Symposium
Rewarding in International Law

Reparation and Judicial Discretion

On Whether Rewards can be Awarded as Remedies by Human Rights Courts

09.06.2021

In *Rewarding in International Law,* Professor Anne van Aaken and Betül Simsek argue that rewards are an effective means to induce State compliance with treaty law. *Rewarding* is inscribed in the analytical framework of 'compliance theory', a field concerning the reasons 'why states fulfil their international obligations [… and] the design and operation of possible enforcement mechanisms' (p. 196). Van Aaken and Simsek's article concerns how rewards (positive incentives) to enter into and comply with treaties work, and why they are a superior option to penalties (negative incentives). Despite its impressive comprehensiveness, it is somewhat surprising that the matter is not analysed vis-à-vis international courts and tribunals and the question of whether the remedies awarded as a result of the adjudicative process may provide for rewards. The article also makes no mention of how the law of State responsibility – particularly the rules on the consequences of the internationally wrongful act – interacts with the idea of rewards and penalties as incentives for compliance.

With that in mind, I want to briefly explore whether international human rights courts such as the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) can incorporate rewards in their awards on remedies. I argue against that proposition if premised in that the breach of the treaties establishing those courts entails the application of a legal standard other than the customary rule of full reparation codified in Part Two of the Articles on State responsibility for internationally wrongful acts (ARSIWA). That said, rewards may have a role to play as a theory that explains the judicial discretion exercised within the boundaries of the positive law of State responsibility.

The *Lex Specialis* Argument for Rewards: The Other Side of the Punitive Damages Coin?

Rewarding echoes van Aaken's earlier scholarly work on *Punitive Damages in Strasbourg* – penned alongside former ECtHR judge Pinto de Albuquerque. The points of connection are so many that one wonders whether the lack of focus on judicial remedies in *Rewarding* owes to the detailed analysis of the matter in *Punitive Damages.* According to *Rewarding,* both rewards and penalties are a means to induce State compliance with their treaty obligations (s. IV). *Punitive Damages* in turn submits that punitive remedies should and are available under International Human Rights Law (IHRL) – particularly in the context of the European Convention on Human Rights – but also as a matter of the law of State responsibility (*Punitive Damages,* s. 2, sub-s. 3.1). Remedies in that sense must not be proportional to the 'harm' suffered by the victim of the case but must be calibrated so as to deter prospective State non-compliance (*Punitive Damages,* p. 240). There is no reason why rewards could not be awarded under the *Punitive Damages* rationale*.* Although punitive damages are usually associated with remedies that exceed the injury resulting from the internationally wrongful act, reparation can also be lower than the actual loss of the victim given that the calibrating factor of remedies is deterrence rather than the injury suffered by the victim (Shelton*, Remedies in IHRL,* p. 27-28).

There are a number of markers that are indicative that remedies proportional to the victim's injury do not meet the desired compliance inducement threshold and therefore justify the application of penalties or rewards by human rights courts. There are factors that have a negative impact in the individual applications mechanism of human rights treaties that result in an effectiveness deficit of the multilateral

treaty framework in question. These include circumstances in which individuals are de-incentivised or prevented from triggering the treaty-based individual applications mechanism, such as the perception that international litigation is too costly when compared with its potential remedial outcome; State obstruction of access to domestic and international courts; and the risk of State non-compliance with the judgments of the international court in question (*Punitive Damages,* p. 241-44; also van Aaken, *Making International Human Rights Protection More Effective*, p. 6-8). Other factors concern the so-called 'inter omnes' character of human rights violations (*Punitive Damages,* 242). The claim of *Punitive Damages* is that incentive-based remedies are awarded by the ECtHR when invoking the 'absolute', 'particularly serious' nature or the 'gravity' of the violations, as well as the 'fundamental importance of the right' (*Punitive Damages,* p. 232; see also *Cyprus v. Turkey, Conc. Op. Pinto de Albuquerque/Vucinic*, para. 13).

