Symposium
Rewarding in International Law

Beyond Shaming

Potentials and Limits of Rewarding in Human Rights

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In human rights law, shame is ubiquitous. 'Naming and shaming' has become the core tactic of human rights advocacy and the modus operandi of international NGOs such as Amnesty International. More subconsciously, shame and guilt over our own privilege in a highly unequal and unjust world brought many of us to study human rights in the first place. By dividing between good and bad actors, between norm-compliant and norm-breaking activities, law as a punitive system regulates and reproduces shame. In the absence of enforcement instruments, human rights institutions have embraced reputational sanctions when pointing out human rights violations by State parties, even though empirical research has demonstrated that there is no conclusive evidence of a positive effect of shaming for the reduction of human rights violations. This raises the question: Are there other options in human rights law beyond shaming?

Rewarding in International Law

According to Anne van Aaken and Betül Simsek's insightful article on 'Rewarding in International Law', the answer is an enthusiastic yes. In their recent article, the authors demonstrate how international institutions can be designed to provide for positive incentives to foster State compliance. The authors thus contribute to the sprawling debate on compliance by highlighting the often-overlooked counterpart to shaming: rewarding. By putting the spotlight on positive incentives, they move away from the idea of "sticks and stones" and the obsession with international law's weak enforcement problems. Instead, they uncover a variety of legal and extra-legal tools which allow international institutions to reward State parties. The article thus complements recent research on institutional and procedural options of international institutions to nudge States parties towards compliance. In short, the authors offer a variety of delicious carrots to a so-far exclusive menu of sticks.

This important contribution thus provides many interesting starting points to rethink treaty design and compliance in human rights law, which is certain to spark wide debate among practitioners and legal scholars. Yet, I argue that van Aaken and Simsek's analysis is not countering or replacing the shaming discourse. Rather, it aims to revive its core premises. In the following, I want to highlight two elements, which demonstrate both the potentials and limits of the behavioralist approach as applied by van Aaken and Simsek: First, the difficult relationship between rewards and reputations in hard cases of non-compliant States, and, secondly, the potential risk of rewards for the authority of international institutions.

Rewards and Reputations

Van Aaken and Simsek develop an encompassing typology of rewarding which consists of four different types of rewards: On the one hand, they differentiate between internal rewards as benefits included in the treaty design and external rewards as incentives external to the base treaty. On the other, they also distinguish between entry rewards which a State receives when it joins a treaty and compliance rewards which benefit the county when it has already achieved membership and fulfills the institutional commitments.

Entry rewards can be easily identified in regional human rights regimes. Within the European human rights system, for example, the admission to membership of the Council of Europe (CoE) is a lengthy

process and has a positive effect not only on the reputation of the country but also on further European integration. Membership of the European Union is conditional on prior ratification of the European Convention on Human Rights. However, while aspiring State parties have to profess a good human rights record at the time of admission, once accepted into the CoE or European Union no member State has ever been expelled from either institution. The only exception is Greece, which decided in 1969 to ultimately withdraw voluntarily at the last minute to evade a potential expulsion on the grounds of systematic human rights abuses by the then-ruling military dictatorship.

The entry reward, although initially conditional, therefore appears to be permanent and thus might lose its pull in the long run. This raises the question of whether entry rewards can be effective in the long run without a credible threat of retracting the reward. In the European human rights regime, neither the retraction of the entry reward nor the possibility of granting compliance rewards is currently available. States might increase their reputation if they comply with judgments of the European Court of Human Rights, yet, in practice, the Committee of Ministers – which monitors the execution of judgments – focuses only on hard cases of non-compliance. The quarterly human rights meetings are closed to the public, but the list of judgments whose compliance is more strictly monitored is available. This is clearly an act of shaming.

Van Aaken and Simsek propose various ways in which institutional design can provide for reputational rewards to incentivize compliance. For instance, an institution might turn to praising (instead of shaming) States for compliance via annual reports or press releases. Indeed, the communication team at the Execution Department of the Committee of Ministers, which was established in 2018, has fully embraced reputational rewards in its communication strategy. On its homepage, social media channel, and official publications such as the annual report, the Department emphasizes the progress States have achieved in the implementation of judgments.

However, in the absence of empirical evidence of the impact of this new strategy, I question whether the new communication strategy will positively influence the rate of compliance for backlashing States. Indeed, similar to shaming in the execution process, the behavioralist assumption of van Aaken and Simsek might hold true for States which usually comply with judgments. Praising them for their good compliance rate might reinforce their relationship to and prestige gained from the institution. Yet, for States which have generally low compliance rates, openly engage in the contestation of human rights, or even in outright backlash, such as Russia, a positive news segment on an institutional homepage might not be of much consequence on their course of action. Indeed, their reputation as a State party that pushes back against an alleged imposed Western model of democracy and human rights might incur more benefit to them than compliance rewards ever would.

