

Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights¹

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18 August 2008

Paper prepared for delivery at the 2008 Annual Meeting of the American Political Science Association, Boston, MA, August 28-31, 2008. Copyright by the American Political Science Association.

¹ The authors thank Heidi Gasparrini and Moises Costa for valuable research assistance.

Expectations about the level of state compliance with international human rights norms vary widely, but tend to cluster around the extremes of high compliance or low compliance. Legal scholars like Henkin (1979) and Chayes and Chayes (1993) suggest that most states obey most laws most of the time. In the same vein, some political scientists suggest that when international institutions socialize states (a relatively frequent occurrence), the result is either stable compliance with international rules or an even deeper transformation of state interests to match international norms (Checkel 2005). In contrast, other scholars suggest that international institutions are little more than cheap talk that reflect existing state preferences and practices (Downs, Rocke and Barsoom 1996). Any observed compliance is the result of states designing easy rules they already follow. Others see large gaps between international rules, especially in idealistic issue areas like human rights, and state behavior and argue that the independent effect of international institutions is negligible (Hafner-Burton and Tsutsui 2005).

We wish to conceptualize and explore the middle ground between these positions. Just as scholars of regime type have broken down the dichotomy between democracy and autocracy by examining imperfect democracies and varieties of autocracies, we aim to break down the dichotomy between compliance and noncompliance by exploring the territory of partial compliance. We aim to catalogue the varieties of partial compliance and to explore the reasons why states choose partial compliance. At first glance, states have a large variety of tools they can use to achieve partial compliance. Some are intuitive. States may ratify a treaty but then not pass implementing legislation. They may pass legislation that implements part of the treaty but not all of it. They may pass

implementing legislation but not complementary legislation to fund agencies that promote and monitor compliance. They may fail to enforce legislation or may fail to educate and train key domestic actors on the nature of the new policy. Below, we also develop five more specific mechanisms by which partial compliance may come about. While some scholars are well aware of the ubiquity of both these obvious and less obvious intermediate stages, many write as if states of partial compliance are way stations on the path to full compliance (Risse and Sikink 1997). Many times, scholars suggest that socialization is a rather transformative experience, leading states to interest convergence (Bearce and Bondanella 2007).

It is first important to distinguish between compliance and effectiveness.² For Raustiala (2000), compliance is conformity between a behavior and a legal standard. Compliance could be the result of the rules and enforcement efforts or it could be sheer coincidence. To say an actor complies with the rule is not to imply that the rule caused the behavior. Effectiveness, in contrast, is the degree to which a legal rule or standard induces the desired change in behavior. Thus, international rules can be effective even when compliance is low (by inducing behavioral changes in some but not all), and international rules with high compliance can be totally ineffective (because they were drafted to fit pre-existing behavior, for example) (Raustiala 2000, 388).

While conceptually very useful, this distinction does put enormous data demands on researchers when, in the normal course of events, they try to distill cases of compliance from ones of efficacy. There is, however, one set of circumstances in which, without very demanding assumptions, we can get a class of cases in which we can

² The less developed literature on the IACHR has failed to make this distinction, but Janis (2000: 39) notes that virtually no studies of the ECHR have made it either.

eliminate the category of pre-existing behaviors and thus treat compliance and effectiveness as rough equivalents. That class of cases is court rulings against states for violating their treaty obligations.

When a country persists in behavior long enough for an international court to rule against that country's practices, and the country subsequently changes its practices, one can assume that the court's ruling helped trigger the change in behavior. Likewise, when a court asks for a specific behavior, such as the payment of monetary damages to a particular individual, and the state responds, we assume the court's request had something to do with the behavior, which is very unlikely to be the result of chance. Because most court cases take several years and cost states significant money and time, it is reasonable to assume that the state prefers to persist in the behavior being challenged in court. Hence, any resulting behavioral changes after an adverse court ruling suggest court effectiveness and create a class of cases where we can reasonably treat compliance and effectiveness as the same thing. In making this assumption explicit, we don't believe it is terribly controversial. Scholars, including ones we criticize below such as Posner and Yoo (2005, 28), study compliance with court rulings and also treat compliance as a measure of effectiveness.

At the broadest level, we argue in this paper that partial state compliance is far more likely than commonly supposed and often more likely than either systematic compliance or noncompliance with the regional human rights courts. Moreover, some of this partial compliance seems quite stable and not likely to turn into full compliance any time soon. We try to break down the broad category of partial compliance into some basic inductive categories. Partial compliance exists at both the state and the regional

level. At the state level, partial compliance may take one of five forms, which we define late in the paper: 1-split decisions; 2-state substitution; 3-slow-motion; 4-attempting an implausible or impossible task; and 5-alternative implementation of details.

Beyond proposing some (tentative) conceptual language, we also sketch a broad empirical contrast. Thus, at the regional level, the European partial compliance regime differs strongly from the American partial compliance regime. In Europe, the European Court of Human Rights (ECHR) exercises delegative compliance where it identifies a violation but leaves it up to the states to decide how to end the violation, compensate for its effects, and avoid future violations. In the Americas, the Inter-American Court of Human Rights (IACHR) exercises checklist compliance where it orders a series of clear, specific steps and then observes whether states in fact comply with those measures. This difference has major implications for any study of partial compliance. For example, the conventional wisdom is that Europe has a much higher compliance rate, but this may be because it is relatively easy to comply when states get to decide the method of compliance.

The compliance data is better on the American side than on the European side. We find that 76 percent of the cases in which the inter-American Court has rendered a judgment (n=92) can be coded as partial compliance, with noncompliance at 17 percent and full compliance at 7 percent. Using a different level of analysis, states have complied with 28 percent of the specific, discrete actions that the Court has required of them, a level that definitely suggests partial compliance might be a stable state. We find some evidence that compliance is higher when it is easy. States are more likely to comply with judgments requiring monetary compensation than with those requiring action, and the

broader the action, the less likely they are to do anything. We also find some evidence that the Court can increase compliance through careful follow-up to initial state inaction. We find only a little evidence that state compliance varies in ways that are related to prominent domestic political factors.

There is little doubt that the ECHR fits theoretical arguments about the prevalence of full compliance better than does the IACHR. First, there is more compliance, though the much higher case load makes it somewhat harder to be precise about the magnitude of full compliance, and the Court's substantial deference to state-defined solutions certainly makes full compliance easier to achieve than for the IACHR, which defines remedies for the states. Second, many cases of partial compliance with ECHR judgments do, over time, turn into full compliance by the states. That said, we develop below several reasons to be skeptical of the Court's own founding mythology that compliance with its judgments is essentially perfect. We also show that a significant minority of cases that are decided against states are now taking a very long time to resolve.

The first section examines international relations theories of compliance while the second compares the practices of the two courts and discusses how compliance can be measured. The third section takes a broad view, examining patterns in state compliance while the fourth section focuses on specific state actions that constitute partial compliance with illustrations from the Americas and a more detailed examination of Britain in the 1990s. We then conclude.

Explaining Compliance

Why do states comply with international rules? This question has been an important one of general concern to international relations theorists. Answers might be divided into three broad categories: international enforcement, management, and domestic politics.

International enforcement refers to the imposition of penalties or rewards, both material and social—though scholars who focus on enforcement also tend to emphasize and prioritize the use of material rewards and sanctions (Simmons 2000; Cortright and Lopez 2002; Kelley 2004; Vachudova 2005). In an influential piece, Simmons (2000) suggested that states are likely to comply with international commitments in order to maintain their good international reputations for predictable and law-abiding behavior. States enjoying such reputations are likely to be rewarded through mechanisms such as increased investment while states lacking such reputations are likely to be punished in an opposite fashion. In Simmons' article, these punishments and rewards are not explicitly tied to a state's compliance behavior, but they could be. In the area of human rights, Hafner-Burton (2005) has argued that international human rights agreements are more effective when states tie compliance to specific material incentives, such as trade integration. Many scholars focusing on international enforcement tend to combine this mechanism with either management (Tallberg 2002) or domestic politics (Schimmelfennig 2005; Kelley 2004) and hence are reviewed more fully below.

It is worth noting that international courts themselves typically have very low enforcement authority, using this definition, though other states or private actors may

reward or penalize states for complying with the courts. The European and inter-American human rights courts have no resources in their control other than public shame. Even that shame is quite limited because so few actors pay attention to the courts' rulings. At the same time, some powerful international actors might occasionally pay attention to court rulings and tie rewards and sanctions to compliance with those rulings. The European Union has certainly been watching Turkey's compliance with ECHR rulings as part of the accession negotiations, for example. Still, European states clearly supply compliance far out of proportion to the any leverage the Council of Europe might have over them.

Another approach, most closely associated with Chayes and Chayes (1993, 1995) emphasizes the ways in which management problems influence compliance. Management problems concern the nature of the international rules and the capabilities of states rather than state motives and the rewards or punishments related to rule-following. In some cases where noncompliance appears widespread, a closer examination may show that the international rules are quite ambiguous, making it difficult for states to comply with one particular interpretation of those rules. Another management problem occurs when states lack the technical expertise or economic capacity to implement international rules. Finally, noncompliance may simply be a timing issue: many international rules are quite difficult to implement and require a fair amount of time. Chayes and Chayes explicitly identify human rights treaties in this category. This is an important issue with the ECHR, which tends in official documents to attribute partial or non-compliance entirely to issues of timing, asserting that ultimately, all of its judgments are complied with.³

³ Cf. Committee of Ministers (2008: 9-10): "The Committee of Ministers has so far always been able to conclude that respondent states have fully executed the judgments rendered against them."

Applying a management approach to international courts, Helfer and Slaughter (1997) and Keohane, Moravcsik and Slaughter (2000) have argued that the courts' institutional design influences the level of compliance. Helfer and Slaughter argue that effective international legal institutions are relatively independent (free from state interference), have binding legal authority, and engage in high-quality legal reasoning and processes. In a similar vein, Keohane, Moravcsik and Slaughter (2000) argue that international courts vary along an important transnational-international dimension. Three factors comprise this dimension: the independence of the court from state pressures, the extent to which individuals and NGOs have access to the court, and the extent to which domestic courts are tied to the international courts. Higher levels on these measures mean that the court has higher levels of transnationalism. The authors expect compliance to be positively related to transnationalism.

Posner and Yoo (2005), in contrast, are deeply skeptical that independent courts are good managers. They argue that independent courts are more likely to issue more highly controversial judgments with which the state is less likely to comply: "Tribunals composed of dependent members have a strong incentive to serve the joint interests of the disputing states. Tribunals composed of independent members have a weaker incentive to serve those states' interests and are more likely to allow moral ideals, ideological imperatives, or the interests of other states to influence their judgments" (27). One important difficulty with this argument is that Posner and Yoo never explain why independent judges are eager to issue rulings that states are likely to ignore. It seems unreasonable to assume that judges will seek to impose their own views on states without considering whether states are likely to listen to their opinions. Much evidence from the

independent ECHR suggests the opposite: that the Court is quite concerned with states' inclination and capacity to abide by Court decisions and is now devoting significant resources to helping states – especially Italy and Turkey – clear longstanding obstacles to compliance.

A third approach to compliance focuses more squarely on domestic politics. For some, compliance is a matter of calculating the costs and benefits of changing policy; where policy changes are relatively difficult, compliance is likely to be low (Downs, Rocke and Barsoom 1996). Relatedly, compliance might be the result of domestic factors that are difficult to observe, such as “political will” (von Stein 2005). In the view of these scholars, compliance is likely to be the result of preexisting domestic factors that led states to commit to particular international rules in the first place. Hence, compliance is not the result of international rules; rather, states who wish to behave in a particular way are likely to create and accept international rules that codify that behavior.

