjoyed when it made the initial consequential decisions. It may be that claimants understood that the “twisties” level of compensation not only failed to respect the dignity of the offense, but offered little or no promise of

257. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (“[O]ne of the most substantial . . . competing values [in adjudication], which often contradicts the search for perfection, is the appearance of equal treatment. As a motivating force of the human spirit, that value cannot be overestimated.”).

258. Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2056 n.101 (1996) (quoting Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM.L. REV. 1, 31 (1985)).

259. AFTAB, ON THE GROUND, *supra* note 11, at 6–8.

260. AFTAB, ON THE GROUND, *supra* note 11, at 15.

detering repetition of the same conduct in the future. An approach that expressly included at least some attention to what gains Barrick earned from the decisions that led to the harms,²⁶¹ or that went even further and calculated compensation to some extent in reference to those gains, might well have earned more satisfaction from survivors. While an argument can be made that the publicity harm Barrick suffered because of the incident is a sufficient and in fact vastly more powerful deterrent than any award, this might not be apparent from the survivor perspective. More significant awards, or awards more expressly matched to any gains from poor decisions Barrick or its partners made on security hiring practices, could give survivors a better sense and understanding of participation in the deterrent effect of the remedy.

In any event, it is obvious in retrospect that little or no sense of justice was furthered in the community, nor amongst observers, by the Porgera OGM.²⁶² To such extent, it was a wasted opportunity not just for justice, but for the attendant benefits that Barrick hoped to achieve for itself with its financing and promotion of the project. The decision also reveals the inherent frailty of a novel dispute resolution approach that does not enjoy *a priori* the foundations of legitimacy that national courts typically enjoy. If BHR hopes for OGMs and other remedy practice under the UNGPs to emerge as a robust complement and alternative to damages lawsuits and their controversies, BHR should be wary before dismissing deterrence and related levels of award quantum from the equation.

3. *What System Benefits a Genuinely Human Rights-motivated Company?*

BHR gives companies the benefit of the doubt that they are sincere about protecting human rights where they can do so in light of market pressures.²⁶³ This premise leads to the

261. For example, any monetary savings it enjoyed from hiring local military units, over whom it had little or no control, for its security functions instead of more reputable and accountable contractors.

262. See AFTAB, ON THE GROUND, *supra* note 11, at 106 (“Everyone [who] invested in the Framework on the ground, including all representatives of the PRFA, expressed heartfelt sorrow that the Framework ultimately did not deliver the empowering and sustainable remedies for which they had hoped.”).

263. See *supra* Section V.A.

possibility that human rights-focused businesses will support a robust deterrence-calculated awards practice as a guard against unfair competitive pressure from less ethically-minded competitors. A company which chooses to adopt measures to protect human rights, which may come at a cost, is at an immediate competitive disadvantage to competitors that do not follow suit.²⁶⁴ A company that protects human rights is itself protected by a system which fully imposes the social costs of human rights harms on any competitors that do not voluntarily undertake the same protections.²⁶⁵

There may be a gap between theory and practice here. Many of the business community's complaints about existing liability regimes in the United States steer clear of attacking its theoretical underpinnings and focus instead on alleged inefficiencies or susceptibility to corruption and abuse. While it may be possible to shape development of BHR remedy practice to mitigate these kinds of concerns, they cannot be foreclosed.

There are two additional objections. First, crediting the collaborative foundational premises of BHR as discussed in Section V.A, businesses may have some legitimate interest in avoiding a deterrence-based liability regime even for negligence-based harms. The argument is essentially that everybody makes mistakes, and that while harmed persons should be compensated, companies do not want to be walloped with massive remedy awards designed to "send a message" when they are already doing the best they can under difficult circumstances. Second, there remain significant differences in understandings of what the "human rights" in Business and Human Rights are and what they require. Businesses will not want to be deterred from undertaking business opportunities that they

264. Any such disadvantage may also be offset by the many gains a company may reap by acting to respect human rights, such as its ability to market its ethical practices to consumers. The percentage of the consumers responsive to such marketing and willing to pay a correlative premium—and even more, *unwilling* to buy unethically produced goods except at a steep discount—is increasing in a number of sectors. See, e.g., Remi Trudel & June Cotte, *Does Being Ethical Pay?*, WALL ST. J. (May 12, 2008), <https://www.wsj.com/articles/SB121018735490274425>.

