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ENGAGEMENT AND ESCAPE:
INTERNATIONAL LEGAL INSTITUTIONS AND PUBLIC POLITICAL CONTESTATION

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EDITORS' INTRODUCTION

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AARON KREADEN & DAN MOORE

In its advisory opinion on Kosovo's unilateral declaration of independence,[1] released about a month before this issue went to press, the International Court of Justice was forced to reflect on the appropriate role of the international judiciary in political disputes. Finding that it had the jurisdiction to consider the General Assembly's question, the Court rejected the idea that there can be a clear division between the political and the legal: "the fact that a question has political aspects does not suffice to deprive it of its character as a legal question".[2]

But the Court split on whether it should exercise its discretion to refuse jurisdiction in cases—such as the Kosovo situation—where the adjudication of a legal issue would make the Court a pivotal actor in the political realm. The majority held that the possible adverse political consequences of its judgments cannot be a factor informing the court's discretion. On this issue, the Court must defer to the (political) judgment of the requesting organ.[3]

This position was criticized by Judge Bennouna, who in his dissenting opinion argued that the General Assembly's request amounted to an attempt to have the Court "take on the functions of a political organ of the United Nations, the Security Council, which the latter has not been able to carry out."[4] To avoid being "exploited in favour of one specifically political

[1] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion (22 July 2010), online: International Court of Justice, <http://www.icj-cij.org/homepage/pdf/20100722_KOS.pdf>.
[2] *Ibid*. at para. 27.
[3] *Ibid*. at para. 35.
[4] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Dissenting Opinion of Judge Bennouna (22 July 2010) at para. 8, online: International Court of Justice, < http://www.icj-cij.org/docket/files/141/15999.pdf>.

strategy or another",[5] Judge Bennouna argued that the Court should have declined to exercise jurisdiction "on a question which is incompatible with its status as a judicial organ".[6]

Even though the majority insisted that the ICJ can validly adjudicate on the legal aspects of questions with political dimensions, its advisory opinion is carefully crafted to minimize any possible political ramifications. The Court narrowly interpreted the General Assembly's question, choosing to rule only on whether there is a prohibition at international law of unilateral declarations of independence. The broader issues raised by the request—including the limits of "remedial secession", the rules governing state recognition, and the legal consequences of such recognition—went unanswered.[7] This approach was criticized in the Declaration of Judge Simma, who was of the opinion that "the Court has not answered the question put before it in a satisfactory manner":[8] "the relevance of self-determination and/or remedial secession remains an important question in terms of resolving the broader dispute in Kosovo."[9] Newspaper reports that the ICJ had ruled "Kosovo independence" to be "lawful" were greatly exaggerated.[10]

The Kosovo advisory opinion lays bare the complicated relationship between law and politics in the global arena, manifested in what Martti Koskenniemi has identified as the two conflicting impulses of international lawyers: the utopian desire to regulate the political through objective legal adjudication, and the apologetic acknowledgment that the practice of international law cannot avoid concerns of realpolitik.[11] The Court insisted that it could and should take jurisdiction over a tense political issue, but sought to minimize the political fallout by imposing strict limits on the terms of its engagement. The Court engaged political issues at the same time that it tried to escape them. A complicated relationship indeed.

The complexities of this relationship are explored by the three articles in this issue, which contribute to the ongoing effort to conceptualize, describe,

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[5] *Ibid.* at para. 15.
[6] *Ibid.* at para. 14.
[7] *Ibid.* at paras. 51 ("The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."), 56 ("The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.").
[8] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Declaration of Judge Simma (22 July 2010) at para. 3, online: International Court of Justice, < http://www.icj-cij.org/docket/files/141/15993.pdf>.
[9] *Ibid.* at para. 6.
[10] Associated Press, "World Court Says Kosovo Independence Lawful" *The Globe and Mail* (22 July 2010), online: <http://www.theglobeandmail.com/news/world/world-court-says-kosovo-independence-lawful/article1648330/>.
[11] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, reissued 2005).

and model the political behaviour surrounding international legal institutions. By examining a wide variety of bodies—the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the European Court of Human Rights, the Inter-American Court of Human Rights, the United Nations Human Rights Commission, and the United Nations Human Rights Council—these articles call attention to the various ways in which processes of norm generation in international law interact with processes of public political contestation.

Contributions to this Issue

The first paper in this issue adopts a methodology that has been well-developed within domestic legal scholarship and applies it to the international context. For international lawyers in particular, the approach constitutes a challenge to traditional perspectives. In "Understanding the Behaviour of International Courts", Sébastien Jodoin employs behavioural hypotheses to analyze overall trends in judicial decision-making. This framework is used to suggest that the ideas of individual judges, and their perceptions of their respective institutions' strategic interests, can account for patterns in the decision-making of international courts.

The author undertakes a comprehensive review of the literature on judicial behaviour. Rather than simply deciding cases on their "objective merits", the approach works from the premise that judges are political actors with their own goals and ideological tendencies. The analysis then adapts the findings in the judicial behaviour literature to the unique context of the decision-making processes at the International Criminal Tribunals for the former Yugoslavia and Rwanda. In doing so, the author takes important first steps towards identifying useful independent variables for modelling judicial decision-making in international tribunals. Significantly, this argument will force readers—particularly those coming from a background in international law—to reassess the boundary between public political contestation and independent legal reasoning that may currently inform assessments of the work done by international tribunals.

The second paper in this issue, "Partial Compliance", also considers the nature of international tribunals, but does so from the other end of the spectrum. "Understanding the Behaviour of International Courts" explores factors that affect decision-making in international tribunals. In "Partial Compliance," Professors Hawkins and Jacoby take tribunal decisions as the starting point of their analysis, and they proceed to offer a new framework to conceptualize the ways in which political actors—particularly states—respond to those decisions.

It is fairly common in the International Law/Relations literature to think of compliance as a binary concept. Indeed, Professors Hawkins and Jacoby acknowledge that the data supports the assertion that the levels of state compliance with international norms vary, but tend to cluster around the extremes of high compliance or low compliance. If a state's behaviour does not fall neatly into these dichotomous positions, it is perhaps intuitive to conceptualize it as on the path from one end of the continuum to the other. However, "Partial Compliance" uses data from the European and Inter-

American Courts of Human Rights to suggest otherwise. Rather than simply being a transitional point along a continuum, the authors argue that partial compliance appears to be a stable end point, and that it is likely to be a common—if not the most common—outcome of international adjudication.