In the European context, Falkner and Treib (2008) suggest the importance of domestic “cultures of compliance,” with the EU member states fall into four groups: First, a “world of law observance” where compliance cultures are solid and compliance is almost always rapid and real. These consist of Denmark, Finland, and Sweden; second, a “world of domestic politics” in which there is an inclination to comply but only in cases where domestic costs were too high. This is the modal pattern in the old EU-15, exemplified by Austria, Belgium, Germany, the Netherlands, Spain, and the United Kingdom; Third, a “world of transposition neglect” in which states are very slow to take on the task of “transposing” EU Directives into national law, exemplified by France, Greece, Luxembourg, and Portugal; Fourth, a “world of dead letters” in which states are

quick to get the law on the books but then didn't really implement it into daily practice – all of the post-2004 new member states plus Italy and Ireland.

A more dynamic, actor-oriented approach suggests that compliance is more likely as domestic actors favoring compliance gain greater influence in the government.

Keohane, Moravcsik and Slaughter moved in this direction with their concept of “embeddedness,” or the nature of the links between international courts and domestic judicial systems. International courts that are domestically embedded have created multiple links to domestic actors who favor abiding by the rule of law, including that laid down by international courts. Analogously, recent work on transnational policy reforms builds on “coalition” approaches in which IO officials try to provide a durable basis for reforms by working closely with domestic actors to tip the balance in hard-fought domestic reform debates (Jacoby 2006; Schimmelfennig 2005; Kelley 2004; Orenstein, Bloom, and Lindstrom 2008). Recent literature on compliance with human rights norms also has emphasized this actor-oriented domestic approach. Some studies have recently shown that compliance with human rights treaties is higher in countries with more robust civil societies, though measures of that robustness remain somewhat limited and questions about the direction of causality remain difficult to solve (Landman 2005; Neumayer 2005).

This is a large and complex literature, yet it misses a sophisticated conceptualization of the key dependent variable, the nature of compliance. Compliance is often treated as a fairly dichotomous term, but we wish to conceptualize it more explicitly as a continuum by exploring the middle ground of partial compliance. As the various theories make clear, a variety of mechanisms are pushing states both toward and away

from compliance on any given rule. The arrows do not all point the same direction. Given these competing influences, it seems unlikely states will end up at either end of a compliance spectrum. We wish to explore this middle ground by conceptualizing different types of partial compliance, at two different levels of analysis. At a state level, we identify five different types of partial compliance. At the regional level, we identify two different compliance regimes.

We argue that the ECHR and IACHR exemplify two different types of partial compliance regimes. The IACHR invites partial compliance by giving offending states a list of highly specific steps that they must undertake as remedies to adverse judgments. Any given judgment may contain what amounts to a checklist of multiple specific orders (paragraphs), shortcomings in any of which lead to partial compliance. In a way, the ECHR works in the opposite fashion. Though it generally does specify precise monetary payments from states to victims as a means of providing what the Court calls “just satisfaction,” the Court has no power to actually demand any specific legal or behavioral remedies from the state in question. Rather, the state, once notified that it is the object of an adverse ruling, must pay the just satisfaction and then conceive and execute other steps to bring itself back into compliance, both in the short and long term. Not only does the Court lack the levers to oblige states to undertake specific measures, the institution tasked with monitoring Court decisions – the Council of Europe’s Committee of Ministers – generally is also unable to set specific tasks for offending states. From an enforcement point of view, this situation is puzzling.

This broad distinction between the courts is critical, for it has several implications for our paper. First, for the ECHR, partial compliance often emerges from cases in which

states try to protect their prerogatives by designing remedies that take less than full account of the Court's judgment, a point long acknowledged by Court insiders (Ryssdal 1996: 49-58). As noted, how well the state remedies respond to Court judgments is, in turn, is entirely a matter for the Commission to judge.⁴ One might thus contrast IACHR "checklist" compliance with ECHR "delegated" compliance. This implies, in turn, that each of these courts is likely to generate partial compliance in very different ways. Where missing items from the checklist might lead to protracted rounds of "institutional nagging" by the IACHR, this trend is less pronounced (though hardly absent) from the ECHR setting, in which partial compliance is more often in the eye of the beholder.

Second, the nearly absolute⁵ prerogative of European states to specify their own measures to comply with the Court's finding – here, we mean measures beyond the payment of the damages through just satisfaction terms set by the Court – means that, by some definitions, "partial compliance" would be nearly a tautological category. If the Committee can only "take note of" state actions, then it might be merely a "recording agency" (Ryssdal 1996: 63). Indeed, as late as the late 1980s, it was still possible for Court insiders to argue that the ECHR had an essentially perfect compliance record.⁶ However, a growing number of pending cases and so-called Interim Resolutions make this claim no longer tenable, as we discuss below.

While theories abound and some compliance studies examine particular regimes or rules, systematic studies of state compliance with international courts are in short

⁴ Some scholars have argued that the Court itself ought, in fact, to be involved in monitoring compliance with its judgments. See Martens (1996).

⁵ A few recent trends, discussed below, have seen both the Court and the Committee growing more assertive in this area.

⁶ Ryssdal (1996: 67) says the Court has "always been complied with," though even the then-President of the Court acknowledged that some cases required more than five years for compliance to be achieved.

supply. Posner and Yoo (2005) have authored the only study we have found that explicitly measures compliance rates across different international courts. When they reviewed the data on compliance with the IACHR in 2004, they found only one case with full compliance with a court ruling, though their measurement of compliance is fairly unclear and may be drawn from reading secondary sources. Taking partial compliance into account, they gauged overall compliance with the IACHR to be 5 percent. However, they also found that compliance with judgments ordering monetary compensation was somewhat higher, at 23.6 percent full compliance. They could not find good compliance data on the ECHR, in contrast, but they doubt that compliance is as high as is often reported. One measure, taken from the Court's own *Survey of Activities* suggests that compliance with ECHR judgments (as measured by domestic law adjustment in the wake of an adverse decision) hovered around 64 percent between 1960 and 1995 (Posner and Yoo 2005: 65). They conclude from this as well as other data that the high levels of independence in the European and inter-American courts do not necessarily lead to high levels of compliance. In the next section, we compare the two courts and discuss in some detail how we know compliance when we see it..

Measuring Compliance

The Inter-American Court

In order to measure compliance with the Inter-American Court, it is important to first understand the Court's jurisprudence. The Court issues several forms of jurisprudence: decisions and judgments on contentious cases, advisory opinions, provisional measures, and reports on compliance with judgment. The compliance reports issued by the Court detail compliance with the Court's decisions and judgments on

contentious cases. We rely primarily on those reports for our understanding of compliance levels. We ignore provisional measures and advisory opinions because they are either more ephemeral (provisional measures) or not legally binding (advisory opinions). Most of the Court's work and the matters of greatest importance to states concern the decisions and judgments on contentious cases.

The Court's decisions and judgments can be broken down into three categories: decisions on preliminary objections, decisions on the merits of the case, and decisions on reparations of the case. Since its inception, the Court has issued decisions and judgments on 100 cases. During the Court's early years, however, the case load was extremely light. The Court was officially established in 1979, but did not receive its first case until 1986, issuing its first judgment, rulings on preliminary objections in the case of *Velásquez-Rodríguez v. Honduras*, in 1987 (Annual Report 2007, p. 62). Under its 1980 Rules of Procedure, the Court spent an average of 39 months processing each case, from reception to final judgment.⁷ In June 2001, however, the Court implemented new rules of procedure that expedited cases, reducing the average time to 21 months.⁸

Unlike the European Court, the Inter-American Court still functions jointly with the Inter-American Commission of Human Rights. The Commission plays a large role in processing individual court cases. Individuals submit petitions claiming human rights violations to the Commission.⁹ The Commission opens the petition as a case, and proceeds to determine the admissibility and the merits of the case. Not all cases are admissible, and if determined inadmissible the case is closed by the Commission and a statement is issued. If the case is admissible, the Commission sends information to the

⁷ 2007 President's report, p. 2.

⁸ 2007 President's report, p. 2.

⁹ American Convention, article 48 and 50.

state regarding the allegations, and may investigate or hold hearings to determine the merits. Once the merits are decided, the Commission issues a report with its conclusions and recommendations to the state. The state is given a period of time to fulfill these recommendations. If the state does not comply with Commission recommendations, the Commission can either publish a new report with further recommendations and an extended deadline, or it can submit the case to the Court.¹⁰ The Commission is currently processing over 800 cases,¹¹ yet it submits a significantly lower number of cases to the Court for review. In 2006, for example, the Commission submitted only 14 cases to the Court, the same number it submitted in 2007.¹² This is a drastic increase from the early years of the Court. Between the years 1990 and 1999, the Commission submitted an average of 3 cases per year (IACHR 2007: 62).

Once the Court receives a case from the Commission, states have the opportunity to submit preliminary objections regarding the Court's competence. The Court accepts very few of these, and we do not analyze them here. Briefs, reports, and documented evidence are submitted by victims or their representatives, states, and the Commission (Pasqualucci 2003, 16). After Court hearings, which can be both written and oral, the Court issues its decisions on the merits of the case. In the merits, the Court determines which articles of the American Convention were violated by the state. To date, the Court has issued decisions on the merits in 95 cases.¹³

Decisions on the reparations and costs are issued after the merits. Since its inception in 1979, the Court has issued reparations on 92 cases. Each reparation decision

¹⁰ American convention, article 61.

¹¹ What is the IACHR?: Commission Processing of Individual Cases. <http://www.cidh.org/what.htm>

¹² 2007 President's report, p. 2.

¹³ These cases are all those the Court determined it had competence to rule on. They do not include contentious cases where the Court accepted the preliminary objections.

includes several paragraphs ordering states to take a particular action. Each paragraph orders a discrete action; for example, one paragraph will order the payment of material damages, a separate paragraph will order the payment of moral damages and third paragraph will order the reimbursement of Court costs and expenses to the victim. We label each of these discrete paragraphs a “compliance order.” A compliance order is our basic unit of analysis for the inter-American Court.

According to Article 68.1 of the American Convention, state parties to the Convention are obliged to comply with all Court rulings in all cases in which they participate. The Court also suggested that states generally have six months from the date reparations are issued to comply with the Court’s judgment (Pasqualucci 2003: 283). Yet states conveniently left off any mechanism for monitoring state compliance, unlike the European system.¹⁴ The Court took it upon itself, beginning in 1996, to monitor compliance with its judgments by issuing periodic reports. States challenged this practice, and in November 2003, the Court issued a ruling determining its authority to monitor state compliance with reparations. To justify its actions, the Court cited the necessity of a monitoring body to ensure state compliance, stating “the effectiveness of the judgments depends on compliance with them.”¹⁵ Although this report did not change the way the Court decided compliance, it formally declared the Court’s authority to monitor compliance.

To determine a state’s compliance, the Court asks victim’s representatives, the Commission, and the state to submit reports regarding the state’s actions (IACHR 2006:

¹⁴ *Baena-Ricardo et al. v. Panama* (November 28, 2003, *Competence*): 33.

¹⁵ *Baena-Ricardo et al. v. Panama* (November 28, 2003, *Competence*): Article 4, paragraph 129.

41-42). The Court decides from these reports the level of state compliance. In some cases, the Court may request a private hearing to determine state compliance.¹⁶

The first compliance report the Court issued was September 10, 1996. To date, the Court has published 141 compliance reports.¹⁷ However, not all cases have compliance reports. In some cases, the Court acknowledged the state's preliminary objections and dismissed the case. Other cases are still pending merit and reparations judgments. Many of the cases whose reparations judgments have been issued recently also do not have compliance reports. For these reasons, 65 cases have compliance reports. Most of these cases have more than one compliance report. Some, such as the *Loayza-Tamayo v. Peru* case, have as many as eight compliance reports. We have been unable to identify a pattern as to how soon after and how often the Court publishes compliance reports. In many cases, the Court has waited a long time to publish a report. For example, the Court did not issue a compliance report for *Velásquez Rodríguez v. Honduras* until seven years after it issued the reparations.¹⁸ In other cases, such as *Ivcher-Bronstein v. Peru*, the Court published a compliance report four months after issuing the reparation judgment.¹⁹ Although the length and specificity of compliance reports has increased through the Court's history, each report follows the same general format. In remarkable detail, the Court specifically reports whether or not the state has complied with each and every one

¹⁶ Orders of the President of the IACHR in monitoring the following cases: *Baena-Ricardo et al. v. Panama* (February 11, 2008); *Fermín Ramírez v. Guatemala* (March 28, 2008); *Raxcacó Reyes v. Guatemala*; *Raxcacó Reyes y otros*, *Solicitud de ampliación de medidas provisionales*.