265. Popper, *supra* note 245, at 181 (discussing how compensation regimes "generate[] far-reaching and positive market effects beyond victim compensation and recovery. . . . [and have] a beneficial effect on the behavior of those who are the subject of legal action as well as others in the same or similar lines of commerce").

do not see as compromising human rights, or that they see as minimal and offset by other benefits such as local employment or critical resource development. For example, concerning the development of a coal-fired electricity plant, local communities and their advocates might see violations of the right to a healthy environment, while the developer and its allies would take the position that the need for energy and local employment sufficiently justifies the impacts and would resist a remedy system empowered to process nebulous or malleable rights claims into forceful monetary results.

Both objections, however, arise in resistance to particular conceptions of deterrence. The former reflects a deterrence effected by punishment and grounded in fault; the latter reflects a deterrence aimed at gain-elimination and requiring some *a priori* position on the legitimacy of the targeted activity.²⁶⁶ Neither makes much of a case against a cost-internalization conception of deterrence. Cost-internalization is not designed to punish, nor does it inherently disfavor any particular activity or target any particular result. As opposed to the “complete” deterrence of gain elimination, cost internalization seeks to arrive at the most socially optimal result using all available information.

Consider as an example a company that can save \$200,000 annually in expenses and increased productivity by not distributing and requiring the use of unwieldy protective eyewear by workers who use certain metal grinders, even though as many as ten workers lose an eye from metal shards every year. By local standards, \$10,000 is considered adequate if not generous compensation for loss of one eye, for an annual cost of \$100,000. Injured workers are reassigned to a different job so there is no threat that he or she loses a second eye, which dramatically increases the compensatory figure even under local standards. A UNGP-compatible OGM could pay the injured workers and the company would face no pressure to change its practices. Arguably it would face even less pressure, because it could point to its compliance with the UNGP remedy requirements.

A punitive deterrence award at overtly extra-compensatory levels would allow the decision-maker to “send a message” to the company that the failure to take simple steps to avoid

266. See *supra* Sections III.D (reviewing deterrence models).

catastrophic eye injury amounts to a reckless and severe violation of the business responsibility to respect its employees' rights to bodily integrity and dignity. By so doing, the decision-maker not only spurs the company to act to prevent future eye injuries but also to be more watchful of other liability-generating practices, potentially deterring other types of injuries as well. A gain-elimination calculated award would proceed from the same normative baseline that the injuries are unacceptable in human rights terms, but address the problem by adjusting compensation upwards of local standards to at least \$20,000 per claimant, thus eliminating the profit available to the company from not distributing the eyewear. A cost-internalization approach, by contrast, does not necessarily start from the same normative baseline. It is prepared to accept an injury-and-compensation result as the socially optimal one, depending on how the economics shake out after internalizing the full range of social costs of the injury—that is, not just the physical impairment of the individual but consequential harms to his family and community; not just easily-documented pecuniary losses but harder to quantify non-pecuniary suffering and diminishment; and not just harm suffered in the immediate aftermath but, at least in some circumstances, proximate harm suffered over the course of the lifespan.

It is hard to deny the existence of a normative position behind the insistence that this full range of costs be appreciated and internalized. There is additional normative content behind the insistence that this internalization occur irrespective of nationality—that an American and a Cambodian life be accorded the same value, not just at the level of lofty principle but in the assessment of their respective claims to pain and suffering, loss of consortium, loss of expected path of life, and other dimensions of injury reviewed earlier.²⁶⁷ These normative positions, however, are sustainable largely without reference to a specific view on worker safety or the eyewear question at a particular factory. The insistence on including the full range of social costs is simply an insistence on accuracy in the

267. Adjusting for the fact that a fixed amount of currency itself has a fundamentally different value (PPP) in the United States and Laos is certainly appropriate, as Marco Simons agreed in the Simons/Aftab exchange discussed in *supra* Section II. However, adjustment for relative income—for relative poverty—starts to raise tension with human rights principles of equal worth and revisits the issues raised in that exchange.

analysis, and the insistence on equal treatment falls within the normative core that all BHR participants purportedly ascribe to.