In the final article in this issue, Professor Eric Cox details the extent to which political preferences influenced the institutional design of the United Nations Human Rights Council (HRC). Despite the widespread criticism of its predecessor—the Commission on Human Rights (CHR)—the author argues that the political compromises that enabled the formation of the new institution also stand in the way of any marked improvement from its predecessor.

The impetus for the creation of this new human rights council was born out of the well-documented disaffection for the shortcomings of the CHR. These shortcomings included its failure to engage with human rights abuses around the world to a sufficient degree; its inclusion of human rights abusers among its members; and its politicized processes of norm generation. Despite the general support for a new institution, Professor Cox argues that the structure and the behaviour of the HRC has been limited by the diverse preferences that informed its creation. For example, many western states sought a more interventionist institution with limited membership, one that would be able to issue resolutions relating to specific human rights violations. Other states, particularly those within the G-77, thought that the HRC's ability to criticize states should be more limited. Professor Cox carefully builds an argument that the general human rights records of these groups are suggestive of the rationale for their respective preferences. If the HRC is fundamentally a political body, as argued by Professor Cox, one should not expect it to function according to the lofty ideals of human rights protection, but according to the more calculating preferences of the actors that dictated its structure.

Editors' Acknowledgments

The publication process is inherently collaborative, and the Journal is indebted to dozens of people who contributed time, knowledge, and resources to the publication of this issue. Although the confines of time and space prevent us from individually acknowledging everyone, we hope that a more general expression of gratitude will convey our appreciation of your contributions.

At the outset, we would like to thank last year's editors-in-chief, Cliff Vanderlinden and Candice Telfer. They were extremely generous with their time in transferring their knowledge, and providing wisdom and guidance throughout the year.

JILIR relies on its editorial staff. The Associate Editors for Volume 6 dedicated hours to carefully reviewing the submissions for each issue, checking footnotes, and providing incisive written feedback to individual authors. The Senior Associate Editors not only participated in this process, they co-ordinated it as well. Finally, the Senior Editors subjected a narrowed selection of submissions to rigorous scrutiny, and selected the articles for publication. They played the key role in defining the issue's substantive

direction.

Once the articles were selected for publication, each one was reviewed by members of JILIR's Executive Editorial Board, along with at least two anonymous peer reviewers. The detailed comments and analysis generously provided to the authors by these individuals were an essential aspect of the publication process.

The Executive and Managing Editors dedicated an incalculable amount of time and effort at nearly all stages in the publication process. Ben Kates, the Executive Editor, was a statesman-like ambassador in liaising with the Executive Editors and peer reviewers. The Managing Editors—Susan Deefholts, Celia Petter, and Harry Skinner—were meticulous in their attention to the persnickety details of citations, proofreading, and layout. The particular devotion of Celia and Susan, who endeavoured throughout the summer to bring this issue to fruition, has left JILIR in their debt.

Critical support was further provided by JILIR's faculty advisors, Professor Jutta Brunnee from the Faculty of Law and Professor Steven Bernstein from the Munk School of Global Affairs. We are also grateful for the assistance and guidance provided throughout the year by the administrative staff at the Faculty of Law, and for generous knowledge-sharing by the staff of the *University of Toronto Faculty of Law Review*.

Finally, we wish to extend our thanks to the authors. Not only were they reliably and extraordinarily responsive to the recommendations that emerged throughout the review process, but they were superhumanly patient with their editors. It has been a pleasure to work with them.

Understanding the Behaviour of International Courts
An Examination of Decision-Making at the *ad hoc* International Criminal Tribunals

SÉBASTIEN JODOIN*

I. Introduction

International courts (ICs)[1] play a key role in a number of regimes and institutional frameworks in international law and policy. Despite the remarkable increase in their prominence in the last twenty years,[2] the literature on the behaviour of ICs remains particularly undeveloped, especially when compared to the voluminous and diverse scholarship developed by North American political scientists on the behaviour of

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[1] By ICs, I refer to the organ or unit of an IC that makes judicial decisions; for instance, in the context of the *ad hoc* international criminal tribunals, IC refers to the Chambers and not to the Registry or Prosecution. By behaviour, I mean the judicial decisions adopted by ICs in cases as opposed to other administrative or diplomatic decision-making that ICs also engage in.

[2] Cesare P.R. Romano, "Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts" in Russell A. Miller & Rebecca M. Bratspies, eds., *Progress in International Law* (Leiden: Martinus Nijhoff, 2008) 433.

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domestic courts and judges.[3] Most of the current scholarship on ICs focuses on their creation and design,[4] or on how they interact with their environments.[5] The literature that does focus on the behaviour of ICs mostly discusses the extent of their independence from the interests of powerful states.[6]

This literature is unsatisfactory for a number of reasons. First, while scholars have produced accounts of the external factors that influence the decision-making of ICs, they have paid little attention to internal dynamics of IC decision-making. Second, much of this scholarship assumes that ICs behave strategically in response to the interests of various actors involved in a regime. Other perspectives on the nature of judicial decision-making, most notably the attitudinal model,[7] have received little attention.[8] Third, much of the empirical work produced by scholars has focused on a few courts—the International Court of Justice (ICJ), the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ)—leaving unexamined the decision-making of many different types of ICs.

In this article, I seek to address these lacunae by focusing on the internal dynamics of decision-making processes within ICs, and by drawing on models of judicial behaviour developed for domestic courts. In this way, I

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[3] Lawrence Baum, *The Puzzle of Judicial Behaviour* (Ann Arbor: University of Michigan, 1997) [Baum, *Puzzle*]; Richard A. Posner, *How Judges Think* (Cambridge, Mass.: Harvard University Press, 2008) [Posner, *How Judges Think*].

[4] James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts" (2000) 54 Int'l Org. 137; Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 Int'l Org. 457; Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals" (2001) 55 Int'l Org. 655.

[5] Anne-Marie Burley & Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration" (1993) 47 Int'l Org. 41; Anne-Marie Slaughter, "A Typology of Transjudicial Communication" (1993-1994) 29 U. Rich. L. Rev. 99; Laurence R. Helfer & Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997-1998) 107 Yale L.J. 273; Andrew T. Guzman, "Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms" (2002) 31 J.L.S. 303.

