

SYMPOSIUM ON ANNE VAN AAKEN & BETÜL SIMSEK, “REWARDING IN INTERNATIONAL LAW”

REWARDING IN INTERNATIONAL HUMAN RIGHTS LAW?

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Compliance in international law remains a challenge and the search to understand whether and why states comply with international human rights law endures as well.¹ This essay endorses van Aaken and Simsek’s contention that rewarding is an important yet underexplored mechanism for ensuring compliance with international law, but suggests that certain features of international human rights law may make rewarding less apposite in the human rights sphere for three interrelated reasons. First, compliance with international human rights law depends on domestic as well as international action, potentially rendering rewarding between states less relevant. Second, the unique and complex structure of international human rights law obligations and their measurement may make an assessment of the effectiveness of rewarding more difficult, at least for certain categories of rights and obligations. Third, rewarding may be inappropriate in international human rights law given its core normative purpose of protecting human dignity. As such, this essay explores whether rewarding *can* or *should* be pursued in international human rights law.

International Human Rights Law Compliance: Vertical Accountability and Domestic Action

Compliance with international law generally rests upon certain structural features, including its horizontal nature and weak enforcement.² Reciprocity is “a basic mechanism for compliance” in international law³ and central to the Vienna Convention on the Law of Treaties.⁴ Reciprocity supports the horizontal obligations underpinning international legal accountability⁵ since “reciprocal benefits are usually understood to be benefits from the treaty obtained through the compliance of the other party (or parties).”⁶

Human rights treaties are different: they are “enacted for the direct benefit neither of the joining parties nor of those pushing for enactment, but rather of uninvolved third parties. In this sense, human rights treaties can take on the character of “charitable” enactments that are designed to benefit people other than the ones whose

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¹ See LOUIS HENKIN, *HOW NATIONS BEHAVE* (1979); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

² Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AJIL 195, 196 (2021).

³ *Id.* at 200.

⁴ *Vienna Convention on the Law of Treaties* art. 60(1–3), May 23, 1969, 1155 UNTS 331, 8 ILM 679.

⁵ See, e.g., Jutta Brunnée, *International Legal Accountability Through the Lens of the Law of State Responsibility*, 36 NETHERLANDS Y.B. INT’L L. 3 (2005).

⁶ *Van Aaken & Simsek*, *supra* 2, at 200.

gratification is the payment for passage, and which, as a result, often suffer from indifferent enforcement and limited impact.”⁷ From the legal perspective of states parties to human rights treaties, the beneficiaries are therefore “third parties.”⁸ The legal accountability underpinning human rights treaties operates *both* horizontally (between states parties),⁹ and therefore vertically (between rights-holders (citizens or those within the state’s effective control) and duty-bearers (primarily states)). This special feature of international human rights law treaties impacts compliance. A few systems exercise strong compliance, such as the European Union’s imposition of fines for violations of the Charter of Fundamental Rights; the process of socialization and persuasion under the Inter-American Convention on Human Rights; and the robust political enforcement of European Court of Human Rights judgments by the Committee of Ministers. But for the most part, compliance with international human rights law is weak. The major engines of international law compliance are absent since “the costs of retaliatory noncompliance are low to nonexistent, because a nation’s actions against its own citizens do not directly threaten or harm other states. . . . As Henkin observed, ‘[t]he forces that induce compliance with other law. . . do not pertain equally to the law of human rights.’”¹⁰ Human rights treaties are therefore unique because while they are concluded between states, the impetus to police compliance does not rest with states but with individuals who are not party to those treaties.

“Compliance presupposes a stipulated or shared theory of law”¹¹ providing a value baseline against which to assess the scope and purpose of compliance. The theory of law proposed here to assess compliance with international human rights law prioritizes legal accountability which operates horizontally (between states) and vertically (between states and individuals). That legal accountability is grounded in human rights and obligations and the relationship of individual right-holder and state duty-bearer. The correlativity of rights and obligations¹² is therefore a defining feature of human rights law¹³ and the foundation of international human rights accountability for states.¹⁴ By establishing human rights norms and fostering dialogue around them through information, participation, and contestation, international human rights law accountability ensures “answerability” and holding governments to account. It “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards and to impose sanctions if they determine that these responsibilities have not been met.”¹⁵

While van Aaken and Simsek make a number of novel proposals for rewarding in international human rights (such as UN human rights treaty bodies showcasing best performing countries in annual reports or concluding observations), and while they note that international trade and foreign investment may encourage government respect of human rights, the effectiveness of any such proposals will be limited because of the bifurcated nature of accountability under international human rights law. International human rights law compliance involves

⁷ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1937 (2005).

⁸ Van Aaken & Simsek, *supra* 2, at 206, 212.

⁹ “The principal element of horizontal deterrence is missing”—or if not missing, is certainly weaker than in other treaty frameworks. Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 27, 253 (1989).

¹⁰ Hathaway, *supra* note 7, at 1937, citing LOUIS HENKIN, *HOW NATIONS BEHAVE* 235 (1979).

¹¹ Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J INT’L L. 345, 346 (1998).