Punitive Damages does not make the case for rewards. That said, such a claim has been made as of recent before the IACtHR. In the ongoing *Members and Militants of the Patriotic Union Party v. Colombia*, the State argued that the obligation to make reparation for breaches of the American Convention committed in connection with the armed conflict is governed not by the general standard of full reparation, but rather by a special regime of transformative and collective reparations (public hearing; day 5 min 01:24:50 *et seq*. (Agent Acosta); day 3 min 01:23:56 *et seq*. (Expert Witness Freeman)). Colombia claimed to have a relaxed obligation to make reparation in two complementary ways applicable insofar as it enacted a domestic legal framework that resulted from a negotiated peace deal: (i) it should only investigate and prosecute the most serious and representative international crimes; and (ii) reparation is to be fulfilled through collective programs of administrative compensation in which lump and pre-determined financial awards are given on the basis of society's solidarity with the victims of the armed conflict (see these 2017 and 2019 journal articles co-authored by Colombia's Agents and an Expert Witness who declared in the court's proceedings). This less-than-full reparation remedial standard was substantiated in a rewards-consistent basis: the court should acknowledge Colombia's peace-making efforts and procure the conditions for the State to comply with human rights obligations which it could not otherwise fulfil under a full reparation legal framework (public hearing; day 1 min 00:15:00 *et seq*. (Agent Acosta)).

But, as argued below, the proposition that human rights courts can award rewards by applying a *lex specialis* standard that displaces the general rule of full reparation codified in Part Two ARSIWA is as unlikely as that of punitive damages.

The Obligation to Make Reparation for Breach of IHRL and the General Law of State Responsibility

The ECtHR, the IACtHR, and the African Court of Human and Peoples' Rights (ACtHPR) have stated that their respective remedial regimes are consistent with the general law of State responsibility standard of full reparation (e.g. ECtHR, *Cyprus v. Turkey (Just Satisfaction)*, paras. 41, 42; IACtHR, *Velásquez-Rodríguez (Reparations)*, paras. 25, 26; ACtHPR, Mtikila *(Reparations)*, paras. 27, 28). And although Part Two ARSIWA is applicable 'without prejudice to any right' resulting from the breach of obligations owed to non-State entities under international law (Article 33(2) ARSIWA), international judicial practice strongly suggests that the obligation to make reparation is in fact controlled by the full reparation rule. The ECtHR, IACtHR, and ACtHPR have all unequivocally held so in their individual application-based case law (e.g. *Mammadov*, paras. 150-51, 162; Mota Arabullo, paras. 134-35; Zongo *et al. (Reparations)*, para. 21). The International Court of Justice similarly applied the customary standard in its case law on the right to individual notification enshrined in the Vienna Convention on Consular Relations (*LaGrand*, paras. 63, 124-25; *Avena*, paras. 119-21; *Jadhav*, paras. 133-39). Arbitral practice in the investor-State arbitration context – the other major field in which remedies are awarded for breach of rights owed to non-State entities – further confirms the general applicability of full reparation (*ADC Affiliate Ltd et al.*, paras. 483-84; *Siemens*, paras. 349-52; *Teinver*, paras. 1088-89; *Micula*, p. 244, fn. 172).

In turn, the cases that are offered as examples of aggravated remedies in *Punitive Damages* suggest that a punitive function is ascribed to non-material injury's compensation, an aspect of reparation whose reasoning and valuation call for the exercise of judicial discretion (e.g. *Chember*, paras. 48-77; *Igor Ivanov*, paras. 30-41, 48-50; *Mayzit*, paras. 34-35, 87-88). But as the ECtHR has underlined, the

assessment of compensation for non-material injury is made on an equitable basis, a determination 'which involves flexibility and an objective consideration of what is just, fair and reasonable' and recognises 'the severity of the damage' (*Nagmetov,* para. 73; *Al-Jedda,* para. 114). That is surely consistent with full reparation rather than with a punitive or rewarding remedial standard. The same holds true of the IACtHR's practice.