[6] Geoffrey Garrett & Barry R. Weingast, "Ideas, Interests, and Institutions: Constructing the EC"s Internal Market" in Judith Goldstein & Robert Keohane, eds., *Ideas and Foreign Policy* (Ithaca, NY: Cornell University Press, 1993) 173; Geoffrey Garrett, "The Politics of Legal Integration in the European Union" (1995) 49 Int'l Org. 171; Geoffrey Garrett, Daniel Kelemen & Heiner Schulz, "The European Court of Justice, National Governments and Legal Integration in the European Union" (1998) 5 Int'l Org. 149; Karen J. Alter, *Establishing the Supremacy of European Law: The Making of International Rule of Law in Europe* (Oxford: Oxford University Press, 2001) [Alter, *Establishing*]; Adam M. Smith, "'Judicial Nationalism' in International Law: National Identity and Judicial Autonomy at the ICJ" (2005) 40 Tex. Int'l L.J. 197; Eric A. Posner & Miguel F.P. de Figueiredo, "Is the International Court of Justice Biased?" (2005) 34 J.L.S. 599; Erik Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights" (2008) 102 Am. Pol. Sci. Rev. 417 [Voeten, "Impartiality"].

[7] The attitudinal model posits that the ideas, attitudes and values of judges are key variables for understanding decision-making by courts. See section II.1, below.

[8] Exceptions include James Meernik, Kimi King & Geoff Dancy, "Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National and International Factors" (2005) 86 Soc. Sci. Q. 683; Erik Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights" (2007) 61 Int'l Org. 669 [Voeten, "Politics"]; Fred J. Bruinsma, "The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)" (2008) Ancilla Iuris 32.

seek to build further bridges between the work of political scientists on judicial decision-making and that of international relations and international law scholars on ICs.[9] My main contention is that the ideas and interests of judges in ICs account for variations in their decision-making.

In order to test competing models for understanding the behaviour of ICs, I examine decision-making at the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These ICs were created by the Security Council in 1993 and 1994, respectively, to try the persons most responsible for the commission of international crimes in the conflicts in these two regions.[10] Despite the limits to their lifespan and jurisdiction, the decisions of the *ad hoc* tribunals have been very influential in developing the field of international humanitarian law and in reviving the field of international criminal law.[11]

My approach to understanding the judicial decision-making of these ICs is characterized by three main assumptions. First, I assume that traditional theories of international organizations (IO), based on variants of Principal-Agent theory, are ill-equipped for understanding the behaviour of ICs. The relationship between states and ICs is actually more akin to a Principal-Trustee relationship than a Principal-Agent relationship.[12] In order to ensure their judicial independence, ICs are endowed with a high level of formal and structural autonomy.[13] In addition, the act of delegation to an IC implies a mandate that is premised on autonomous decision-making, such that ICs are

[9] Another possible avenue of fruitful bridge-building would be to look at the largely unacknowledged links between the models of judicial decision-making developed for understanding the behaviour of international judges and ICs, with those developed in an earlier period of international relations scholarship dealing with decision-making in foreign policy analysis.

[10] See *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, adopted by SC Res. 827, UN SCOR, 48th Sess., 3217th Mtg., UN Doc. S/RES/827 (1993) [*ICTY Statute*]; *Statute of the International Criminal Tribunal for Rwanda*, adopted by SC Res. 955, U.N. SCOR, 49th Sess., 3453d Mtg. at 3, U.N. Doc. S/RES/955 (1994) at 3 [*ICTR Statute*]. See generally William A. Schabas, *The U.N. International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006).

[11] Allison Marston Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War" (2006) 59 Vand. L. Rev. 1.

[12] Karen J. Alter, "International Courts are not Agents! The Perils of the Principal-Agent Approach to Thinking about the Independence of International Courts" (2005) 99 Am. Soc. Int'l. L. Proc. 138; Karen J. Alter, "Agents or Trustees? International Courts in their Political Context" (2008) 14 Eur. J. Int'l Rel. 33 [Alter, "Agents or Trustees?"]. Principal-Agent theory involves the delegation of authority by a Principal to an Agent whereby the Principal retains influence over decision-making by the Agent by virtue of its authority to write and change the delegation contract. On the other hand, Principal-Trustee theory involves the delegation of authority with the purpose of producing independent and high quality decision-making. As explained by Alter, *ibid.* at 35, "Trustees are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgement or professional criteria, and (3) empowered to act on behalf of a beneficiary" and are thus "less manipulable via recontracting tools".

[13] Dinah Shelton, "Legal Norms to Promote the Independence and Accountability of International Tribunals" (2003) 2 Law & Prac. Int'l Courts & Trib. 27; Ruth Mackenzie & Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge" (2003) 44 Harv. Int'l L.J. 271.

expressly not meant to serve or be seen to serve as the agents of states.[14]

Second, I assume that judicial decision-making is not reducible to the objective application of pre-existing legal rules and principles. I recognize instead that the law is often ambiguous and leaves space for opinion, discretion and innovation.[15] This is especially the case in international law, given the imprecise and incomplete nature of treaty law and the flexibility of customary international law.[16] Judicial decision-making is not however merely political. Rather, within certain boundaries shaped by law and the exigencies of the judicial function, judges in ICs exercise a measure of discretion that can only be explained by non-legal factors.

Third, I adopt an individual-level perspective[17] that focuses on the specific individuals who are personally invested with the authority and independence to make judicial decisions—i.e. judges, panellists or adjudicators. Of course, the influence and involvement of individual judges varies with the personal philosophy of the judge in question.[18] Nonetheless, given that most judges take their roles seriously and retain control over the ultimate outcomes of their individual votes, my individual-level perspective accords analytical priority to variables derived from the ideas and interests of judges. This perspective is based on the "professional" model of judicial authority,[19] which is broadly similar to the one found in ICs.[20]

However, as I point out in the conclusion, an individual-level perspective is not necessarily best placed to explain all forms of decision-making, or decision-making in all ICs. An institutionalist perspective may be more appropriate for certain aspects of judicial decision-making or for certain ICs.[21] Likewise, it is important to stress at the outset that this article

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[14] Jose Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005) at 635.

[15] Yosal Rogat, "Legal Realism" in Paul Edwards, ed., *The Encyclopaedia of Philosophy* (New York: Macmillan, 1972) vol. 8.

[16] Alvarez, *supra* note 14.