Even in the example above, it is not clear that a full cost-internalization calculated award would result in complete deterrence forcing the company to require the protective eyewear. A robust articulation of the injured worker's pain and suffering, as well as more advanced claims—such as the worker's diminished function in many settings over the lifespan or even the worker's impoverished visual aesthetic life—might well lead to that result. But a full costs analysis might also consider, for example, that absent the cost savings and productivity levels achieved by avoiding the eyewear, the factory would not be competitive and would be forced to close, devastating hundreds of families who rely on factory jobs for income.

The Porgera OGM consultant stressed the need to make sure that the demands on OGMs don't go so far as to make the mechanism undesirable or unpredictable for companies.²⁶⁸ To the extent deterrence considerations would need to be incorporated for OGM awards to be perceived as UNGP compliant, this could deter companies from setting up OGMs in the first place. But companies are not walking away from UNGPs anytime soon, nor from OGMs, the endorsement of which as a remedy fulfillment option was a key benefit. Moreover, discussing cost internalization in BHR award practice would create space for defendants to directly address the issue: to interpose argument and evidence as to why the scope of cost internalization is inappropriate under the specific circumstances, why the level of deterrence should be mitigated, or why the cost-internalization calculus should lead to a different result. Allowing deterrence to operate only behind the scenes, as arguably has happened over the last few decades in IHR practice,²⁶⁹ is unfair generally. No one is served by deterrence-based awards dressed in compensation-only clothing.

268. See, AFTAB, RESPONSES, *supra* note 16, at 217 (the economics of OGMs “should not work to decimate any incentive for a business to invest in an OGM in the first place”).

269. See *supra* Section IV.A.

VI. WHAT COULD DETERRENCE-BASED BHR REMEDIES REALISTICALLY LOOK LIKE?

This Article turns now to the question of what deterrence-oriented compensation awards in BHR practice might realistically look like in light of the full range of the available models and the political and prudential considerations discussed in foregoing sections. While not excluding the possibility of some role for extra-compensatory (punitive or gain-elimination) damages, the Article concludes that a deterrence model that enhances the bedrock IHR principle of *restitutio in integrum* with a more robust cost-internalization mandate is most feasible.

A. Punitive Damages

The express adoption of a punitive damages component in BHR remedy practice is unlikely, given the resistance to the concept in IHR law and within many national legal systems. The controversies such proposals engender, including the legal and political backlash, are evident even in the United States where punitive damages have been most robustly embraced.²⁷⁰ BHR, as reflected throughout the UNGPs, seeks to transcend the politics that have deadlocked corporate accountability efforts in the past by articulating a gentler and more nuanced model of progressive realization of human rights in the context of the realities of international business.²⁷¹ For example, concerning a company's relationships with suppliers and other parties allegedly involved in human rights abuses,²⁷² the UNGPs are sympathetic to the fact that such "situation[s] [are] complex" and that "appropriate action" by the company will depend on many factors, including the company's "leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the

270. See *supra* Section III.C.

271. See Page, *Alchemy Part I*, *supra* note 2; Ruggie, *Hierarchy or Ecosystem*, *supra* note 7, at 3-4 (describing stakeholder engagement process in the crafting of the UNGPs); John G. Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, REG. & GOVERNANCE (forthcoming), at 2-4 <http://onlinelibrary.wiley.com/doi/10.1111/rego.12154/full> (last visited 27 Feb. 2018) (discussing the adaptation of BHR to the modern multinational enterprise).

272. UNGP Pamphlet, *supra* note 2, at 14-15, 21-22.

abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.”²⁷³ This nuanced “soft law” approach, deferential to how “business enterprises [govern] their own affairs,” can be frustrating to human rights “traditionalists,” but the approach is grounded in the UNGP text and part of the overall negotiated package that has achieved such momentum in recent years.²⁷⁴

This practical reality about BHR should not mask other practical realities about punitive damages: (1) they are a notoriously powerful tool for “shaping” corporate behavior, and (2) they have been necessary to serve justice in the past where other means have failed.²⁷⁵ Indeed, it is the fundamental reallocation of power inherent in that “shaping” that has motivated the intense backlash against them as discussed above in Section III.C. It is legitimately argued that if BHR were “serious” about ending human rights abuses “at any cost”—a telling phrase—punitive damages awards would be the first place to turn.