¹⁷ The compliance reports issued after 2001 are available on the Court's website. Before 2001, however, there were several reports issued, and we have consulted all but four, which we were unable to find.

¹⁸ Compliance with judgment. Order of the IACHR of September 10, 1996.

¹⁹ *Castillo-Páez v. Peru*, *Loayza-Tamayo*, *Castillo-Petruzzi et al.*, *Ivcher-Bronstein* and the Constitutional Court. *Monitoring Compliance with Judgment*. Order of the Court of June 1, 2001; *Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74

of its compliance orders, paragraph by paragraph. The Court is currently overseeing the compliance of 84 cases (IACHR 2007: 66).

One way to understand compliance is to sort the Court's compliance orders into categories. Pascualucci (2003) lays out a typology for the Court's compliance orders.

Type of Compliance Order	Example of judgment
Enjoyment of right or freedom violated	The State shall nullify any court, government, criminal or police proceedings there may be against Luis Alberto Cantoral Benavides in connection with the events in this case and shall expunge the corresponding records...
Remedy the consequences of the violation <i>Investigate, identify, publicize & punish</i>	The State shall adopt...all measures necessary to identify, prosecute and punish the physical perpetrators and instigators of the violations committed against Mr. Bernabé Baldeón-García...
<i>Amend, repeal, or adopt domestic laws or judgments</i>	The State should adopt the legislative measures and any other kind of measures as necessary to adapt the Guatemalan legal System to the international standards on human rights, and give full effect to said standards at a domestic level...
<i>Take action or refrain from taking action</i>	The State shall name, within one year following notice of this Judgment, a street, park or school in the memory of Mr. Bernabé Baldeón-García...
<i>Apologize</i>	The State shall make, within six months following notice of this Judgment, a public apology and acknowledgment of its international liability regarding the violations referred to herein, in the presence of the highest-ranking State authorities...
Pay fair compensation <i>Material damages</i>	The State shall pay... all members of the Baldeón-Yllaconza family, within one year, the compensation for pecuniary damage established...

Moral damages

The State shall pay...all members of the Zaldeón-Yllaconza family, within one year, the compensation for non pecuniary damage established...

Cost and expenses

The State shall pay, within one year, the costs and expenses incurred in domestic courts and in the international proceedings carried out within the Inter-American System for the Protection of Human Rights, pursuant to the amount established...

Source: Pasqualucci, 2003; IACHR Compliance Reports on *Baldeon v. Peru* (February 7, 2008), *Cantoral-Benavides v. Peru* (February 7, 2008), *Bamaca Velasquez v. Guatemala* (November 27, 2003).

We coded each compliance order according to Pasqualucci's typology. The categories are largely self-explanatory. The most confusing categories are "enjoyment of right violated" and "take action or refrain from action." The difference is that the former is focused on and directly affects the victim while the latter is more general.²⁰ For each of its compliance orders, the Court decides partial or full compliance and we simply adopted the Court's coding. Additionally, we coded partial compliance when the court requested further information because the state had not submitted a report, which occurred quite frequently. We also coded partial compliance when the Court issued an order concerning multiple people, and one or some of the victims did not receive the reparations.²¹

The European Court

As with the IACHR, a brief description of the Court's jurisprudence is necessary. The ECHR was established in 1959 as one of the main institutions foreseen by the

²⁰ We will see a similar distinction between individual and general measures with the European Court.

²¹ We did not code compliance on procedural judgments, such as orders to submit reports, comply with provisional measures, and comply within a certain deadlines. We also did not code presidential reports, which are reports issued by the Court to call the state, victim's representatives, and Commission together for a private hearing to determine compliance.

European Convention on Human Rights, itself the creation of a group of European democracies in 1950. The Court hears cases against signatory states – as of 2008, the Convention and Court had 47 members – from plaintiffs who have exhausted the national appeals process. The Court now oversees its own (rapidly expanding) docket. Originally, a Commission had exercised a gatekeeping function by reviewing cases submitted to the Court in somewhat the way the Commission of the IACHR still does. In earlier years, the Commission not only decided on admissibility criteria, but it also offered a mediating function that might avoid a formal Court hearing. Only if no settlement could be reached did the Commission draw up a report on the facts of the case and forward these, along with its opinion, to the Court. In 1997, a series of major reforms ended the Commission as a separate entity and folded many of its functions into the Court itself.

Each nation that is party to the Convention nominates judges to the Court, and the Court generally has one judge from each member state. Crucially, the Court can only rule on whether an individual has had his or her rights violated by a state party to the Convention; however, it generally cannot overrule national decisions or annul national laws. Rather, states must work backwards from the violation to understand what must be changed to remedy the violation in the specific case and to avoid that future cases might also arise. In many instances, states do decide to make legislative changes as part of their remedies, but this is not something the ECHR can prescribe for them or even require of them in a general way. The Court thus draws a line between finding an individuals' right have been violated and commenting on specific state practices. Put different, the Court is, in the words of one of its presidents, not “prescriptive” in its judgments, but allows the states to respond as they will (Ryssdal 1996: 50).

This pattern of extreme deference to states, however, has changed recently, with the Court becoming more willing to give specific instructions to the offending state, including some specific mentions of offending laws and practices. It seems that this trend is linked mostly to a Court effort to better signal what kinds of state behavior are most likely to minimize future cases, although it does nothing to change the basic fact that states are free to come up with their own legal remedies to adverse rulings.²² While the Court ruling applies only to the state held to be in violation, other states can and clearly sometimes do adjust their legislation to take Court decisions into account.²³ This might arguably be a source of partial compliance, insofar as a third-party state might have an incentive to “low ball” the Court and hope that pre-emptive action might win Court approval.²⁴

The Court also has no power to remand the cases to national courts (Sims 2004). While the Council of Europe – the ECHR’s parent organization – undertakes a substantial effort to inform national officials, including judges, police, and bureaucrats, of ECHR jurisprudence, there are in fact few formal links between the ECHR and domestic courts. This is quite different from the more familiar case of the ECJ, where those links have become substantial over time (Alter, Conant, etc). Moreover, where the ECJ rulings are generally superior to domestic law, the European states have a wide variety of approaches to ECHR law. While ECHR law is arguably superior to the constitution in the Dutch case and co-equal with it in the Austrian case, more generally the ECHR judgments hold a legal position somewhere between the respective national constitutions and ordinary acts

²² For an extended discussion with examples, see Ress 2005: 371-73; Nicola and Nifosi-Sutton 2007: 13. This practice of the Court is criticized in Breuer 2004.

²³ For examples, see Ryssdal 1996: 54-55; Ress 2005: 378; Committee of Ministers 2008: 10.

²⁴ This hypothesis will be the subject of future interviews with ECHR officials. For now, it should be treated with caution.

of parliament (Ress 2005). Moreover, as the number of cases grows, the Court has suggested to states that tolerating more direct effects from the ECHR judgments would spare states the difficulty of “complex and lengthy legislative work” (Committee of Ministers 2008: 11). This is a development well worth deeper consideration.

How, then, is compliance tracked? Instead of remanding cases to lower courts as is common in the US Supreme Court, for example, compliance with ECHR judgments is monitored by a political body, the Committee of Ministers of the Council of Europe²⁵, comprised of the Ministers of Foreign Affairs (or their deputies) from the states party to the Convention. In the case of an adverse ruling against a state, the Committee then “invites” the state to report on the measures it has taken to address the violations found by the Court. When the Committee is convinced that just satisfaction has been paid and that appropriate individual and general measures put in place, the Committee will close the case.²⁶

What are just satisfaction, individual measures, and general measures? As noted, when the Court rules against a state, it generally obliges the state to undertake just satisfaction towards the victim. Typically, just satisfaction takes the form of some kind of payment to the victim, often a combination of pecuniary losses, non-pecuniary losses (e.g. psychological damages), court costs and even interest payments (Sims 2004: 644-45). In addition, the Court in most cases also invites the state to take either individual and/or

²⁵ The Council of Europe is, of course, the parent organization of the ECHR.

²⁶ Just satisfaction payments are routinely paid by states in a timely manner. However, in the 1980s, one state (Italy?) was so slow to pay that interest fees were eventually introduced (Ryssdal 1996: 60). For an argument that the Committee of Ministers became increasingly assertive after 2004, see Nicola and Nifosi-Sutton 2007.

general measures.²⁷ Individual measures are meant to put the victim into the same position enjoyed prior to the violation, while general measures are intended to prevent future cases of a similar nature from arising. For example, an individual measure might be a state decision (not an ECHR order) to release an individual from jail, while a general measure might be a state decision to amend a law or practice that has resulted in findings of a violation in the past (see further details below). As noted, the ECHR generally does not even suggest detailed remedies to the offending state (Sims 2004: 652). In recent years, however, the explosion of the Court's docket has led the Court to be more assertive in recommending individual measures (in addition to specific sums of just satisfaction) in certain cases, though it still generally abjures any advice on general measures (Committee of Ministers 2008: 11).

These measures vary widely in ease of monitoring. Where just satisfaction payments are quite easy to monitor, individual and general measures are a source of more ambiguity. Neither the Court nor the Committee of Ministers is empowered to demand specific individual measures (though the Committee can refuse to close a case when it deems state actions to have been inadequate). In practice, however, as ECHR caseload explodes, there is evidence that the Committee is not able to track individual measures as carefully as those for just satisfaction (Sims 2004: 655). By contrast, the Committee may have stronger incentives to make sure that states get appropriate general measures in place since these are presumably their best preemptive defense against the flood of applications that arrive in Strasbourg each month.

²⁷ Technically, just satisfaction is a sub-category of individual measures, but most discourse treats these monetary awards as a category distinct from the other forms of individual measures detailed below. See Committee of Ministers 2008: 16.

Like the IACHR, the ECHR caseload was very light in its initial years. In its first two decades in existence, the Court ruled on only 84 cases (Hawkins and Jacoby 2006: 217). Far more than the IACHR, however, ECHR caseload has truly exploded in recent years, reaching over 1000 rulings in 2004 alone based on over 20,000 cases submitted (for details, see Conant paper; Committee of Ministers 2008). We suggest below that this surge has hampered the Court and Committee's ability to monitor partial compliance, especially individual measures that are harder than just satisfaction to oversee and yet less likely than general measures to provide "docket relief" for the Court. Thus, it is here in the details of individual cases that states may still have very substantial freedom to design their own remedies, including in ways that may not be in the spirit of the Court's judgment.

Testing this proposition is far from easy. ECHR compliance data is compiled in ways very different from that of the IACHR, making comparison difficult. Most importantly, unlike the IACHR, there is no single dataset that lists detailed provisions of court judgments to state actions intended to remedy prior violations. Nor indeed are there the kind of multi-pronged judgments that allowed us to track several issues within a single case. Instead, there are single judgments that an individual's rights either have or have not been violated. For cases where violations were found, there is a set of databases that include these major categories analyzed more fully below:

- 1) Closed cases for which general and/or individual²⁸ measures were taken by the states and for which the Committee has been satisfied by state remedies.

²⁸ Including just satisfaction payments.