[17] Baum, "Puzzle", *supra* note 3 at 7 (explaining that "[s]tudents of judicial behaviour generally focus on individual judges, building explanations of collective choices from the individual level.").

[18] Wayne W. McIntosh & Cynthia L. Cates, *Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas* (Westport, CT: Greenwood Press, 1997), specifically at 14, 108.

[19] Héctor Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Portland, OR: Hart Publishing Ltd., 2004); Mitchel de S.-O.-l'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004).

[20] The career of an international judge is a second career for individuals who have distinguished themselves in other professions. There is no specific training for becoming an international judge, and international judicial posts are not part of an organized and hierarchical career: see Daniel Terris, Cesare P.R. Romano & Leigh Swigart, *The International Judge. An Introduction to the Men and Women who Decide the World's Cases* (Oxford: Oxford University Press, 2007). In addition, the practice of producing and publishing individually signed decisions, which is common in many ICs, creates "an environment and expectation of individual judicial responsibility for the judicial opinion and for its reasoning": de S.-O.-l'E Lasser, *supra* note 19 at 312).

[21] Cornell W. Clayton, "The Supreme Court and Political Jurisprudence: New and Old Institutionalisms" in Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision-Making: New Institutionalist Approaches* (Chicago: University of Chicago Press, 1999) 15.

adopts a methodologically conventional approach to studying the causal effects of ideas and interests on decision-making.[22]

The ICTY and the ICTR form natural case studies for this approach to understanding the behaviour of ICs. They are a unique kind of Trustee IC: they are not dispute resolution mechanisms set up by a collection of states for use by or within these states, but rather criminal courts created by the Security Council to address crimes primarily relevant to another group of states. Accordingly, the Principal states in this context do not directly benefit from, nor are directly affected by, the decisions taken by the IC on behalf of the Beneficiary states and populations. In addition, judges at the ICTY and ICTR are able to issue separate and dissenting opinions, making it possible to study their voting behaviour through an individual-level perspective. Finally, a comparison of the decision-making at the ICTY and ICTR can serve to isolate the roles played by different non-legal variables relating to differences in the political context in which they operate, since the two ICs have similar institutional structures and norms, as well as shared legal rules and principles. The statute and structure of the ICTR were modelled after those of the ICTY and the same judges sit on the Appeals Chambers of both ICs. Legal officers in Chambers also frequently migrate from one to the other. Notwithstanding some differences in the types of charges that have been brought and legal issues that have arisen, there is a high level of consistency between legal developments in both ICs.

I proceed in the following manner. In section II, I discuss two kinds of models for understanding the decision-making of ICs: 1) attitudinal models, which emphasize the ideas of judges; and 2) strategic models, which emphasize their interests. On the basis of these models, I then develop hypotheses that are appropriate to the particular contexts of decision-making in the ICTY and ICTR. My attitudinal hypothesis posits that the most appropriate conceptualisation of the ideational preferences of judges in ICs is whether they are aligned with "international activism" or "statist conservativism". My strategic hypothesis is that judges in ICs are committed to advantageously extending the authority, standing, independence and influence of their institution.

In section III, I test these hypotheses though a quantitative analysis of decisions taken by the Trial Chambers and Appeals Chambers of the ICTY and ICTR.[23] I conclude that both ideas and interests can account for variations in the decision-making of ICs: judges pursue their preferences on certain matters while also taking into account, for strategic reasons, the preferences of relevant actors on other matters. While I agree that external interests may influence judicial decisions, I argue that they do so largely because they have a basis in the ideas and interests of judges.

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[22] The possible contributions of constructivist approaches will be discussed below, in the conclusion.

[23] Throughout this article, I also draw on confidential interviews conducted with current and former judges and staff members at the ICTY and ICTR, as well as on my own professional experience working in the Chambers of both these ICs.

In sum, judicial decision-making in ICs amounts to a form of autonomous decision-making undertaken by judges who pursue certain objectives and who, like other actors, react and adapt to their environments in the pursuit of their objectives. The theoretical position advanced here is ultimately an eclectic one that combines insights from rationalism and liberalism, with the aim of understanding the relationship between international politics and judicial decision-making in ICs by moving beyond simple conceptualizations of transcendence or subjugation, and recognizing and accepting that they are necessarily intertwined.

II. Models of decision-making in international courts

Attitudinal Models

In this section, I provide the theoretical underpinnings of the attitudinal hypotheses that will be tested below, in section III.2., I begin by reviewing various approaches to modelling the nature and origins of the preferences of individual judges in the context of ICs. I argue that the most fundamental policy preference for an international judge is whether he or she is an international activist or a statist conservative in his or her approach to international law. I discuss a number of potential explanations for these preferences, but identify as most critical the independent variable of professional background: whether an international judge is a former academic, diplomat, or judges or practitioner.

The attitudinal model has been the pre-eminent approach in the political science literature on judicial behaviour for much of the last thirty years.[24] It posits that the ideas, attitudes and values of judges are key variables for understanding decision-making by courts. Some scholars emphasize policy preferences, arguing that judges "base their decisions on the merits on the facts of the case juxtaposed with their personal policy preferences."[25] These scholars adopt a rational model of decision-making in which judges seek case outcomes that best approximate their stable policy preferences on specific issues.[26] Other scholars stress the beliefs that judges hold about their judicial roles in terms of what constitutes appropriate and inappropriate judicial behaviour.[27] One of the key distinctions in this regard concerns the extent to which judges stress judicial restraint over judicial activism.[28]

In an ideal type attitudinal model, judicial decision-making is not influenced by external preferences and pressures or by long-term considerations, but instead by a judge's preferences about policy or the

[24] Sarah C. Benesh, "Harold J. Spaeth: The Supreme Court Computer" in Nancy Maveety, ed., *The Pioneers of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2003) 116.
[25] Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002) at 312 [Segal & Spaeth].
[26] *Ibid.* at 91-92.
[27] James L. Gibson, "Judges' Role Orientations, Attitudes and Decisions: An Interactive Model" (1978) 72 Am. Pol. Sci. Rev. 911; G. Alan Tarr, *Judicial Process and Judicial Policy Making* (Belmont, CA: Wadsworth, 2003) at 267-268.
[28] *Ibid*. at 268.