The other variable to which *Punitive Damages* ascribes a punitive function concerns ECtHR's awards of compensation made despite the fact that the Applicants did not enter a claim of just satisfaction in accordance with Rule of Court 60 (p. 231). This exercise of judicial discretion confirms that the ECtHR seeks to make good of the injury resulting from the wrongful act and avoid adjudicating an issue in which the remedy does not make good of the victim's damage (*Nagmetov,* paras. 80-92). In *Mozote,* the IACtHR similarly awarded compensation for non-material injury despite the fact that the Applicants did not make any such request – it did so after recalling that the obligation to make reparation is controlled by the customary regime of the general law of State responsibility (paras. 302, 382-84). In fact, whether an international court enjoys jurisdiction to adjudicate on remedies on a *proprio motu* basis has nothing to do with the law applicable thereto (*Chorzów Factory (Jurisdiction),* p. 21; Brown, *The Inherent Powers of International Courts and Tribunals*, p. 221-22).

Neither rewards nor penalties seem to fit with the remedial authority of human rights courts if these are meant to articulate a *lex specialis* rule vis-à-vis the general law of State responsibility. Neither the ECtHR nor the IACtHR enjoy so broad a judicial discretion so as to allow for awarding remedies articulating either less than full reparation (rewards) or more than full reparation (penalties). Relatively small variations in the determination of what constitutes repairable injury in similar cases can be explained within the four corners of the positive law of State responsibility. Judges, chambers, and different benches may adopt different approaches to causation, or may factor the specific circumstances that provide context to each case differently in their remedial assessments.

More plausible even is that, unlike material injury, the assessment and valuation of non-material damages cannot be reduced to precise mathematical formulae. That is quite different from claiming that courts are surreptitiously enforcing a non-disclosed *lex specialis* framework of criminal State responsibility. The law of State responsibility, and particularly the rules on the consequences of the internationally wrongful act, are not guidelines subservient to policy. The obligation to make reparation for breach of IHRL concerns rules provided for in customary and treaty law that have been applied by international courts and tribunals in a manner that is mostly consistent with the rules enshrined in Part Two ARSIWA.

Is There a Place for Rewards and Sanctions in the Law of Remedies for Breach of IHRL?

There may be a place for incentives within the confines of the law of State responsibility – perhaps. The valuation of compensation for non-material injury on an equitable basis, as well as the choice or combination of different forms of reparation certainly leave room for courts to provide positive or negative inducements to States. Although always reasoned in connection with the injury proven in the case, the IACtHR does not provide a thorough reasoning to justify why it awards less or more compensation for non-material injury in comparable cases concerning the same State (cf. *Rochela,* paras. 264-74 with *La Esperanza,* paras. 306-12). Rewards or reproach may be behind this particular feature of the IACtHR's case law.

That lack of reasoning of the IACtHR may be indicative of a deliberate intention to preserve its discretional authority in these limited remedial aspects. That may also be the reason why the ECtHR's tables on compensation guidelines are confidential. I have met a few people who have seen them, some of them judges – all of them are incredibly circumspect when it comes to this topic. Therein lies another challenge for rewards and penalties, for ascribing a function to a remedy where a court chooses to not provide detailed reasoning is highly difficult.

This short commentary surely raises more questions than it answers. I tend to look for those answers in positive international law and its continued interpretation and application by international courts. That is

not to say that the framework provided by *Rewarding* and more generally by Professor van Aaken's impressive work is incompatible with my own attitude and preferences vis-à-vis international law. Quite the opposite. The lack of thorough and detailed reasoning in the remedial case law of human rights courts raises the questions that are at the core of my own intellectual interests. Rather than explaining those gaps as the arbitrary exercise of authority – as States with appalling human rights records tend to do – *Rewarding* provides an interesting rationale against which the remedial practice of human rights courts can be assessed.

Disclosure: The author is lead counsel for the victims in the pending Members and Militants of the Patriotic Union Party v. Colombia *cited to in this post. All the arguments cited to are public and the opinions expressed in the present contribution—which are of a personal nature—do not necessarily reflect the Applicant's arguments in that case.*

Cite as
Luis F. Viveros-Montoya Reparation and Judicial Discretion: On Whether Rewards can be Awarded as Remedies by Human Rights Courts, Völkerrechtsblog, 09.06.2021.