- 2) Pending cases (by definition, ones that resulted in adverse judgments for the state) that are transmitted by the Court to the Committee of Ministers, which is to monitor subsequent state compliance.
- 3) Interim resolutions, which are formal communications from the Committee to the states asking for evidence that a prior judgment has been complied with.²⁹

Analysis: General Patterns

The Inter-American Court

As shown in Table 1 (far right column), the inter-American Court has ordered states to engage in 908 discrete actions and states have complied with 251 of these, for a compliance rate of 28 percent. This is significantly higher than the compliance reported by Posner and Yoo (2005) of around 5 percent. The difference is partly a result of different units of analysis. Posner and Yoo are apparently reporting only the cases in which states have complied with every aspect of the Court's rulings. Using that measure, we find a similar result: full compliance has occurred in six of the 92 cases for which there are compliance reports.³⁰ In 16 of those 92 cases, the state has not complied with

²⁹ In the normal course of events, a state will simply have informed the Committee that it has complied, and the Committee will then not need to issue an interim resolution. These resolutions are quite rare. Of the nearly 1000 cases reviewed by the Committee in 2007, only 15 resulted in an interim resolution. A major difference with the IACHR is that the latter relies heavily on victims to report on state compliance. While the ECHR does this for just satisfaction payments, victims play almost no role in the much more subjective aspects of individual measures and, as far as we can see, no role at all in monitoring general measures. There is some recent evidence that the Commission is communicating somewhat more with victims on compliance matters, but much more research would be needed to substantiate the claim (Committee of Ministers 2008).

³⁰ See "*The Last Temptation of Christ*" (*Olmedo-Bustos et al.*) v. *Chile*, *Acosta-Calderón v. Ecuador*, *Godínez-Cruz v. Honduras*, *Gangaram-Panday v. Suriname*, *Velásquez-Rodrigo v. Honduras*, *Castillo-Petruzzi et al v. Peru*.

any compliance orders, for a noncompliance rate of 17 percent. Thus, 76 percent of the cases should be coded as having partial compliance. By either unit of analysis, the overall picture is one of partial compliance. In any given case, states rarely do all they are ordered to do. But by the same token, states rarely do nothing at all. Rather, they engage in partial compliance by complying with some compliance orders but not others. In the remainder of this section we examine compliance orders (a discrete, specific action ordered by the Court in a given paragraph of a particular case judgment) as the unit of analysis.

State compliance varies by the type of action required by the Court, as illustrated in Table 1. States comply most with Court orders to pay moral (47 percent) and material (42 percent) damages. They also have above-average compliance for paying Court costs and expenses (38 percent). Posner and Yoo also found these forms of compliance to be above average, but reported them at 24 percent. Curiously, states are more willing to pay money than to apologize, where the compliance rate is only 31 percent—still above the overall compliance rate of 28 percent but somewhat low for an action that seems like it would be the lowest cost of all Court-ordered activities. At the other end of the spectrum, compliance rates are lowest with Court orders to amend, repeal or adopt domestic laws or judgments. Changing domestic legislation is difficult and costly, with many ripple effects and the risk of unintended consequences. It is not surprising that states generally fail to make those sorts of changes. They have done so in only two of 43 instances. States comply from 13 to 19 percent of the time with Court orders to undertake other sorts of activities such as punishing perpetrators or restoring rights to those who have had them taken away.

Overall, Table 1 provides some evidence that states comply when the costs are relatively low, with the exception of apologies. It is easiest for states to pay monetary damages and walk away, and states do so around 38-47 percent of the time. It is next easiest to punish perpetrators or to alter government behavior in a way that ends the violations of rights, and states do so 13-19 percent of the time. It is most difficult to systematically change related government rules and institutions to ensure that such rights violations will not occur again, and governments rarely do so (only 5 percent of the time). The deeper the required change in behavior, the lower the rate of compliance.

Have compliance rates increased over time? That is, has the Court become more effective over time? Tables 2 and 3 address these questions. It is difficult to see much of a pattern here. Table 2 lists compliance by date of the Court's judgment. The Court issued its first judgment in 1989 and the most recent ones for which we have data were issued in 2006. During that time, compliance rates have ranged from a high of 50 percent (recorded in 1994) to a low of 4 percent (recorded the very next year, in 1995). The low number of judgments and hence of opportunities for compliance affects these early numbers. Compliance in 1999, 2000 and 2003 ranged from 39 to 48 percent, much higher than the 4-11 percent recorded in 1995-98. But 2001 and 2002 came in at 28 and 6 percent. Such jumping around is common. Compliance rates from 2005 and 2006 may be low because it typically takes a few years for states to comply. These could go up as states comply with those relatively recent rulings.

Table 3, which examines compliance by date of the compliance report, suggests a somewhat different story: compliance improved dramatically in 2003. Prior to 2003, states had complied with three of the 98 actions required by the Court as examined in

compliance reports, an average of 3 percent. Since 2003, the lowest compliance rate has been 20 percent and compliance rates of 30 to 40 percent are normal. Compliance rates seem to have settled into that bound with no upward or downward trend during that period. That change coincides with a Court ruling in 2003 that it could monitor compliance and with a renewed effort by the Court to do so. The Court's efforts appear to have increased state compliance, suggesting that Court actions can make a difference.

Table 4 addresses the question of whether continuing Court efforts within a single case can make much of a difference. For any given case, the Court can follow up with repeated compliance reports over time. We number these reports for each case. For example, if the Court follows up with a compliance report one year after a given judgment, that is the first compliance report for that judgment. If it then follows up the next year, it is the second compliance report, and so on. At each stage, instances of compliance are removed from the data set and thus each subsequent report examines only outstanding orders with which states have not yet complied. Table 4 suggests a diminishing return for each compliance report but suggests that the Court does indeed make some progress each time it follows up. The highest compliance rate is at the first report, with 32 percent, providing more evidence that compliance is highest when it is easiest because one would expect the easiest tasks to be done first. If the Court does a second compliance report, states comply with an additional 26 percent of the Court orders they did not comply with in the previous report. In the third, fourth and fifth compliance reports, states comply with about 17-19 percent of the Court orders. There have been too few instances of orders beyond five to analyze fruitfully, though the scanty evidence

(from one case) suggests the Court may eventually run out of influence as compliance reports mount.

Finally, Table 5 gets more explicitly at domestic politics arguments by examining compliance by state. Chile and Uruguay top many lists of stable, democratic Latin American states with vibrant civil societies. Uruguay has not yet had a case go to Court, suggesting a fairly high level of compliance with human rights norms. Among states with compliance orders, Chile's rate of compliance is the highest, at 67 percent. Costa Rica, on the other hand, has had one case in Court that produced nine compliance orders and no compliance. Yet it is difficult to generalize from one case. Other states with very low compliance rates are Trinidad and Tobago (zero), Paraguay (six), Panama (seven), Colombia (eighteen) and Peru (nineteen). Moderate compliance levels are found in Argentina (thirty), Dominican Republic (thirty-three), Ecuador (twenty-seven), El Salvador (thirty-one), Guatemala (forty-one), Honduras (thirty-five), Nicaragua (thirty-eight), and Suriname (forty-two). The highest compliance rates are found in Bolivia (fifty-seven), Brazil (fifty-seven), and Venezuela (fifty-six). It is difficult to identify any patterns here that correspond to differences in domestic factors.

It is possible that the low number of cases for some of these states throws off the analysis. If we discard any state with fewer than 30 compliance orders, we are left with six states that resolve themselves into two groups. Argentina, Guatemala, and Honduras fall into the higher end of compliance with rates of 30, 41, and 35 percent respectively. Colombia, Paraguay and Peru fall in the lower category with compliance rates of 18, 6, and 19 percent respectively. Paraguay is a pretty clear outlier and may merit further study. Colombia has faced an ongoing civil war and Peru's justice and political systems have

been particularly unstable, suggesting low levels of compliance correspond to higher levels of domestic political and judicial instability.

The European Court

As noted earlier, cases on which the ECHR has already rendered judgment can either be closed (which equates to a Committee judgment of full compliance with Court decisions) or pending (which means the Committee had not yet closed the case, though in some cases, the state may already have satisfied Court requirements but not adequately reported these actions).³¹ For cases that have been pending for some time, interim reports are also issued by the Committee of Ministers. In closed cases, we need to report on payments of just satisfaction as well as individual and general measures taken by states. As a crude measure of the *potential* magnitude and distribution of partial compliance, Table 6 arrays the data discussed by the Committee in calendar year 2007. The data show four issue types with large numbers of total cases overseen by the Committee³²: access to efficient justice (111 cases reviewed in 2007), protection of private and family life (37), protection of rights in detention (37), and right to life and protection against torture (35). In all four issue types (and in 15 out of 18 total types), instances of non-compliance

³¹ There is a long dispute (cf. Rysdal 1996; Martens 1996) about whether the Court could express disapproval of the Commission closing a case by agreeing with a plaintiff that state actions were, in fact, not consistent with the Court's ruling. That plaintiffs sometimes feel this way (and are backed by experts in national law) can be seen, for example, in the famous *Sunday Times v. UK* case. Here, the plaintiff is essentially arguing that partial compliance is masquerading as full compliance.

³² All are, by definition, cases in which the Court had (often in years prior to 2007) already delivered adverse rulings against states.

outweigh instances of compliance.³³ This shows some potential for partial compliance even when accounting for the obvious facts that of the non-compliance cases noted a) many cases would not be expected to show compliance in such a short time frame and b) some cases are of complete non-compliance and not of partial compliance.³⁴

General and Individual Measures from Closed Cases

While closed cases represent, by definition, cases of full compliance (at least on the assumptions of this paper), we can gain more insights into the potential for partial compliance by looking at what states do to achieve full compliance. The Court expects states to undertake general measures in order to prevent further violations associated with a specific judgment. These are not intended to remedy a past violation, which is the function of both just satisfaction and individual measures. General measures arose as a category in the 1980s and most general measures occurred from the 1990's onward. The ECHR classified general measures into 7 categories:

- 1) Parliamentary legislation
- 2) Executive action in the form of regulations or changes of practice
- 3) Changes of jurisprudence
- 4) Administrative measures (whatever the organ of government)
- 5) Publication of judgments/resolutions³⁵
- 6) Practical measures like recruitment of judges or construction of prisons
- 7) Dissemination

Of these categories, the first (legislation) is most common. As noted earlier, 64% of adverse judgments against states from 1960-1995 resulted in a legislative change. The

³³ The ECHR data only show whether or not full compliance has been achieved by December 31, 2007. By definition, then, partial compliance would make up a subset of the non-compliance cases.

³⁴ The next iteration of the paper will track these categories over time, though annual reports only go back to 2001 and use somewhat different reporting methods over time.

³⁵ ...where increasingly the Court clearly hopes that the national courts will directly apply the jurisprudence emanating from the ECHR.

second most common appears to be publication of judgments, while executive action is a distant third. And there are some clues about partial (or non-) compliance. States that still have a high volume of cases before the court, such as Italy, Turkey, or Russia, seem to have undertaken only a small number of general measures in other cases already closed. This pattern may result from the very high number of similar cases brought against each state. In these cases, it is often possible that one set of general measures could, if taken, address hundreds (and in a few cases, thousands) of related cases. By the same token, this pattern may explain why precisely these countries have a high volume of cases at the court: since they do not take general measures (which are intended to prevent further violations of the same type), they run the risk of being held accountable multiple times for the same basic class of state violation.

In keeping with its tradition of deference to state-designed remedies, the Court merely keeps statistics on general measures, but it generally does not presume to suggest them to the state that is the target of an adverse judgment. Well-known cases that resulted in states taking general measures that were the object of disputes in domestic politics include *Marckx v. Belgium* (preventing discrimination against children born out of wedlock) and *Incal v. Turkey* (limiting the use of military judges in civilian trials). In *Broniowski v. Poland*, the Court ordered general measures and did not leave the question completely to the state or Committee of Ministers in case involving compensation for lost property among the so-called Bug River people (Ress 2005: 381). Of course, greater Court specificity may well lead to more cases of partial compliance on the logic that, as with the IACHR, specific demands are much easier to monitor for compliance and may be more likely to generate state resistance.