judicial role. While the attitudinal model recognizes that judicial decisions are not unconstrained by the rules and structures of decision-making, it posits that these rules and structures nonetheless allow judges to engage in decision-making reflective of their preferences on the merits of a case.[29] In the context of the US Supreme Court, justices "can further their policy goals because they lack electoral or political accountability, have no ambition for higher office, and comprise a court of last resort that controls its own caseload."[30]

The principal challenge for scholars interested in adapting the attitudinal model to the context of international judicial decision-making is developing categories of judicial preferences. It is important to note that the attitudinal literature focusing on ICs is still in its infancy and that the assumptions and implications of many early studies of the behaviour of ICJ judges conducted in the 1960s and 1970s and cited below are of limited import to the current context. The traditional left-right categories along which judicial preferences are aligned at the domestic level may need to be modified when moving from the domestic to the international context. In the context of international criminal law for example, in a complete reversal of the situation present at the domestic level, the left has been the strongest proponent of international prosecution while the right has been more recalcitrant.[31] Likewise, the categories of activism and conservatism through which judicial roles at the domestic level are often understood may also not translate to the international level. As explained by Erik Voeten,

> National judges who enjoy a high degree of independence may find that activism by an international court constitutes undesirable interference whereas judges from countries where courts are less secure from political interference may view an activist court as a potential ally.[32]

In addition, unlike domestic judges, international judges operate within specialized and often self-contained legal regimes and structures. Judicial preferences are therefore likely to vary according to the regime to which the IC belongs. Preferences held by ECJ judges about the proper scope of EU trade regulation may not have much salience for ECHR judges dealing with human rights issues.

On the other hand, just as domestic judges are assumed to have preferences regarding the relationship between the state and its citizens, international judges are assumed to have preferences about the relationship between international law and state sovereignty.[33] The international-national interface can also be seen as reflecting an international judge's conceptions of their role as judges in terms of activism or restraint. I argue that an

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[29] Segal & Spaeth, *supra* note 25 at 92-97, 114.
[30] *Ibid.* at 92.
[31] Jared Wessel, "Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication" (2005-2006) 44 Colum. J. Transnat'l. L. 377 at 446-447.
[32] Voeten, "Politics", *supra* note 8 at 681.
[33] Terris, Romano & Swigart, *supra* note 20.

international judge's position on the relationship between international law and state sovereignty represents his or her fundamental policy preference—and therefore hypothetically the most powerful dependent variable in the attitudinal model.

The international activist judge thus favours the development of a strong international legal system and accords limited deference to state sovereignty. Such a judge is more likely to adopt an expansive approach to the interpretation, application, and development of international law. This would include, for instance, recognising new norms of customary international law or interpreting treaties in a teleological manner. Conversely, the statist conservative judge favours the assertion of state sovereignty and its associated prerogatives against the expansion of the authority of international law. Such a judge is more likely to adopt a restricted methodology in international law, emphasizing the role of state consent in the creation and interpretation of international norms.

A number of previous studies demonstrate that understanding the preferences of judges along these lines captures a key aspect of the political nature of decision-making in ICs. Early qualitative studies of decision-making at the ICJ found that the most important attitudinal differences between judges related to issues such as the flexibility of international law and the role of the ICJ in judicial innovation.[34] A quantitative study of ECHR decision-making concluded that judges varied in the flexibility that they accorded to respondent states in the performance of their human rights obligations, and in their conception of the proper reach of the ECHR.[35] Likewise, a qualitative study of separate opinions at the ECHR distinguished between judges who adopted a "lawyer statesmen" perspective and those who adopted a "human rights activist" perspective.[36] Examining the decision-making of the Dispute Settlement Body of the World Trade Organization (WTO DSB), Colares found that WTO DSB panellists "have consistently deployed interpretive methods that produce a consistent outcome: restricting Respondent discretion to adopt otherwise trade-restrictive measures, and thus furthering the promotion of an unfettered version of trade."[37]

My and other qualitative research on the ICTY and ICTR reveals that many judges occupy a consistent place along the international activist-statist conservative spectrum.[38] For example, ICTY and ICTY Appeals Chambers

[34] Lyndel V. Prott, *The Latent Power of Culture and the International Judge* (Abindgon, UK: Professional Books, 1979) at 220-227; Smith, *supra* note 6 at 225. On the other hand, looking at voting by ICJ judges in the 1945-1967 period, Terry concludes that while a few ICJ judges were consistent in their approach to international law, the votes of the majority of judges varied from case to case: G.J. Terry, "Factional Behaviour on the International Court of Justice: An Analysis of the First and Second Courts (1945-1951) and the Sixth and Seventh Courts (1961-1967)" (1975) 10 Melbourne U.L. Rev. 59.
[35] Voeten, "Politics", *supra* note 8.
[36] Bruinsma, *supra* note 8.
[37] Juscelino F. Colares, "A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development" (2009) 42 Vand. J. Transnat'l L. 383 at 435.
[38] Wessel, *supra* note 31 at 389-396. Confidential interviews with select staff and judges at the

Judge Shahabuddeen is often identified as being a more international activist judge, due to his numerous dissents in cases such as *Stakić*, where he adopted an expansive approach to interpreting the scope of application of genocide and deportation as a crime against humanity.[39] The salience of these preferences is hardly surprising, given that ICTY and ICTR judges have had to address numerous issues regarding the reach of their powers and authority and the scope of application of international humanitarian law and international criminal law generally.[40] The judges faced an example of the first kind of issue in a decision at the ICTR on whether they had the power to award financial compensation for rights violations to an accused person despite the absence of an express provision to this effect in the ICTR Statute;[41] an example of the second kind is a decision by judges at the ICTY on whether military reprisals against civilians are prohibited in customary international law.[42]

Attitudinal scholars assume that the attitudinal commitments of judges have been shaped by the independent variable of the backgrounds and attributes of judges before their arrival on the bench.[43] For example, Tate shows that US Supreme Court justices who were prosecutors before being named as judges have a tendency to vote conservatively in civil liberties cases.[44] A focus on the backgrounds of judges thus enables scholars to develop base-line predictions about the voting behaviour of judges, avoiding the circularity of deriving a judge's preferences from their voting record.[45] Again, it is important to stress that much of the data and studies on the backgrounds and attributes of international judges are not very developed.

Several potential explanations for the policy preferences of international judges have not been supported by qualitative analysis. One posited independent variable lies in judges' national origins and cultures: in explaining the prevalence of national voting at the ICJ, a number of scholars have speculated that national bias could be explained by unconscious

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ICTY and ICTR evince commonly shared perceptions that certain judges are indeed activist while some are more conservative in their approach to international law.