As examined in the following sections, the deterrence rationale is more likely to progress under the more economically-grounded models of gain elimination and cost internalization. Nonetheless, it is not impossible to imagine scenarios where the deployment of punitive damages would receive sup-

273. *Id.* at 22 (discussing Principle 19 commentary).

274. Ruggie, *Hierarchy or Ecosystem*, *supra* note 7; *see also id.* (arguing that “soft law” approaches are “increasingly . . . how governments make initial moves into highly complex and conflicted issues”). Deference to traditional business practices and wisdom also need not always cut in favor of slow progress and against drastic action. In an earlier essay on Coca-Cola’s claims to have little ability to redress “land grabs” effected by local suppliers, I proposed the thought experiment that the supply chain problem was not about the land rights of poor people, but rather an outbreak of E. Coli in the sugar supply, leading to a broad-scale consumer backlash and plunging sales. Would Coca-Cola still be constrained to be merely “leverag[ing] its influence” with suppliers and telling its shareholders, three years on, that “[d]iscussions with these suppliers are ongoing”? Page, *Alchemy Part V*, *supra* note 236.

275. *See, e.g.*, Popper, *supra* note 245, at 191-93 (exploring the “extraordinarily powerful” role played by “the potential for imposition of punitive damages”); Rustad & Koenig, *Historical Continuity*, *supra* note 60, at 1296 (asserting that in the United States in the nineteenth century, “the awarding of exemplary damages was one of the few effective social control devices used to patrol large powerful interests unimpeded by the criminal law”); Bogus, *supra* note 60, at 207 (discussing experience with tobacco companies).

port. This would surely need to be in the context of “gross abuses,” which some authorities suggest are sufficiently distinct in nature from the more contested norm scenarios used as examples above that they might be addressed on their own track. Professor Ruggie recently raised the idea of “a [new] legal instrument addressing corporate involvement in the category of ‘gross’ human rights violations.”²⁷⁶ In the context of such an instrument, sometimes analogized to the widely and rapidly embraced ILO Convention on the Worst Forms of Child Labor,²⁷⁷ participants might be more willing to consider the tool of punitive damages as an acceptable means to “send a message” to a fundamentally objectionable or recalcitrant corporate actor. Additionally, if the persuasively argued concurrence in *Cyprus v. Turkey* and similar developments in the Inter-American System signal a new willingness by leading IHR institutions to impose punitive damages in certain circumstances, that precedent would necessarily come to influence BHR practice with time.²⁷⁸

276. John G. Ruggie, Closing Plenary Remarks, United Nations Forum on Business & Human Rights (Dec. 3, 2014), <http://jamesgstewart.com/closing-plenary-remarks-un-forum-on-business-and-human-rights> (last visited 28 Feb. 2018); cf. John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 825 (2007).

277. Jenny Martinez, *A First Step Is Better Than No Step At All*, JAMES G. STEWART BLOG (Feb. 3, 2015), <http://jamesgstewart.com/a-first-step-is-better-than-no-step-at-all> (analogizing to the ILO Convention on the Worst Forms of Child Labor, “which was adopted by the ILO in 1999 and has now been ratified by 174 countries (the fastest pace for ratification of any ILO agreement)”).

278. See, e.g., *supra* Section V.A (noting that BHR remedies “must ultimately be ‘compatible’ with the nature and degree of remedies provided at IHR law”). The ECHR’s *Mosley* decision may also stand as a caution to not too quickly dispense with the deterrence analysis. There, the ECHR cited, with apparent approval, the deterrence analysis of a predecessor U.K. tort decision that considered the possibility of a deterrence-based damages award against News Corporation’s *News of the World*. *Mosley v. United Kingdom*, *supra* note 114, at ¶ 26. That analysis, as described by the ECHR, was that “if damages for deterrence were to have any prospect of success it would be necessary to take into account the means of the relevant defendant [and as such] [a]ny award against the *News of the World* would have to be so large that it would fail the test of proportionality when seen as fulfilling a compensatory function.” *Id.* (referencing *Mosley v. News Grp. Newspapers* [2008] EWHC 1777, [2008] EMLR 20 [228]). The U.K. court’s assumption is questionable in light of the factors analyzed in *supra* Section V.B. A company does not necessarily need to be brought to its knees by the size of an award