While general measures are intended to prevent further violations by the state, individual measures are meant to remedy the effects of the violation on the applicant. There is now a lively debate underway about whether an adverse ECHR judgment obliges a state to reopen an individual's case. The argument that it is so obliged is increasingly widespread, and some even suggest the Court can quash a domestic judgment or even free a prisoner (Ress 2005: 380-81). For most of the Court's existence, however, individual measures were left to state discretion. The individual measures are classified into 11 categories:

- 1) Speeding-up or conclusion of pending proceedings
- 2) Reinstatement of the applicant's rights
- 3) Official statement by the government on the applicant's innocence
- 4) Modification of a sentence by administrative measure such as pardon/clemency/non-execution of judgment
- 5) Measures concerning restitution of/access to property or use thereof
- 6) Measures concerning the adaptation of proceedings
- 7) Modification in criminal records or in other official registers
- 8) Special refunds
- 9) Reopening of domestic proceedings
- 10) Measures concerning the right to residence (right granted/reinstated, non-execution of expulsion measure.)
- 11) Special measures (pictures destroyed, meetings organised between parents and children.)

We have seen that the Court's long-standing assertion that states always comply with its judgments turns, in part, on its historical deference to states to set these individual measures. But even a cursory glance at this list suggests that if the Court and/or Committee were so inclined, there might well be more disputes about which of these measures states had really complied with fully. We give some initial evidence below that suggests both more partial compliance and cases in which partial compliance is a relatively stable equilibrium, at least in the medium term. In short, it seems harder

and harder to write off very long compliance lags as a kind of “full compliance in the making.”

Pending Cases

Partial compliance obviously is much easier to see in pending cases. All cases transmitted to the Committee of Ministers remain pending before the Committee, which examines them at its (now quarterly) Human Rights meetings until the adoption of a final resolution acknowledging that the measures chosen by the respondent state have achieved the result required by the Convention. This means the state has remedied, where possible, the consequences of the violation for the applicant (by adopting individual measures and the payment of just satisfaction) and sought to prevent new similar violations from occurring (by adopting general measures). Table 7 summarizes the length of pending cases that are considered “leading cases” and shows that just over half have been pending for less than two years (data as of July 2007), while just over a third have been pending for 2-5 years and a further 11% pending for more than five.

Table 8 shows the geographical distribution of pending “leading cases” in 2007, where Turkey, Italy, and Bulgaria have the most cases.³⁶ When one expands the list to include all cases, the pattern changes a bit, though Italy and, to a lesser extent, Turkey still stand out among a range of other ECHR members:

Italy – 2488
Turkey – 840
Poland – 336
France – 285
Russia – 233
Romania – 137
UK – 126

³⁶ The ECHR distinguishes “leading” cases from “clone/repetitive” and “isolated” cases.

Bulgaria 124
Austria – 79
Hungary – 74
Belgium – 52
Portugal – 46
Netherlands – 34
Germany – 32
Spain – 11
Ireland – 7
Denmark – 5

What explains this pattern? While this question goes more to the issue of non-compliance and is thus beyond the scope of this paper, one hypothesis we can eliminate is that compliance turns on the year when each country adopted the Convention. One might assume that since pending cases are cumulative, countries with much longer membership periods might have accumulated more pending cases. Here, however, the relative “lateness” of Italian (1973) and Turkish (1990) full ECHR membership actually strengthens the finding: they have required relatively less time to compile a relatively worse record.³⁷ Moreover, most of the pending cases from all countries are no older than ten years, with a good number even more recent.³⁸ In many of these cases, just satisfaction has been paid, but individual measures are stalled – often because Italian law has not allowed the courts to re-open closed cases, a remedy that is available in almost all other European states.

Is Italy stuck with partial compliance? We simply can’t say. Certainly, if consistent with the ECJ typology reported earlier from Falkner and Treib (2008), these Italian cases may remain pending for a very long time. On the other hand, of the pending

³⁷ One could make the argument the other way and suggest that long time ECHR members have now adjusted and thus generate few cases. This hypothesis fits the overall data pattern much better, but the UK – a longtime member – still generates a substantial number of cases, as does France.

³⁸ Italy is a partial exception since it also has some of the oldest pending cases.

Italian cases, nearly 2,200 are connected to one issue – the excessive length of judicial proceedings (Committee of Ministers 2008: 209). Italian authorities have recently undertaken legislation designed to address this issue, which has gotten so troublesome that the Council of Europe’s Parliamentary Assembly has begun issuing reports on the problems as well.³⁹ Our next step will be to look into a random sample of pending cases to distinguish among cases of stable non-compliance, stable partial compliance, and trajectories that seem likely to lead to full compliance.

Interim Resolutions

Interim resolutions (IR) from the Committee also are an important potential marker of partial compliance.⁴⁰ The vast majority of adverse judgments require no IR since states have generally complied quickly and completely enough to satisfy the Committee. For example, Table 9’s left column shows that 3,347 cases decided against states in 2007 generated no IRs while a total of 2,675 other such cases did generate an IR. What are IRs? According to the Council of Europe, “During the examination of the case, the Committee may take various measures to facilitate execution of the judgment. It may adopt interim resolutions, which usually contain information concerning the interim measures already taken and set a provisional calendar for the reforms to be undertaken or encourage the respondent state to pursue certain reforms or insist that it take the measures

³⁹ See Parliamentary Assembly Resolution 1516 (2006). Implementation of the Judgments of the European Court of Human Rights. This report urges states to develop new domestic mechanisms to speed compliance and to make responsibility for compliance much more transparent. It will be important in the near future to gauge what affect the Parliamentary Assembly might have. Traditionally, it has been a non-factor, but the Committee seems to be outsourcing to the Assembly reporting on some of the most persistent cases.

⁴⁰ Although they also occur in cases of complete non-compliance as well, so caution must be exercised in interpreting these figures.

needed to comply with the judgment.” Such “interim measures already taken” clearly imply instances of partial compliance by states. Since 1989, the Committee has issued over 1700 IRs, but this includes cases subsequently closed as well.⁴¹ States were often very slow to respond to the prodding of an IR, and the Committee sometimes has responded with multiple IRs. In the past, some cases have required as many as six IRs. Among cases pending as of July 2007, two had five IRs, including a very high profile case (*Iliescu and others vs. Moldova and Russia*),⁴² one had had four IRs, and 40 others had three (see Table 9).

Mass IRs are a phenomenon of the 1990s. Starting in 1989 with a few IRs, the Committee soon released hundreds each year, before significantly curtailing the practice by the end of the decade. By 2001 and 2002, there only about 5-8 IRs per year, and in 2007, there were 15 IRs. While one might interpret this trend as a huge surge in rapid and full compliance, the best evidence suggests that this is mainly due to the new practice of lumping cases around so-called “leading cases” with “clone” or “repetitive” cases then falling under the same IR. In conjunction with data on pending cases and cruder measures of compliance versus non-compliance, we now have a better sense of the magnitude of potential cases of partial compliance in the ECHR. The picture, at minimum, is in tension with the claims of the ECHR itself – echoed by many scholars – that state compliance with the ECHR judgments is nearly universal (e.g. Martens 1996).

⁴¹ There was one IR each issued in 1972 and in 1988.

⁴² This is the only current case with three or more IRs not to involve Turkey.

Varieties of Partial Compliance: The IACHR and ECHR Compared

We have examined general patterns and levels of compliance with court rulings, but what does partial compliance look like in practice in individual cases? What kinds of behaviors do states actually adopt? Our final section begins with lessons for partial compliance distilled from a detailed study of Great Britain from 1975-87. We then identify five types of partial compliance at the state level and illustrate them with examples from Latin America and from the British study.

One of the only detailed studies of national compliance with ECHR judgments took account of the UK's compliance record between 1975 and 1987 (Churchill and Young 1992). During this time, the UK accounted for 29 out of 95 adverse findings against states by the ECHR, or about 31%. These 29 cases are coded below for full or partial compliance. They appear in chronological order from oldest to newest, and since Churchill and Young grouped some similar cases together, only 21 cases result from the original 29. Virtually all of these cases were ultimately resolved by the UK either during the period under review or later, so what is really on offer here is a kind of "extended snapshot" of a compliance difficulties over a 12 year period.

Though Churchill and Young offer no metric for distinguishing between full and partial compliance, their careful case narratives allow us to code this along with apparent reasons for less than full compliance. Table 10 lists the case of adverse judgment in column one, full (F) or partial (P) compliance in column two, and peculiarities relevant to compliance issues in column three. Several findings emerge. First, ECHR compliance is relatively high even in a state with high levels of adverse decisions: of the 21 cases, 11 showed full compliance as of 1987. Second, full compliance often took time. In at least

three of these eleven full compliance cases (a corporal punishment case (number 2) plus two prison treatment cases (3 and 4), required lengthy periods before full compliance (in one case, nearly six years). Third, some other cases seem to have been quite easy for either a sitting government (e.g. cases 18, 5, and perhaps 10), while others were easy upon a change in government (e.g. the trade union case, number 20). Fourth, some actions that resulted in full compliance were not authored by the government but by backbenchers (case 4) or with crucial contributions from the opposition (case 17) or even the House of Lords (case 12). So full compliance was a mixed bag: some easy and quick, others painful and drawn out.

What about partial compliance? First, partial compliance was also clearly a feature of the data, though not to the extent seen in the IACHR above. Here, it was just under 50% of the adverse judgments (10 out of 21, see bolded outcomes in Table 10). Second, the type of partial compliance varied, with at least three of the five varieties noted earlier in evidence (see below for details). Third, in some cases, the UK government acted *before* the Court pronounced judgment but after the case was heard. This raises the possibility that in some cases governments might try to put a new set of facts in place that might, arguably, be minimally compliant but which can, in any event, be spun to be so. Such anticipatory low-balling of the Court might be preferable to having the Court spell out remedies. It might be a way to spin partial compliance as full compliance. Given its exploding docket and very limited resources, we can see why the Court and Committee might go along in many cases (e.g. case 13 on marriage of prisoners, where full compliance was achieved). In other cases, such government action might still result in only partial compliance (e.g. case 17 on equal treatment of

immigrants of both sexes) or might be the result of court action rather than government action, which would seem to negate suspicions of anticipatory adjustment (e.g. case 11 on prisoner discipline). Finally, the UK governments often found that common law principles were difficult to revise around the ECHR judgments (examples include all three prisoner cases plus 19 and 21). This reminds us that not just the political coloration of government but also deep features of a nation's legal heritage play a role in the speed with which and the degree to which states comply.⁴³

Table 10: Adverse rulings and state reactions, The British case, 1975-1987

<u>Cases</u>	<u>Compliance Partial or Full?</u>	<u>Observations and Peculiarities</u>
1. Corporal punishment I	P	Government failed to legislate at all.
2. Corporal punishment II	F	Government banned corporal punishment after 5+ years delay.
3. NI ⁴⁴ prisoners (ill treatment)	F	No legal change needed. Compliance slow and halting. ⁴⁵
4. NI prisoners (notification)	F	Phone call law passed, though with long delay.
5. NI prisoners (delays)	F	Practices amended to oblige speedy trial.
6. Mental health ⁴⁶	F	Other academics dispute coding this as full compliance. ⁴⁷
7. Prisoner access legal advice	P	Government produced inadequate and delayed response.
8. Prisoner interviews	P	Government responded in "convoluted" and "piecemeal" style. ⁴⁸
9. Prison letters	P	Practice liberalized but not initially published/publicized.
10. Prison access to read/write	F	Govt. revised standing orders to comply.
11. Prisoner discipline	P	Domestic courts force some adjustment; other disputes remain.

⁴³ There may be an analogy here to Italy, for whom a substantial number of adverse judgments remain on the books. As noted earlier, there is evidence that Italy suffers from fundamental structural problems in trying to address ECHR judgments.

⁴⁴ NI=Northern Ireland

⁴⁵ Cases 2,3, and 4 are all ones in which the final outcome is "full compliance," but in which the delays are quite lengthy, especially case 2. For non-British cases from the same period but with similarly long delays, see Ryssdal 1996: 55 (e.g. *Marckx* case in Belgium (eight years) and *Sporrong and Lönnroth* in Sweden (six years)).