[39] Dissent of Judge Shahabuddeen in *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement (22 March 2006) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <http://www.icty.org/> [*Stakić*].

[40] Danner, *supra* note 11; Alexander Zahar & Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2007) at 14-35, 79-105.

[41] See *Prosecutor v. Rwamakuba,* ICTR-98-44C, Decision on Appropriate Remedy (31 January 2007) (International Criminal Tribunal for Rwanda, Trial Chamber III), online: <http://www.ictr.org/>; *Prosecutor v. Rwamakuba*, ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy (13 September 2007) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: < http://www.ictr.org/>.

[42] See *Prosecutor v. Kupreskić*, IT-95-16-T, Appeal Judgement (14 January 2000) at paras. 527-533 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) online: <http://www.icty.org/>.

[43] Tarr, *supra* note 27 at 266.

[44] C. Neal Tate, "Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946-1978" (1981) 75 Am. Pol. Sci. Rev. 355.

[45] Benesh, *supra* note 24.

psychological, cultural, or philosophical biases.[46] However, scholars have generally failed to show that state interests may be transmitted to or inculcated in international judges. For instance, a study of sentencing outcomes at the ICTY found no evidence that French, British and American judges were more likely to sentence convicted Serbian war criminals to longer sentences due to their potential identification with their national interests.[47] A more convincing explanation of national voting is that states may select judges that hold policy preferences similar to their own: Voeten showed that states aspiring to join the EU and EU member states favourably disposed to integration are significantly more likely to appoint activist judges to the ECHR.[48] However, the effect of such appointment politics and of national voting generally will only be felt in situations where states have clear interests or preferences. Accordingly, Thomas R. Hensley showed that ICJ judges are more likely to vote with their states in contentious cases than in advisory opinions where state interests are more ambiguous.[49]

Another posited explanation of international judicial policy preferences relates to the national legal systems of judges. A number of scholars have tested variables such as domestic standards of judicial independence and experiences with human rights, with no significant results to report.[50] Voeten thus concluded that "judges did not so much transport their role conceptions to the international level, but rather thought strategically about how interference by an international court would affect a domestic situation."[51] Scholars have also examined the role played by the type of national legal system from which an international judge originates—whether they hail from a common law, civil law or another legal tradition.[52] However, previous empirical studies have concluded that judges' domestic legal systems had no observed impact on their behaviour in ICs in terms of levels of agreement at the ICJ,[53] levels of activism or impartiality at the ECHR,[54] and sentencing outcomes at the ICTY.[55] In the end, these results are hardly surprising: although they may influence the form and sensibility of legal reasoning with respect to international legal issues, types of legal systems contain few, if any, specific attitudinal commitments in terms of the relationship between

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[46] Prott, *supra* note 34 at 155-157; Terris, Romano & Swigart, *supra* note 20 at 68-70; Thomas R. Hensley, "National Bias and the International Court of Justice" (1968) 12 Midwest J. Pol. Sci. 568 at 585 [Hensley, "National Bias"]; Posner & de Figueiredo, *supra* note 6 at 624-625 (see also section II.2, below, on strategic motivations for national voting).
[47] Meernik, King & Dancy, *supra* note 8 at 691-692, 698-700.
[48] Voeten, "Politics", *supra* note 8 at 693-694.
[49] Hensley, "National Bias", *supra* note 46 at 575.
[50] Voeten, "Impartiality", *supra* note 6 at 427-430; Meernik, King & Dancy, *supra* note 8 at 690-692, 698.
[51] Erik Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights" (Paper presented to the annual meeting of the Midwest Political Science Association, April 2007) at 14, online: <http://www.allacademic.com/meta/p197493_index.html>.
[52] Terris, Romano & Swigart, *supra* note 20; Prott, *supra* note 34; Terry, *supra* note 34.
[53] Thomas R. Hensley, "Bloc Voting on the International Court of Justice" (1978) 22(1) J. Confl. Res. 39 at 55 [Hensley, "Bloc Voting"].
[54] Voeten, "Politics", *supra* note 8 at 694-695; Voeten, "Impartiality", *supra* note 6 at 428-429.
[55] Meernik, King & Dancy, *supra* note 8 at 698.

international law and state sovereignty.[56]

Professional background, as an independent variable, provides the most promising account of the origins of international judges' preferences. Limited qualitative evidence shows that background may be significant in the way in which international judges decide cases: former diplomats are more likely to be responsive to national interests and political realities and thus be restrained in their approach to international law; former academics are less likely to be responsive to these influences and more likely to be activist in their approach to international law; and former national judges and practitioners are more likely to focus on the facts of a case and less likely to focus on international issues as a whole.[57] One quantitative study of decision-making at the ECHR suggests that professional backgrounds may indeed be useful proxies for policy preferences: former private practitioners were found to be about 14% more likely than non-private practitioners and non-diplomats to find a human rights violation and former diplomats and bureaucrats were about 13% more likely to favour the respondent governments.[58] My own professional interactions and confidential interviews with select staff and judges at the ICTY and ICTR also revealed that judges hold similar opinions about themselves or their colleagues.

The above discussion evinces two key variables for applying the attitudinal model to international judicial decision-making. The dependent variable is IC judges' approach to international law: whether they are international activists or statist conservatives. The independent variable is the professional backgrounds of international judges: whether they are former academics, diplomats or judges or practitioners. I derive the following hypotheses from this relationship:

Attitudinal Hypothesis 1: Former academics are more likely to be international activist in their decision-making. (AH1)

Attitudinal Hypothesis 2: Former diplomats are more likely to be statist conservative in their decision-making. (AH2)

Attitudinal Hypothesis 3: Former judges or practitioners are less likely than former academics to be international activist in their decision-making, and less likely than former diplomats to be statist conservative in their decision-making. (AH3)

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[56] The applicability of international law within a domestic legal system does not depend on whether that system is common law, civil law or another legal tradition, but rather by whether that system is governed by a monist or dualist constitution. To be sure, an international judge's training in a particular legal tradition may condition their reflexes in the use of international legal sources and the structure of legal reasoning, although they would still be bound by the particular sources and methodology of international law.