B. *Gain-elimination Remedies*

Gain-elimination awards are calculated with attention to the measure of profit earned by the defendant linked to the human rights abuse and aim to impose a sanction, extra-compensatory as necessary, sufficient to offset any such gain and thus remove any ongoing economic incentive for the defendant (or others) to simply “bear the cost” of human rights abuse as a cost of doing business. Like the punitive damages approach, it remains a normative, results-oriented approach, requiring some level of *a priori* commitment to eliminate conduct that is accepted as abusive. In this regard, gain elimination becomes more difficult the farther one strays from the sorts of “gross abuses” discussed in the previous section and instead confronts more normatively contested and counter-balanced conduct, such as the example of health impacts from an economically important coal-fired electric plant, discussed in Section V.D.3. Gain-elimination awards also continue to implicate the difficult practical issue of excessive compensation to “windfall” plaintiffs, unless alternatives are developed to receive any “eliminated” (essentially disgorged) funds. Yet while gain elimination is a normative exercise, damages are typically less reliant on notions of wrong-doing and fault—they are more didactic than shaming—thus eliminating at least some of the IHR and national law objections.

As with punitive damages, any movement in the direction of gain-elimination damages would certainly begin with a focus

in order to get its attention; the court could have considered what size award would be sufficient to off-set the costs the company avoids by failing to implement oversight mechanisms that would have prevented or caught the violation at an earlier stage. It is striking that the U.K. court observed that because of the difficulty establishing damages, “journalists . . . can usually relax in the knowledge that intrusive coverage of someone’s sex life will carry no adverse consequences for them.” Mosley, *supra* note 114, at ¶ 26. (quoting Mosley v. News Grp. Newspapers [2008] EWHC 1777, [2008] EMLR 20 [230]). Even if it were argued that the award would need to off-set the significant profits *News of the World* enjoyed in sales from salacious but privacy-invasive reporting and publishing practices, a strong efficiency argument can be made—along with the human rights argument—that it would have been better to impose a genuine deterrence-calculated award in 2008 than to suffer the costs and additional violations of the “phone-hacking scandal” that ultimately blew up the company in 2011. *See, e.g.*, “News of the World to close amid hacking scandal,” BBC News, Jul. 7, 2011, at <http://www.bbc.com/news/uk-14070733> (last visited 28 Feb. 2018).

on the sort of “gross abuses” discussed in the previous section. This conduct—slavery, human trafficking, torture, rape, severe labor rights violations—offers the possibility for a consensus not only that the conduct should be eliminated, but a consensus that is largely deaf to arguments as to countervailing social costs. Indeed, human rights advocates have increasingly begun framing their advocacy around calls for “zero tolerance” not just of the mentioned categories of abuse but increasingly more technical abuses as well, such as corrupt land acquisition practices known as “land grabs.”²⁷⁹ Human rights advocates have also been joined in such characterizations by corporate interests, including even some top-level brand-name companies implicated in the abuse through their supply chains.²⁸⁰

Contemporary scenarios raise the possibility that corporate fear of being linked to the abhorrence of certain gross abuses could create space for a real discussion around gain-elimination awards. A salient example is the response to reporting by the *Associated Press* and *The New York Times* in 2015 on slavery-like conditions in the Thai marine seafood industry.²⁸¹ When the individual companies who allegedly profited from abhorrent Thai fishing industry practices were targeted with U.S.-based lawsuits, all responded with aggressive motions to dismiss in court.²⁸² Outside of court, however, several of

279. See, e.g., Lauren Ravon, “Land grabs: Explaining the issue is no simple matter,” Oxfam Canada, <https://www.oxfam.ca/blogs/grow/land-grabs-explaining-issue-no-simple-matter> (last visited 28 Feb. 2018).

280. See Page, *Alchemy Part V*, *supra* note 236 (discussing Coca-Cola’s alleged “zero tolerance” for “land grabbing”).

281. See, e.g., Martha Mendoza, *AP Report on Slave-Peeled Shrimp Spurs Calls for Boycott*, ASSOC. PRESS (Dec. 14, 2015), <https://www.ap.org/explore/sea-food-from-slaves/ap-report-on-slave-peeled-shrimp-spurs-calls-for-boycott.html>; Ian Urbina, “Sea Slaves”: *The Human Misery that Feeds Pets and Livestock*, N.Y. TIMES (July 27, 2015), <https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>; see generally *Seafood From Slaves: An AP Investigation Helps Free Slaves in the 21st Century*, ASSOC. PRESS (2015), <https://www.ap.org/explore/seafood-from-slaves> (detailing reporting that earned the 2016 Pulitzer Prize for Public Service).