¹² Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS RIGHTS: A TEXTBOOK* 22 (Asbjørn Eide et al. eds., 2001).

¹³ Wesley Newcomb Hohfeld, *Some Fundamental Legal Concepts as Applied to Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913); Bernard Mayo, *What Are Human Rights?*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 68, 72 (D.D. Raphael ed., 1967).

¹⁴ Hohfeld, *supra* note 13, at 38; Mayo, *supra* note 13, at 73; HENRY SHUE, *BASIC RIGHTS* 35–64 (1980).

¹⁵ Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

“outward-looking activities,” such as state legislation mandating disinvestment in rights-abusing countries and regimes—the more traditional conception of the horizontal enforcement of human rights norms between states parties—and “inward-looking human rights activities to influence domestic policy and practice.”¹⁶ “Naming and shaming” can set in motion national processes that foster compliance,¹⁷ but the vertical accountability features of international human rights law may limit the extent to which rewarding can be effective in the domestic setting, compared with the international realm among states parties as peers.

Enforcement of international human rights law depends, to a greater degree, on domestic mobilization and enforcement:¹⁸ “domestic, not international, institutions are the linchpin for securing human rights.”¹⁹ It requires the actions of parliaments, civil society, media, academia, National Human Rights Institutions, Ombuds, courts,²⁰ individual right-holders,²¹ and in some cases state and local government.²² True compliance with international human rights law is thus “an inherently domestic affair,”²³ reliant on domestic political transformation and “socialization”—a process by which international norms are internalized and implemented domestically.²⁴

Van Aaken and Simsek opine that governance *between states* is a key element of compliance with international law.²⁵ For international human rights law, effective governance *within states* is also essential. Its implementation requires political transformation anchored in the rule of law within a country,²⁶ and “finding other strong incentives, outside domestic demands for promoting human rights, is an elusive task.”²⁷ Given that not all states are rational and unitary,²⁸ the lack of horizontal policy coherence may also impede compliance with international human rights law which “requires strong partnership among all levels of government.”²⁹

However, compliance with international human rights law is ultimately about ensuring accountability for human rights, which has both horizontal and vertical dimensions. The proposals put forward by van Aaken and Simsek rely primarily on the horizontal dimension of international human rights law, relating to undertakings between state parties to treaties.³⁰ Given the vertical application of international human rights law, it is worth asking how rewarding might operate between traditional rights-holders (individuals) and traditional duty-bearers (states). Rewarding presupposes that the rewarder is in a position to provide a benefit to the rewardee. What benefits can or should a citizen confer on her government to incentivize or reward fulfillment of the latter’s human rights obligations?

¹⁶ Risa E. Kaufman, *“By Some Other Means”: Considering the Executive’s Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971, 1973–74 (2012).

¹⁷ BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

¹⁸ Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588 (2007).

¹⁹ COURTNEY HILLEBRECHT, *DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE* 19 (2014).

²⁰ Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights*, 44 CORNELL INT’L L.J. 493 (2011).

²¹ See Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. (1998).

²² Kaufman, *supra* note 16, at 1972.

²³ HILLEBRECHT, *supra* note 19, at 5.

²⁴ *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 5 (Thomas Risse et al. eds., 2013).

²⁵ Van Aaken & Simsek, *supra* 3, at 198.

²⁶ THOMAS RISSE & KATHRYN SIKKINK, *THE SOCIALIZATION OF HUMAN RIGHTS NORMS* 3.

²⁷ David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. UNIV. L. REV. 879, 907–908.

²⁸ Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEG. STUD. 285 (2002); Robert Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. LEG. STUD. 307 (2002).

²⁹ Kaufman, *supra* note 16.

³⁰ However, rewarding by a third party (such as another state party) assumes the third party’s stake in the domestic human rights situation, which cannot be assumed. State parties can seek to enforce human rights in the territory of another state party, but rarely do.

Moreover, what body or institution could be entrusted with the role of administering rewards relating to legal norms that mediate the relationship between state and citizen? More fundamentally, it may be that rewarding governments for complying with their human rights obligations subverts the legal relationship underpinning a human right, which exists to contest domination, redress power imbalances, and safeguard human dignity. Human rights are designed primarily for the benefit of people not for the benefit of the state. Given that “[h]uman rights are inherent in the human person . . . [and] are not *given* to people by the State,”³¹ why would a right-holder reward a state duty-bearer for respecting, protecting or fulfilling human rights? Rewarding in this context could also be advantageous for elites who are in a position to bestow rewards, thereby potentially marginalizing the very people international human rights law is designed to protect and empower.

Measuring International Human Rights Law Compliance

Van Aaken and Simsek note that compliance is neither a unitary concept nor a static phenomenon. The same is true of compliance in international human rights law, which is dynamic, complex and politically sensitive. In analyzing rewards-for-complying (as distinct from rewards-for-entry), van Aaken and Simsek observe that compliance goes beyond the signing and ratification of a treaty, since these actions do not always result in consistent behavior or true compliance.³² Compliance is about tackling the potential gaps between formal commitments and actual state practices and this presents particular challenges for international human rights law.³³

Human rights indicators provide one way to assess those gaps, although human rights measurement is fraught.³⁴ A human rights indicator is “specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights.”³⁵ Drawing on the framework developed by the UN Office of the High Commissioner of Human Rights, the process of international human rights law compliance can be conceived as an arc comprising several interrelated stages that ensures human rights accountability. It begins with a formal commitment measured by a structural indicator (evidenced by the signing and ratification of a human rights treaty or enshrining rights in a constitution). This is followed by enforcement efforts such as the enactment of legislation or the adoption of policy measures (process indicators). Finally, an appraisal of compliance with international human rights law requires assessing intended or achieved short and medium-term effects of an intervention (outcome indicators).