[57] Terris, Romano & Swigart, *supra* note 20 at 64; Prott, *supra* note 34 at 199; Bruinsma, *supra* note 8. On the other hand, a study of ICTY decision-making finds no statistically significant relationship between the previous backgrounds of ICTY judges and sentencing outcomes: Meernik, King & Dancy, *supra* note 8 at 692-694, 698-700. That said, there are good reasons to think that sentencing outcomes in an international criminal tribunal are not likely to reflect the sincerely held attitudes of international judges. See section II.3, below.

[58] Voeten, "Impartiality", *supra* note 6 at 430.

Strategic Models

In this section, I provide the theoretical underpinnings of the strategic hypotheses to be tested below, in section III.3., I will discuss the literature that has developed in domestic political science and in international relations around the nature and impact of judges' strategic objectives on their decision-making. Although I accept the principal insight in this literature that international judges are focused on organizational self-interest—on expanding their power and standing—I argue that their strategies for doing so are not necessarily directed at states, but may also focus on transnational and non-state actors. As such, I posit that the particular targets of strategies pursued by international judges will depend on the context within which they operate as well as on their specific strategic objectives.

The strategic model of judicial behaviour posits that judicial decision-making is rational and goal-oriented, and therefore "whenever strategic judges choose among alternative courses of action, they think ahead to the prospective consequences and choose the course that does most to advance their goals in the long term."[59] On the whole, the strategic model is flexible. It can accommodate a focus on a number of different goals, including the pursuit of policy preferences, the expansion or strengthening of authority and influence, the advancement of professional career objectives, the enhancement of standing with particular audiences, or the minimization of intra-court conflicts and judicial workloads.[60] Of these various objectives, I will consider two that have been considered to be particularly relevant by scholars in the context of ICs: personal career self-interest and organizational self-interest.

The personal career self-interests of judges normally encompass avoiding a removal from the bench or seeking promotion up the ranks of the judiciary. While most international judges have little fear of removal or expectation of advancement, many authors nonetheless posit that they are subject to pressures emanating from their respective national governments, which "may refuse to support them for reappointment and also refuse to give them any other desirable government position after the expiration of their term."[61] This literature thus connects to older international organization (IO) scholarship on conflicts of loyalty between an international civil servant's national affiliation and his or her obligations to the IO to which he or she is attached.[62]

In contrast to the attitudinal scholarship discussed above positing that national bias results from unconscious psychological, cultural or philosophical factors, a strand of strategic scholarship identifies personal

[59] Lawrence Baum, *Judges and their Audiences* (Princeton: Princeton University Press, 2006) at 6 [Baum, *Judges*].
[60] Baum, *Puzzle*, *supra* note 3 at 16-19; Posner, *How Judges Think*, *supra* note 3; *Ibid.* at 11-14.
[61] Posner & de Figueiredo, *supra* note 6 at 608. See also Paul B. Stephan, "Courts, Tribunals and Legal Unification – the Agency Problem" (2002) 3 Chicago J. Int'l L. 333 at 7-8.
[62] Bob Reinalda & Bertjan Verbeek, "The Issue of Decision Making within International Organizations" in Reinalda & Verbeek, eds., *Decision Making within International Organizations* (London: Routledge, 2004) 9 at 33-34.

career self-interest as a factor conducive to national bias in decision-making. In particular, scholars have evaluated whether national bias influences the decision-making of judges at the ICJ[63] and the ECHR.[64] Although these studies suggested that judges tend to protect national interests in cases where these interests are at stake, there is little evidence that decision-making is influenced by national affiliation in contexts where home states have no clear interests.[65] In fact, the factor of national affiliation is often absent from decision-making in ICs: in the ICJ, nationality was found to be relevant in 81 votes as compared to 1,277 where it was not relevant;[66] and in the WTO DSB, no national of the disputing parties may serve as a panel member, unless the parties agree otherwise.[67] Likewise, in the context of the *ad hoc* international criminal tribunals, none of the judges have any affiliation with parties to the conflicts in the former Yugoslavia and Rwanda. While some of the judges may be affiliated with a state with regional interests in these conflicts, such interests are unlikely to be so clear or so significant as to have any profound influence on decision-making. Accordingly, a study of sentencing outcomes at the ICTY found no relationship between the voting of judges on sentencing and the plausible policy preferences of the states with which they are affiliated.[68] For these reasons, it is therefore sensible to conclude that national affiliation is not a likely factor in judicial decision-making at the ICTY and ICTR.

In comparison to personal career self-interests, organizational self-interest is a much more promising avenue for applying the strategic model to decision-making in ICs. Like other IOs,[69] ICs are concerned with issues relating to staffing and budgeting. Like other scholars, I assume however that when it comes to judicial decision-making, ICs are most concerned with extending their authority, standing, independence and influence in the

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[63] William Samore, "National Origins v. Impartial Decisions: A Study of World Court Holdings" (1956) 34 Chicago-Kent L. Rev. 193; Hensley, "National Bias", *supra* note 46; Il Ro Suh, "Voting Behaviour of National Judges in International Courts" (1969) 63 Am. J. Int'l L. 224; Edith Brown Weiss, "Judicial Independence and Impartiality: A Preliminary Inquiry" in Lori Damrosch, ed., *The International Court of Justice at a Crossroads* (Dobbs Ferry, NY: Transnational Publishers, 1987); Smith, *supra* note 6; Posner & de Figueiredo, *supra* note 6.

[64] Martin Kuijer, "Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice" (1997) 10 Leiden J. Int'l L. 49; Bruinsma, *supra* note 8; Voeten, "Impartiality", *supra* note 6.

[65] Terry, *supra* note 34; Hensley, "Bloc Voting", *supra* note 53; Kuijer, *ibid.*; Bruinsma, *supra* note 8; Voeten, "Impartiality", *supra* note 6.

[66] Posner & de Figueiredo, *supra* note 6 at 615.

[67] *Dispute Settlement Understanding*, *being Annex 2 to the Marrakesh Agreement Establishing The World Trade Organisation*, 15 April 1994, 33 I.L.M. 1125 (entered into force 1 January 1995), Art. 8(6).

[68] Meernik, King & Dancy, *supra* note 8 at 691-692, 698-700 (Judges hailing from France, the UK and the United States, states which most strongly conceived of Serbs as the aggressor states, were not more likely than judges from other countries to sentence convicted Serbian war criminals to longer sentences).