282. See, e.g., Emma Gallimore, *US Court Rules in Favour of Nestlé in Case Alleging Forced Labour in Thailand Under Transparency in Supply Chains Act*, BUS. & HUMAN RIGHTS RES. CTR. (Feb. 19, 2016), <https://business-humanrights.org/en/us-court-rules-in-favour-of-nestle%C3%A9-in-case-alleging-forced-labour-in-thailand-under-transparency-in-supply-chains-act>; Emma Gallimore, *Plaintiff Loses Challenge to Calif. Law in Forced Labor Case over Fancy Feast, Appeal to Ninth Circuit*, LEGAL NEWSLINE (Jan. 27, 2016), <https://legalnewsline.com/>

them adopted strikingly different postures.²⁸³ Nestlé, which has invested heavily in its reputation as a BHR corporate leader, went so far as to disclose high-level results from a commissioned investigation acknowledging that it had, indeed, sourced from certain identified abusive suppliers, but tried to transform the optics by casting that very acknowledgment as an opening more in “a new era of self-policing” as well as an opportunity to proclaim that “forced labour and human rights abuses have no place in our supply chain.”²⁸⁴ It is not hard to imagine that, in the same publicity-shifting vein, Nestlé would be willing to disgorge any profits realized from cost-savings linked to the abusive suppliers. An OGM established pursuant to UNGP guidance could be a useful, legitimating, and highly visible vehicle for Nestlé and similarly situated and motivated companies.

Effectively a “forfeiture tribunal,” such a body could investigate and issue compensation “awards” against companies that voluntarily appear for reputation protection benefits. In light of the competitiveness considerations discussed in Section V.D.3, the mechanism could serve an important role within particular industries or regions if it were empowered to receive complaints from participating companies regarding alleged abuse-gotten gains enjoyed by their competitors. Such a mechanism could enjoy widespread perceived legitimacy from affected rights-holders if it issued awards with a deterrent purpose aimed at protecting future potential victims—a purpose many affected rights-holders hunger for. Even lacking a cooperative defendant, the mechanism or tribunal could potentially operate in a public advocacy capacity pursuant to referrals by competitor companies, civil society groups, or national human rights institutions lacking sufficient jurisdiction over multinational enterprises. Of course, countless operational features would need to be negotiated with an eye to such a mechanism’s feasibility, on the one hand, and its legitimacy, on the other. Would the mechanism require an admission of

stories/510660064-plaintiff-loses-challenge-to-calif-law-in-forced-labor-case-over-fancy-feast-appeal-to-ninth-circuit.

283. See, e.g., Annie Kelly, “Nestlé admits slavery in Thailand while fighting child labour lawsuit in Ivory Coast,” *The Guardian* [UK], <https://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast> (last visited 4 Mar. 2018).

284. See, e.g., *id.*; Page, *Alchemy Part V*, *supra* note 236.

wrongdoing? Would it allow for the development of an authoritative factual record? Would it cap awards at some level acceptable to companies yet be theoretically sufficient for gain elimination? Despite the practical hurdles, such a mechanism could offer affected rights-holders a sorely needed additional avenue for access to remedy and offer human rights-motivated companies a process that they could use to protect their reputations and even manage relations with particular affected communities in the face of potential allegations.

C. *Cost-Internalization or “Whole” Compensation Remedies*

This Article has already described the congruence between the cost-internalization theory of deterrence and the *restitutio en integrum* principle—a strong legal right at IHR—requiring “whole” compensation sufficient “as far as possible, [to] wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”²⁸⁵ The Article also described the significant gap between present IHR practice and truly “whole” remedies, a gap which has led some IHR authorities to deny compensation entirely, essentially out of despair, rather than use available tools to better articulate, calculate, and compensate for human rights harm in all its many dimensions.²⁸⁶ Notably, even the lawyers of human rights abuse survivors often fail to adequately pursue truly “whole” remedies, resulting in a “consistent undervaluing” of human rights claims.²⁸⁷

Into this standstill environment at IHR, and considering new possibilities for BHR, the deterrence rationale could have a salutary organizing and motivating effect. It has already been observed that deterrence, while rarely mentioned in IHR tribunal decisions, operates significantly in the background, justifying, for example, higher “compensatory” awards in the case of outrageous or intransigent State conduct.²⁸⁸ Expressly linking the compensatory and deterrence rationales would increase analytic transparency and thus fairness to respondent

285. *Supra* notes 198-200 and related text (quoting *Factory at Chorzów* (Ger. v. Pol.)).