Rewards and Institutional Authority

The application of rewarding also poses challenges for international institutions. Shaming became such a widespread and effective strategy to induce compliance in human rights law because it can be applied by a variety of State and non-State actors which can form transnational advocacy coalitions. Rewarding, on the other hand, is mainly a top-down instrument. It can only be exercised by high-ranking actors who enjoy significant institutional authority. Those powerful actors have either economic, financial, or political capital to provide for material or immaterial rewards for State actors. Civil society activists or grassroots movements have only limited rewarding resources. While they might occasionally highlight positive developments, they rely on the attention of media actors which disproportionally cover negative news. This can be explained by psychological research which has demonstrated that people are drawn to stories written in a negative tone. Moreover, people are also quicker to respond to negative news, which increases the likelihood of successful organizing and mass mobilization efforts for grassroots and other social movements. Hence, NGOs do not only have limited rewarding resources, but it is also often not in their best interest to offer incentives. Transnational advocacy coalitions based on rewarding strategies are thus highly unlikely to form.

Even for international institutions and major global NGOs that enjoy significant institutional authority,

rewarding poses significant risks. In particular, I argue that the rational approach overlooks long-term institutional costs in case rewards do not incentivize compliance. As a millennial, whose generation is routinely mocked for being raised on constant praise and thus bound to fail, I question the threshold value of adopting a communication policy focused on rewards. At which point does the institution become too focused on emphasizing the (small) progress States have achieved in the implementation while overlooking more systematic problems? If praise is the modus operandi, does a non-mention and non-listing of a State become a shaming in disguise? Does the emphasis on progress mask the underlying conflicts and problems which might fester and even intensify over time? How can the institution make sure praise and reward are not manipulated by State parties and results in the better implementation of human rights norms?

An interesting example of this dilemma in recent years was Amnesty International's difficult relationship with Aung Sang Suu Kyi. In the 2000s, Aung San Suu Kyi was one of the most iconic human rights defenders featured in Amnesty's campaigns and even received Amnesty's highest honor, the Ambassador of Conscience Award in 2009. Her release from 15 years of house arrest was celebrated throughout the world. Yet, after she became the de-facto leader of Myanmar's civilian-led government in 2016, she remained silent in the face of massive and systematic human rights abuses against ethnic minorities such as the Rohingya. This was deeply unsettling for Amnesty and in 2018, Amnesty for the first time in its history publicly revoked the award on account of her "shameful betrayal of the values she once stood for."

In a similar vein, the European human rights system had accepted to admit Russia to the Council of Europe in 1996 on account that the State "is clearly willing and will be able in the near future to fulfil the provisions for membership of the Council of Europe as set forth in Article 3 [of its Statute]". 25 years after this decision, it is obvious that this institutional hope and reputational reward to Russia as a new member State turned out to be mistaken. In particular, since the invasion of Crimea, the organs of the CoE had struggled with imposing membership sanctions upon Russia, which turned into one of the biggest institutional crises in its existence. Yet, even after Russia was rewarded by an amendment of the Rules of Procedure of the Parliamentary Assembly, which excludes significant membership rights such as the right to elect judges from the sanctioning menu, the conflict with Russia is far from over and the institutional costs of the continued Russian membership for the CoE are high (see also Steininger, forthcoming 2021 in ZaöRV/HJIL 81/2).

While I agree with van Aaken and Simsek that rewards have similar costs and benefits than punitive sanctions, and might even be less costly for institutions in the short term as the institution does not need to uphold a credible threat, they overlook the reputational costs rewarding might entail for the institution. The authority of international institutions is fragile and human rights institutions are particularly reliant on their image of impartiality and credibility. Praising a State party that has made progress in its human rights commitments can backfire on the institutional authority if that State does not follow through or even retracts its commitments. Institutional rewarding, like negative sanctions such as expulsion or suspensions, is as much an institutional-political choice as a rational one. This also means that instead of rational cost-benefit considerations, geopolitical interests and institutional veto players might play an essential role in internal and external rewarding.

Rewards as Game Changers?

The article by van Aaken and Simsek excellently captures the phenomenon of rewarding in international law both in its breadth, by developing a typology of various types of rewards, and depth, by identifying rational and psychological benefits of rewarding. While its insights can be very helpful for the design of new treaties, I wonder how those important insights can be implemented in existing human rights regimes. In particular, socio-cultural institutional barriers might pose hurdles for a more reward-oriented approach. The reward-oriented approach runs counter to the institutional self-understanding where compliance should be the norm, not the exception for which States need to be rewarded for.

In this sense, the German saying 'Nicht geschimpft ist genug gelobt' (Not being scolded is praise enough) captures the institutional path dependency for shaming. Against this background, rewarding is neither an

alternative to shaming as it reproduces the same behavioralist blindspots, nor can it effectively replace shaming in most situations. Indeed, it might be more useful to consider it as an extension to the existing menu of institutional options which can provide new and innovative ways to foster compliance.

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