⁴⁶ Four separate cases.

⁴⁷ Churchill and Young (Footnote 67) note at least one article suggesting these remedies were not, in fact, compliant with the Court's ruling and one other academic suggesting that the UK went further than it had to in order to comply! This suggests that our coding of these cases might well be slightly different if we surveyed other experts. Yet Churchill and Young provide extensive discussions for all cases we coded, and we think it is unlikely that the differences would be large if we used a different set of experts. The same debate that leads to partial compliance is a good marker of the domestic difficulties that full compliance would engender.

⁴⁸ It was well over a decade before the actual law changed to accommodate the compliant practice.

12. Parole violations	P	Compensation paid, but law changed only after 4+ more years.
13. Prisoners marrying ⁴⁹	F	Anticipatory compliance possibly in evidence here.
14. Homosexuality	F	Legal change seems clearly driven by Court ruling.
15. Phone taps	P	British safeguards much less developed than German ones.
16. Immigration (delays)	F	No legal change required.
17. Immigration (sex disc.)	P	Anticipatory action but also discrimination in details (students).
18. Guernsey housing	F	Government paid small fine. No legal change needed.
19. Contempt of Court	P	Govt. never takes on board ECHR's preferred legal principle.
20. Closed Shop	F	New Conservative government "oversupplied" compliance.
21. Article 13 ⁵⁰	P ⁵¹	"Inconclusive and unsatisfactory" outcomes.

In order to think more systematically about partial compliance, we sketch five discrete forms that appear in both Latin American and European cases: split decisions, state substitution, slow motion compliance, impossible requests, and disputes over details.⁵²

1. In a "split decision," the offending state complies with part of the judgment (e.g. monetary compensation) but not with other parts (e.g. legal changes).

In *Maritza Urrutia v. Guatemala*, the IACHR ruled that the state should investigate, publish, and punish those who committed human rights violations against the victim (including torture) and pay compensation for material and moral damage. In 2005, the Court declared that Guatemala had paid the compensation in full and requested information about the state's investigation. Guatemala subsequently submitted information, but in a 2007 report the Court found that the information submitted by Guatemala concerned measures adopted from 1992-99 and that the Court had already

⁴⁹ Two separate cases.

⁵⁰ Four separate cases.

⁵¹ This is a special article that turns, in part, on whether Convention is incorporated into British Law. At the time, it had not been, but now it has. The cases illustrated the awkward fit between ECHR and British law.

⁵² We welcome suggestions for better labels!

reviewed that information. Here, it is not difficult to see how Guatemala's government might more easily pay a fine than investigate a difficult human rights case that might implicate powerful people. Partial compliance results. A similar pattern has already been indicated in many pending Italian cases, where just satisfaction has been paid but Italian law has not allowed the reopening of cases that might satisfy the need for individual measures.

2. In "state substitution," the state sidesteps a specific court order and offers a different response than the one the Court demanded.⁵³

In *Paniagua-Morales et al. v. Guatemala*, the Court ordered the government to rebury a victim in a place to be chosen by the victim's next of kin. The government then performed a symbolic reburial rather than actually exhuming the remains and reburying them. Authorities claimed that the victim's mother authorized the symbolic reburial, but the Court was not satisfied because the government never presented any documents from the victim's mother to that effect nor did the government make a case that the victim's mother was unable to provide written documents. In this case, it is certainly possible that the government substituted its own preferred method and did not in fact receive permission to do so. Its compliance is properly coded as partial until it either fulfills the Court's order or provides sufficient evidence that such an action is inappropriate.

3. In "slow motion" compliance, the state take steps towards remedial action, but doesn't close the case (including state steps that are real but fall short of the court demands).

⁵³ Since the ECHR has traditionally given no specific orders along the lines of those used by the IACHR, we have no illustrations from the ECHR.

In *Paniagua-Morales et al. v. Guatemala*, the Court instructed Guatemala to create a register of detainees deprived of freedom. Guatemala responded by passing a new law registering all those detained in Guatemalan prisons. The Court responded that the law, while helpful, only went part of the way because not everyone detained in Guatemala is being held in the prison system. Hence, further legislation was needed so that a record would be kept of *all* detainees, whether in prison or elsewhere. As suggested above in Table 10, slow motion partial compliance was a feature of cases 7 (prisoner access to legal advice), 8 (prisoner interviews), 12 (parole violations), 15 (phone taps), and 17 (gender discrimination in immigration laws).

4. In “implausible/impossible” requests, the states may be asked to do things beyond their capacity, such as tracking down suspects or turning over land owned by private citizens to an indigenous tribe.⁵⁴

In *Garrido and Baigorria v. Argentina*, the Court ordered Argentina to pay compensation to the families of the victims, who had been “disappeared” by the government. In 2007, the Court agreed that Argentina had paid compensation to all of the family members it could find. But the Court also insisted that Baigorria had out-of-wedlock children who should also be compensated. Argentina insisted that it contacted all known family members and that Baigorria had no such out-of-wedlock children. It even reported that Baigorria’s brother had reported that Baigorria lied about having children as a way to get out of jail earlier. This seems to be a case where it is impossible to tell what the truth may be, yet the Court continues to insist that Argentina pay the alleged children and has coded this as a case of partial compliance as a result.

⁵⁴ Again, such features are limited to the IACHR cases, where the Court makes specific demands.

5. In “detail disputes,” states may disagree with the Court about unforeseen fine points in the execution of their response.

In *Carpoi-Nicolle v. Guatemala*, the Court ordered Guatemala to pay compensation to the family of the victim, who was murdered. Before Guatemala made the payment, it suffered extensive damage from Hurricane Stan. Guatemala then argued to the Court that it suffered a severe financial emergency and could only make the payment in installments. One of the victim’s relatives accepted this method of payment, but the others refused. Hence the Court ruled that Guatemala had partially complied with its obligations. In the British case (see 9 above), an issue was whether a new Convention-compliant rule regulating prisoners’ rights to send letters must also be widely published.

Conclusions

While scholars tend to discuss compliance as a dichotomous, all or nothing outcome, we suspect partial compliance is likely to be very common and sometimes the most common outcome for many international rules, especially in the field of human rights. This is so in part because states have strong incentives for both compliance and noncompliance. Some domestic constituencies favor compliance, while others favor noncompliance. International reputations rise as states comply, but changing domestic policies is difficult and brings other unwanted consequences. States who want to reap the benefits of both compliance and noncompliance can implement partial compliance to do so. In the same fashion, compliance may be related to management capability. Such capabilities are likely to vary by issue area and by state, and hence it should be no

surprise that many states wind up with middling compliance outcomes because they have middling capabilities.

In Europe, conventional wisdom suggests that compliance with Court rulings is very high. In the Americas, there is not much conventional wisdom because of the Court's lower profile, but Posner and Yoo (2005) suspect compliance is very low, around 5 percent. We have found some initial evidence that both assessments are wrong. That evidence is stronger in the Americas, where compliance is more carefully monitored. But the picture is also muddied by the fact that compliance may be easier in Europe, where the Court does not order states to undertake any particular steps other than payments to victims, leaving to the states a substantial area of discretion around other aspects of compliance. In the Americas, compliance with payments is the most common form of compliance, hovering around 40-50 percent. In Europe, compliance with payments appears to be quite a bit higher. For example, in 2007, at least 60% of just satisfaction payments were made on time, with only 7% clearly late (the rest had not been recorded as of the close of the reporting period) (Committee of Ministers 2008: 219-221).

Finally, we have some evidence that compliance is higher when it is easy. It is relatively easier for a state to pay reparations than it is for a state to track down criminals or to change domestic laws. Hence, compliance rates for those types of actions are higher in the Americas. Interim resolutions in Europe are rarely issued for nonpayment of compensation but rather for actions that states need to take to remedy problems. Where those problems are systemic, as with delays in the Italian penal system, compliance is deeply problematic and large-scale changes desired by the Court are very slow in coming.

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Table 1: IACHR Compliance by type of judgment