Compliance with international human rights law must be analyzed at different stages of the compliance arc. Rewarding for entry—measured by structural indicators—could be relatively straightforward. But rewarding for effort (through process indicators), or rewarding for results and the actual enjoyment of rights (through outcome indicators), might be less so. Rewarding effort or outcome would rely on human rights due diligence tools such as human rights impact assessments and would require rigorous monitoring, using a sophisticated data collection methodology and both qualitative and quantitative indicators. There are therefore practical challenges to confront at different stages of the compliance arc, particularly in its latter phases. A further layer of complexity with regard to measurement is that human rights obligations may require either action or restraint on the part of state duty-bearers. In addition, economic, social, and cultural rights are subject to the principle of progressive realization that requires a

³¹ Laurie Wiseberg, *Introductory Essay*, in *ENCYCLOPEDIA OF HUMAN RIGHTS* xix (1996).

³² *RISSE & SIKKINK*, *supra* note 26, at 33.

³³ RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 136 (2013).

³⁴ Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 *HUM. RTS. Q.* 1062, 1065 (2001).

³⁵ OHCHR, *GUIDE TO HUMAN RIGHTS MEASUREMENT* 16 (2012).

programmatic approach to measuring compliance over time.³⁶ It is therefore unclear that rewarding *can* be operationalized in international human rights law given the particular complexities associated with its measurement.

Normative Content of International Human Rights Law Obligations

A broader question to consider is whether rewarding *should* be pursued in international human rights law. Structurally, international human rights law is unique in establishing obligations to respect, protect, and fulfil. The contours of compliance with these obligations (of conduct and result) vary by right and in context.³⁷ But what they have in common is the protection of human dignity³⁸ and the goal of enhancing capabilities.³⁹ According to the preamble of the International Covenant on Civil and Political Rights, “these rights derive from the inherent dignity of the human person.”⁴⁰ In light of this, is rewarding inimical to the overarching normative purpose of international human rights law? Are international human rights law treaties qualitatively different because of the nature of the interests they protect? The protection of human dignity should arguably be pursued because it is a moral imperative backed by international legal obligations, and not because of the prospect of some additional reward or external inducement. International human rights law reflects the rights that inhere in people because they are human, the respect of which should not be monetized or incentivized. In fact, the non-instrumental reasons for complying with international human rights law are potentially undermined by introducing rewards. The commitments embodied in international human rights law treaties (which include “covenants”) are unique in ways that may make rewarding unsuitable.⁴¹ To take two extreme examples, the absurdity of rewarding a government for complying with the prohibition against torture or for respecting a *jus cogens* norm such as the prohibition of slavery is obvious.⁴² Finally, international human rights law fulfills an important expressive function grounded in the individual interest in integrity.⁴³ Rewarding may deprive international human rights of that expressive function and eviscerate its power to make statements and “change social norms.”⁴⁴

Conclusion

Rewarding in international law is worthy of exploration, but a number of legal, methodological, and normative considerations may limit its effectiveness and appropriateness in the realm of international human rights law. Distinct structural features of international human rights law, and the particular challenges of measuring compliance with it, raise practical questions about whether rewarding *can* work in this realm. Furthermore, the normative interests protected by international human rights law raise the more fundamental question of whether rewarding human rights compliance *should* be subject to external incentives or reward.

³⁶ [International Covenant on Economic, Social and Cultural Rights](#) art. 2(1), Dec. 16, 1966, 993 UNTS 3.

³⁷ See Daniel M. Brinks et al., [Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular](#), 11 ANN. REV. LAW & SOC. SCI. 289 (2015).

³⁸ See UDHR, American Declaration of Human Rights and American Convention on Human Rights; Jack Donnelly, [Human Rights as Natural Rights](#), 4 HUM. RTS. Q. 391 (1982); Klaus Dicke, [The Founding Function of Human Dignity in the UDHR](#), in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 111 (David Kretzmer & Eckart Klein eds., 2002); [Helsinki Final Act](#), 1975.

³⁹ See, e.g., Martha Nussbaum, [Human Rights and Human Capabilities](#), 20 HARV. HUM. RTS. J. 21 (2007).

⁴⁰ ICCPR (1966).

⁴¹ ICESCR (1966).

⁴² Under Article 53 of the Vienna Convention on the Law of Treaties, treaties that conflict with a peremptory norm of international law (*jus cogens*) are void.

⁴³ Cass Sunstein, [On the Expressive Function of Law](#), 144 U. PENN. L. REV. 2021, 2026 (1996).

⁴⁴ *Id.*