286. *See supra* Section IV.C.2-3.

287. SHELTON, *REMEDIES* 3d ed., *supra* note 1, at 336.

288. *See supra* Section IV.A.

entities, States or corporations, who would be given more opportunities to challenge or shape the deterrence basis of the awards in light of the circumstances. Expressly incorporating a deterrence rationale into BHR, and IHR, could also add critically-needed fuel to efforts to bring more sophistication and rigor to the elaboration and quantification of various forms of pecuniary and non-pecuniary damage. Such tools are already available in national jurisdictions—especially U.S. litigation practice—and simply need be given more credence by IHR and BHR adjudicators and practitioners.²⁸⁹ These tools include increasingly sophisticated methodologies for establishing, in injury cases, pain and suffering claims (such as post-traumatic stress syndrome and rape-trauma syndrome diagnoses), loss of enjoyment of life or established course of life claims, and anxiety, distress, humiliation, stigmatization, and similar claims; in death cases, loss of consortium, solatium, society and companionship, love and affection, and other personal services claims; and in health and safety cases, increased relative risk and medical monitoring claims.

These methodologies and claims are not without their controversies. They give rise to some legitimate concerns about the potential for abuse by malingering claimants, excessively aggressive claimant attorneys, or excessively sympathetic tribunals. Moreover, they may be in tension with some societies' more limited views on the proper role of compensation.²⁹⁰ An increased role for the deterrence rationale in the analysis would not solve these problems, but neither would it exacerbate them. In both IHR and BHR, the deployment of these analytical tools should be coupled with appropriate safeguards. Such safeguards have worked in the United States, where the long-running narrative of "runaway" damages has now been exposed as largely hyperbolic.²⁹¹ And unlike punitive and gain-elimination theories of deterrence, cost internalization does not push awards into more controversial "extra-compensatory" territory. Indeed, there is only limited room for normative opposition to the cost-internalization approach in light of its foundation in the *restitutio in integrum* principle and its grounding in concrete, albeit sometimes expansively

289. See *supra* Section III.C.

290. *Supra* notes 115-119 and related text.

291. *Supra* notes 60-63 and related text.

interpreted, impacts on affected rights-holders. Even those who would say that compensation for more “expansive” interpretations of harm is inappropriate are unlikely to argue against preventing such harm in the first place. As such, the deterrence rationale could bolster arguments for such “expansive” compensation with a more compelling motivating purpose in individual cases.

Perhaps most importantly, “whole” compensation promises to better satisfy affected rights-holders—not just by more accurately meeting their own perceived measure of the harm they have suffered, but by linking their remedy to a larger justice process that fulfils the UNGP “duty to protect against [future] business-related human rights abuse.”²⁹² An award that openly articulates its methodology to include cost-internalization and deterrence offers a claimant critical additional dignitary relief²⁹³ and is far more likely to be perceived as legitimate and receive participation from affected communities. This participation by communities is what many business enterprises hope to achieve by way of their own participation in UNGP remedy processes, along with attendant potential benefits of dissuading communities from engaging in alternative contentious options such as domestic and international lawsuits or even self-help actions directed against company resources. To the extent BHR requires remedial processes under its auspices to meet cost-internalization expectations, the whole field will share in the legitimacy benefits. To the extent that BHR comes to set expectations and outcomes regarding remedy more broadly in the context of international business, BHR could more fundamentally shift how affected communities engage with international business and begin to ameliorate the tensions, mistrust, and conflict that characterize many sectors of multinational enterprise-led development in the global economy.²⁹⁴

292. UNGP Pamphlet, *supra* note 2, at 27; *see supra* Section V.C.

293. *See supra* Section V.D.2.