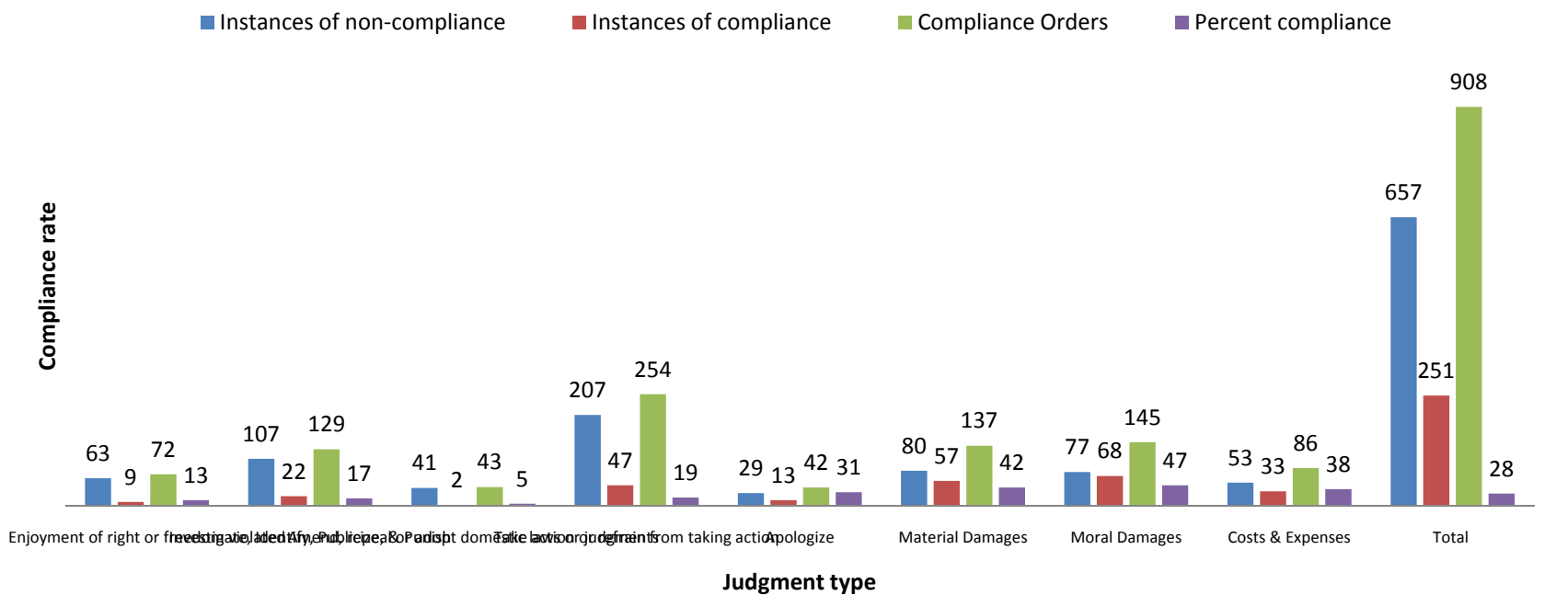


Table 2: IACHR Compliance by judgment date

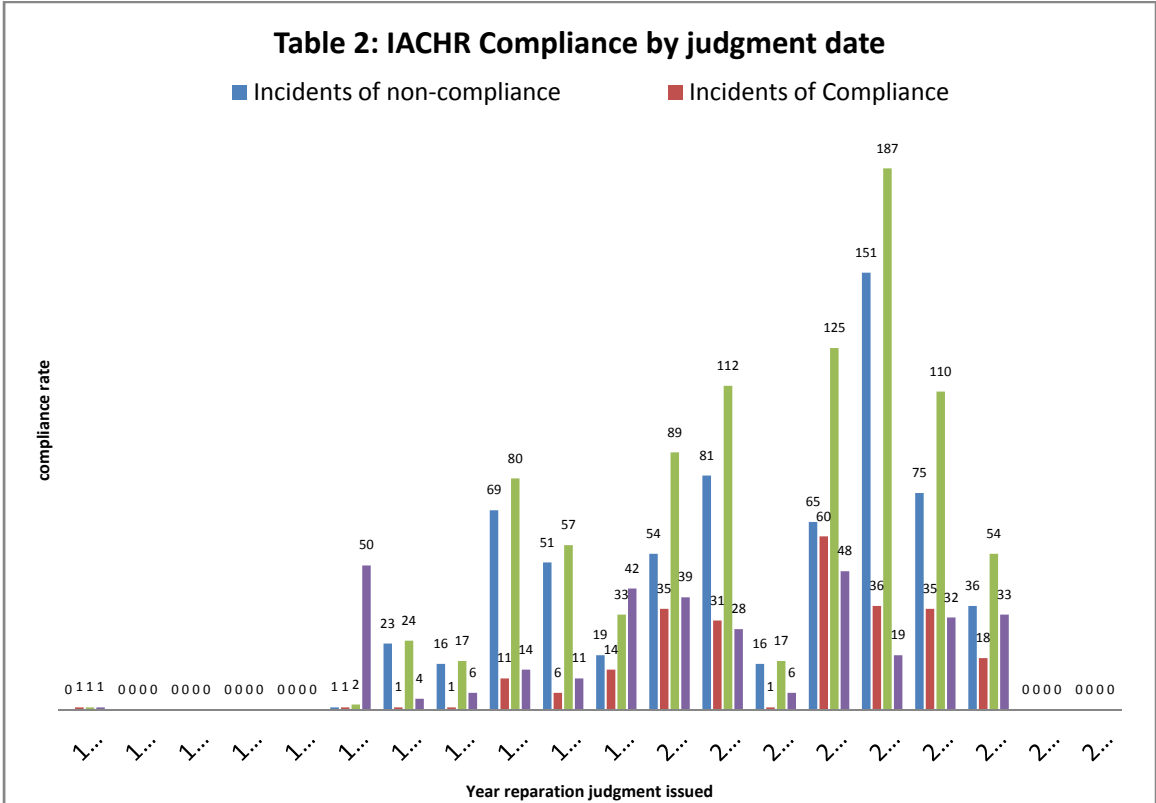


Table 3: IACHR Compliance by date of compliance report

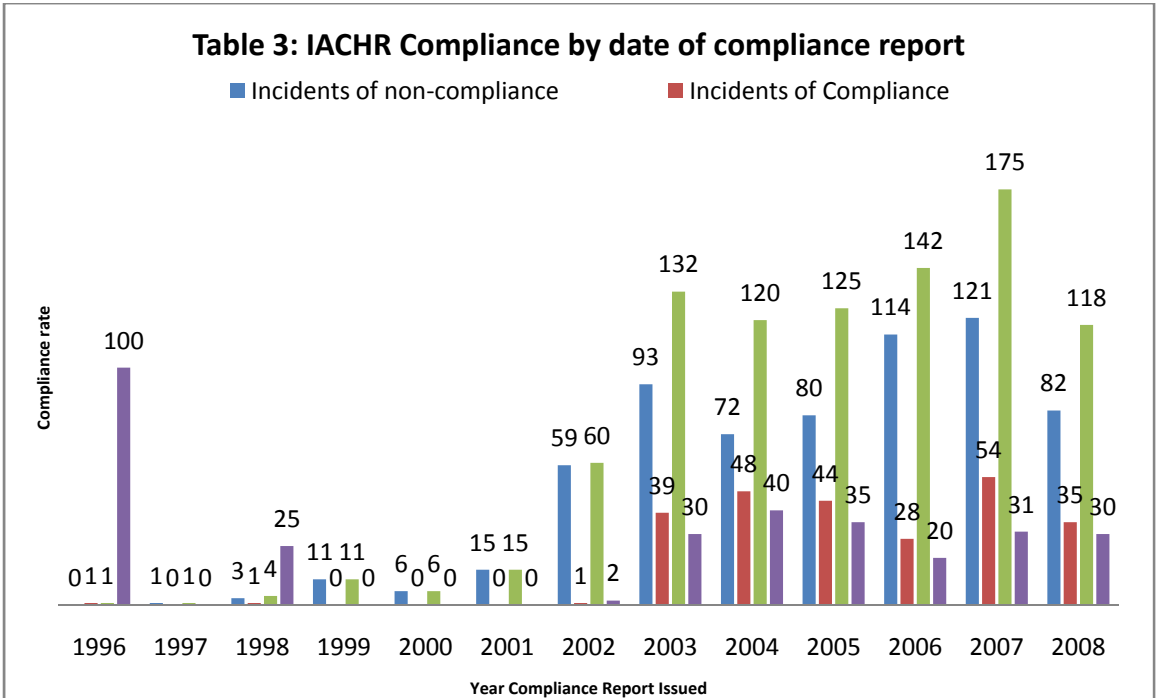


Table 4: IACHR Compliance by Compliance Report

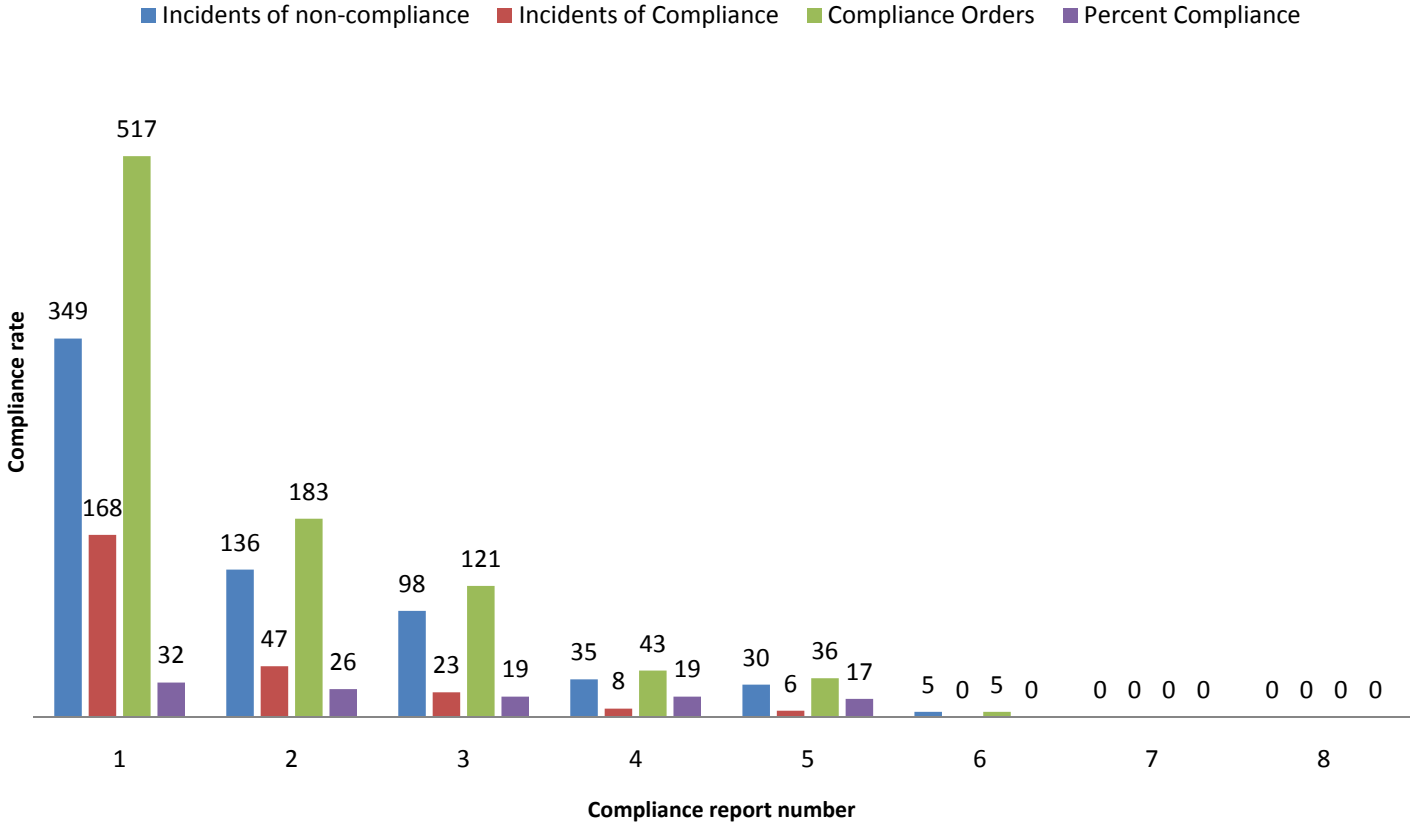


Table 5: IACHR Compliance by state

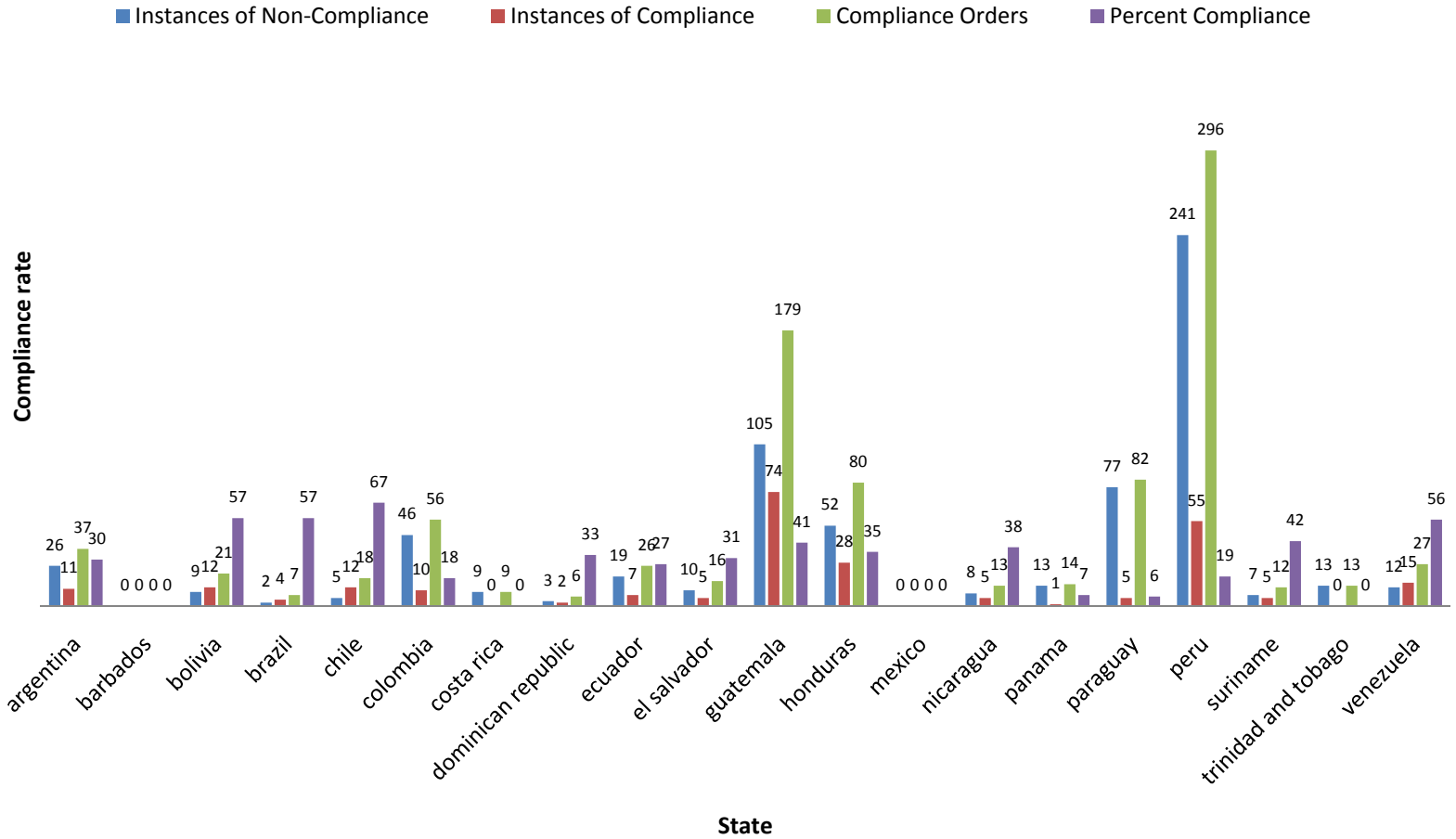
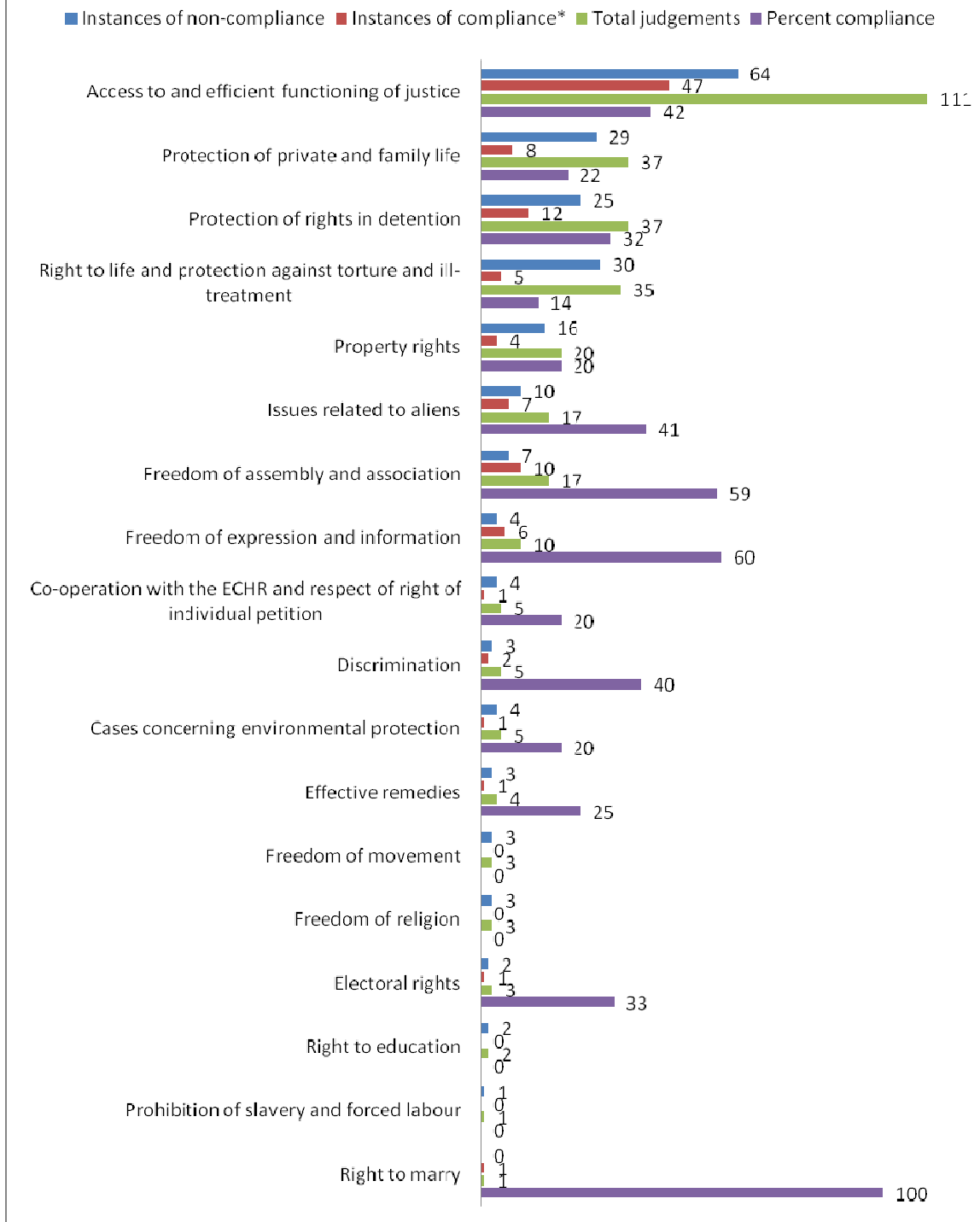


Table 6: ECHR Compliance by Issue Type



*Compliance refers to cases closed by Committee final resolution and also cases closed in principle but awaiting final resolution.

Source: Compiled by authors from data found in Committee of Ministers 2008: 27-195.

Table 7: Length of leading* cases pending before the CM - Global Situation

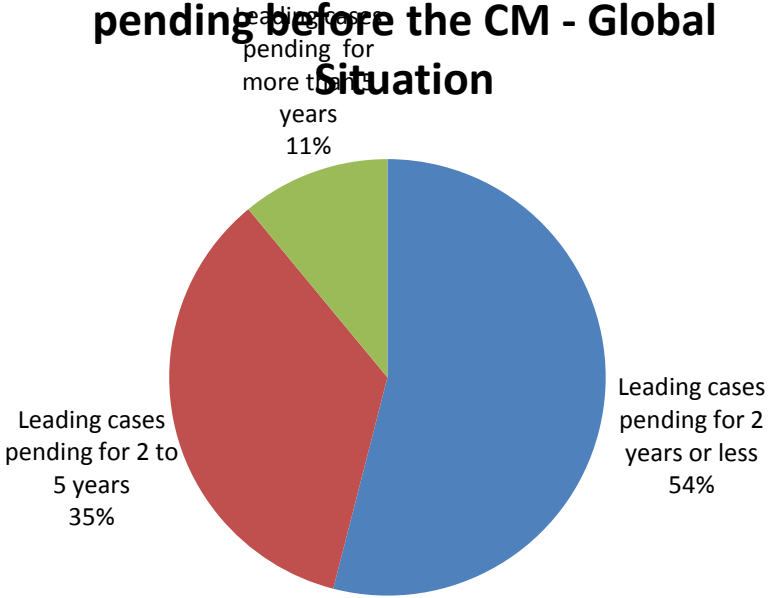
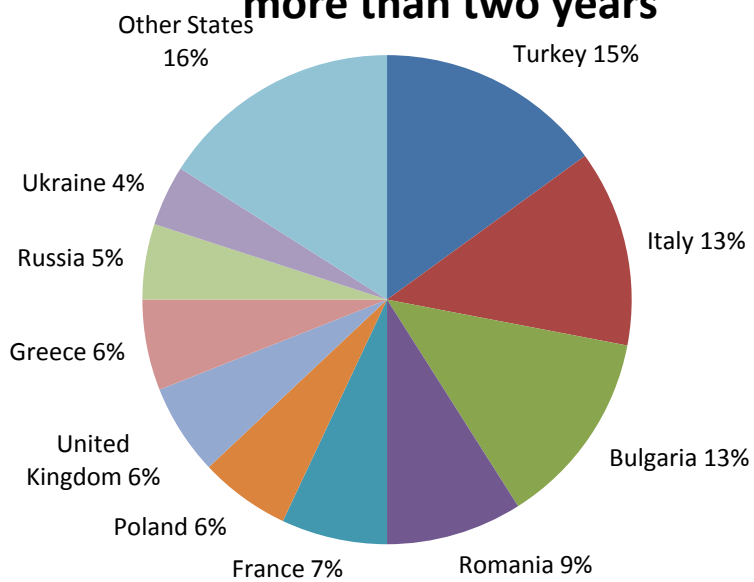
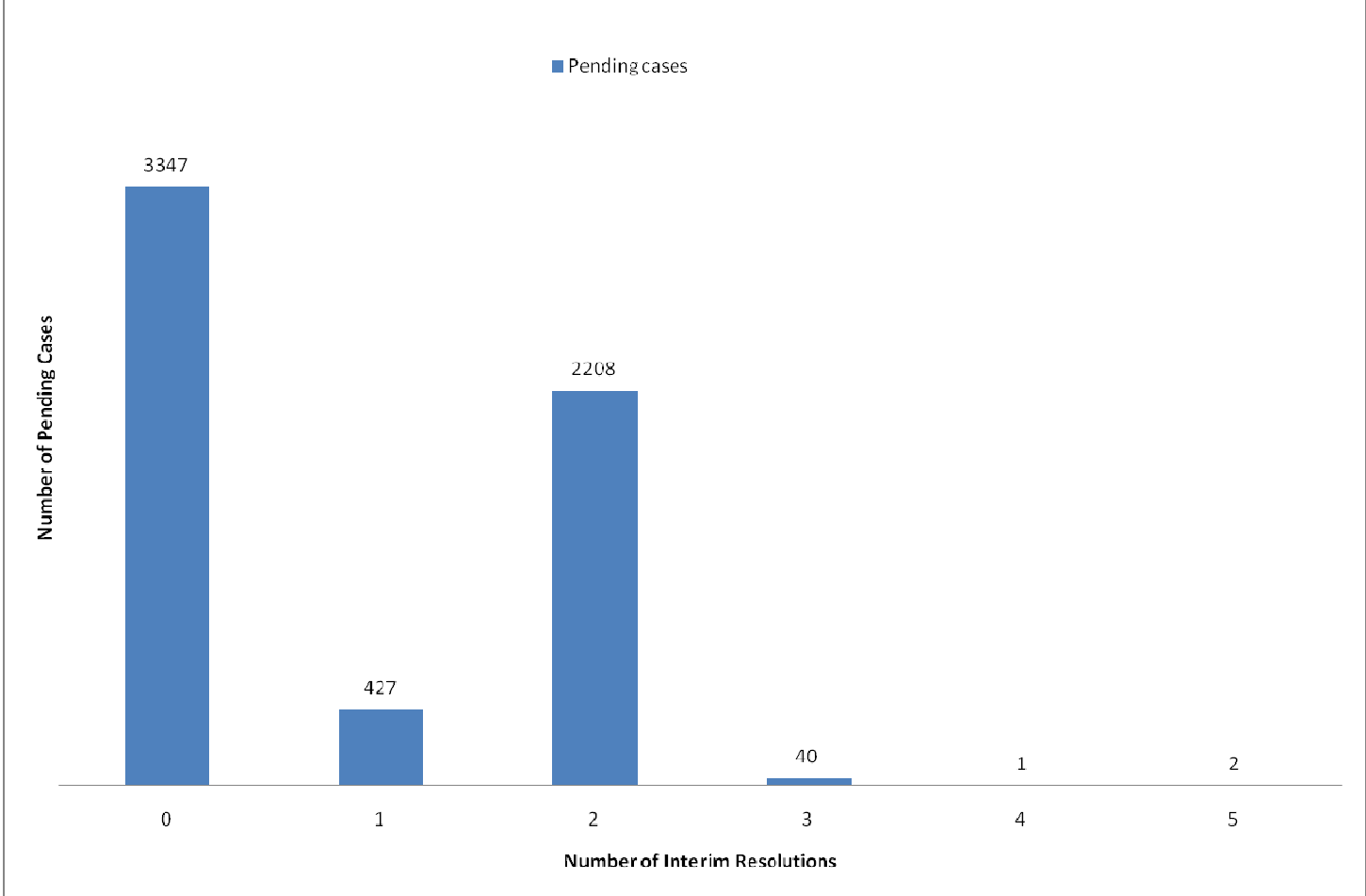


Table 8: Leading* cases pending for more than two years



*The ECHR distinguishes leading cases from “clone/repetitive” and “isolated” cases
SOURCE: Committee of Ministers 2008: 229–30.

Table 9: ECHR pending cases by number of interim resolutions



Source: Compiled from data in the “simplified global database” at http://www.coe.int/t/t/human_rights/execution/02_documents/PPIndex.asp#TopOfPage. Visited August 15, 2008.