294. *See, e.g.*, RACHEL DAVIS & DANIEL FRANKS, COSTS OF COMPANY-COMMUNITY CONFLICT IN THE EXTRACTIVE SECTOR 8-10 (2014), https://sites.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf (last visited 4 Mar. 2018) (describing patterns of conflict between multinational enterprises and local communities and attendant costs, including lost productivity due to temporary shutdowns or delay, diversion of senior management time, lost value linked to future projects or expansion

VII. CONCLUSION

This Article began with a frank acknowledgment and examination of the conceptual and practical difficulties surrounding the deterrence rationale in a civil damages context—as well as an examination of the political valence of some of the most vocal criticisms.²⁹⁵ It considered the resulting constrained and delicate nature of the deterrence rationale's role in award practice in IHR law.²⁹⁶ After looking more closely at the bases for constrained use of deterrence in IHR and more clearly defining the distinct but overlapping legal and cultural spheres of IHR and BHR, the Article next considered whether the same constraints apply with the same force in the context of BHR.²⁹⁷ This analysis left open several possible conclusions but cohered around the possibility that deterrence is a more realistic objective in awards directed at corporations as opposed to States, thus raising the question of whether BHR should consider a more robust embrace of the rationale in its award practice.²⁹⁸ However, as noted in Section V.A, BHR faces its own constraining institutional and political considerations.

The Article next considered the more normative question of whether BHR *should* embrace the deterrence rationale by examining arguments and counterarguments to whether BHR really *needs* the deterrence rationale in light of other available tools and considerations. Specifically, Section V.D.1 acknowledged the central argument from the business community that compensation-based awards, even at their best, offer only pale deterrence in comparison with the threat of a public relations disaster, a threat leveraged by other BHR practices. But the Article also acknowledged that variations of such pressure tactics have also repeatedly failed in the past. Returning to the example of the Porgera OGM as a cautionary tale, the Article argued that existing attempts to deliver remedy in the BHR

plans that do not proceed, and suspension or abandonment of projects); JOHN RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* xxxv (2013) (describing the “global business and human rights picture” as a “deeply divided arena”).

295. Section III.

296. Section IV.

297. Section V.

298. Section V.B.

context without a strong deterrence foundation have profoundly failed to deliver not only justice from the perspective of abuse survivors but, consequently, the desired benefits *to companies* of a perceived legitimate BHR remedy system such as reputational benefits and improved relations with affected communities.²⁹⁹ The Article then reviewed the argument that a robust deterrence-based compensation practice may be critical for companies genuinely committed to respecting human rights because it would prevent less ethical competitors from enjoying profits derived from unaddressed human rights abuses.³⁰⁰

Finally, the Article considered whether and how deterrence might be brought into the awards practice of BHR given current political and institutional realities.³⁰¹ While acknowledging the potential power of punitive and gain-elimination calculated awards in the aggressive realization of human rights norms, the Articles simultaneously recognized that a cost-internalization model of deterrence is far more adapted to the practice and culture of both BHR and IHR at present. Noting a degree of standstill on “whole” or “true redress” practice in IHR, the Article proposed that the deterrence rationale could add critically-needed fuel to existing efforts to motivate tribunals, and even human rights lawyers themselves, to more fully articulate and seek compensation for the multiple dimensions of harm effected by human rights abuse.³⁰²

The broadest conclusion of this Article is that BHR practitioners and future BHR remedy efforts must think seriously about how they will address the deterrence rationale in their work. As in IHR generally, “much more attention should be given to compensatory damages that *truly* provide redress,”³⁰³ and even the most meticulous BHR remedy mechanisms will see their legitimacy threatened if they fail to appreciate the multiple roles served by compensation awards. Deterrence is critical not just to the overarching UNGP duty to protect against future business-related human rights abuse, but also to the compensatory mission of making the affected rights-holder

299. Section V.D.2.

300. Section V.D.3.

301. Section VI.

302. Section VI.C.

303. SHELTON, REMEDIES 3d ed., *supra* note 1, at 376 (emphasis added).

“whole” by signaling respect for the dignity of the individual, including specifically by preventing the repetition of the individual’s tragedy. If BHR remedies are to deliver a justice that will be understood and respected by all stakeholder communities—and thus deliver on foundational BHR principles as well as provide finality to the involved companies—BHR may have to push past the apprehensiveness of IHR precedent and see damages awards as a deterrence practice beyond just compensation.