[69] Bertjan Verbeek, "International Organizations: The Ugly Duckling of International Relations Theory?" in Bob Reinalda & Bertjan Verbeek, eds., *Autonomous Policy Making by International Organizations* (London: Routledge, 1998) 11 at 22; John Mathiason, *Invisible Governance. International Secretariats in Global Politics* (Bloomfield, CT: Kumarian Press, 2007) at 226-235.

particular regime or region in which they operate.[70] The notion of organizational self-interest advanced here is not focused on the mere survival of an organization, but instead on its non-material interests in terms of ideational commitments, reputation, and effectiveness.[71]

The most prominent strategy in this vein is that of a court acting in accordance with public expectations, with the long-term of objective of improving its standing in a community, and thereby enhancing compliance with its judgements.[72] This strategy is at the heart of positive political theory, which asserts that "the actions of courts are fundamentally 'political' in that they must anticipate the possible reactions of other political actors in order to avoid their intervention."[73] More so than domestic courts, ICs remain fragile institutions in many respects and their authority may be diluted or resisted through non-use of their jurisdiction, non-participation in their proceedings, non-compliance with or legislative override of their decisions, and recontracting of their statutes. In the context of ICs, positive political theory therefore predicts that international judges will be especially sensitive to the political constraints with which they are faced, and thus will be responsive to the interests of relevant political actors, namely those actors whose compliance or participation they seek to secure and whose intervention they seek to avoid.

Although scholars have studied the political constraints on both the ICJ[74] and the WTO DSB,[75] scholars have most often used the strategic model in studies of the ECJ. These studies have indicated that strategic considerations related to political constraints play a role in judicial decision-making. These scholars note that the ECJ is constrained by the EC's broader institutional structure, thus ensuring that the delegation of authority to the ECJ remains within the interests of state members. They have argued that the ECJ is faced with two principal political constraints: the threat of legislative override through treaty revision or the adoption of secondary rules by member states and the threat of non-compliance by the states involved in a particular case. In order to maintain its credibility and legitimacy, the ECJ purportedly

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[70] Walter Mattli & Anne-Marie Slaughter, "Revisiting the European Court of Justice" (1998) 52 Int'l Org. 177 at 180; Alter, *Establishing*, *supra* note 6 at 45-46.

[71] Hans Mouritzen, *The International Civil Service: A Study of Bureaucracy: International Organizations* (Brookfield, VT: Dartmouth Publishing Company, 1990) at 12-14; Bob Reinalda & Bertjan Verbeek, "Autonomous Policy Making by International Organizations: Purpose, Outline and Results" in Reinalda & Verbeek, eds., *supra* note 69, 1 at 7; Bob Reinalda & Bertjan Verbeek, "Patterns of Decision Making within International Organizations" in Reinalda & Verbeek, eds., *Decision Making within International Organizations* (London: Routledge, 2004) 231 at 234.

[72] Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998) at 163-177.

[73] Garrett & Weingast, *supra* note 6 at 200.

[74] Jonathan Charney, "Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance" in Lori Damrosch, ed., *supra* note 63, 288; Eric A. Posner, "The Decline of the International Court of Justice"(John M. Olin Program in Law and Economics Working Paper No. 233, University of Chicago Law School, 2004), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629341> [Posner, "Decline"].

[75] Richard H. Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints" (2004) 98 Am. J. Int'l L. 247.

anticipates the reactions of powerful states to its decisions, chooses not to rule against their interests and decides cases among a range of outcomes acceptable to them. Through quantitative analysis of ECJ case-law and government and EC legal briefs, these scholars have concluded that ECJ decision-making is systematically influenced by political constraints.[76]

There are however a number of problems with the existing literature on the strategic model of decision-making in ICs. First, much of this literature tends to overstate the importance of the political constraints confronting ICs. Recontracting and override are generally unlikely in an international legal context where the processes for the adoption of secondary legislation and for treaty revision are costly, complex and lengthy.[77] This is all the more true when ICs interpret foundational treaties such as the UN Charter and when they adjudicate on the basis of norms of customary international law—situations where the odds of overriding by states are very low. In many ways, the context in which most ICs operate thus resembles that of a constitutional court, where the difficulty of amending a constitution makes it unlikely that an unpopular decision could trigger recontracting or override.[78] It is not surprising therefore that strategic scholarship finds that threats of non-compliance are more influential than threats of override.[79] But the threat of non-compliance may also be overestimated given that there are numerous examples of states complying with decisions of ICs that they do not agree with.[80] Ultimately, the relevance of the political factors that constrain ICs varies with the credibility of threats of override and non-compliance, which in turn depend on the formal features of ICs and regimes[81] as well as the sovereignty costs implied by particular decisions or regime issues.[82]

Second, this literature presumes that international judges are able to obtain perfect and complete information about the reaction and possible response of relevant actors.[83] However, the ability of international judges to ascertain whether state interests are threatened by a particular decision is not always obvious. This is especially the case in relation to decisions that deal with the interpretation and creation of international law:

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[76] Garrett & Weingast, *supra* note 6; Garret, *supra* note 6; Garrett, Kelemen & Schulz, *supra* note 6; Clifford J. Carrubba, Matthew Gabel & Charles Hankla, "Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice" (2008) 102 Am. Pol. Sci. Rev. 435.
[77] Mark Pollack, "Delegation, Agency, and Agenda Setting in the European Community" (1997) 51 Int'l Org. 99 at 119-120; Darren G. Hawkins *et al.*, *Delegation and Agency in International Organizations* (Cambridge: Cambridge University Press, 2006) at 312.
[78] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) at 24-25 [Stone Sweet, *Governing with Judges*]; Segal & Spaeth, *supra* note 25 at 106-107.
[79] Carrubba, Gabel & Hankla, *supra* note 76.
[80] Karen J. Alter, "Who Are the 'Masters of the Treaty'?: European Governments and the European Court of Justice" (1998) 52 Int'l Org. 121 [Alter, "Masters of the Treaty"] (pointing to the ECJ's decisions on the supremacy and direct effect of European Community law) ; Alter, "Agents or Trustees?", *supra* note 12 at 48-54.
[81] Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004) at 23-27.
[82] Alvarez, *supra* note 14 at 479.
[83] Segal & Spaeth, *supra* note 25 at 106.

> The legal impact of a decision on the disputants and, even more, on the international community, may not become evident for a considerable period of time in part because of the absence of a direct reference to the decision or any acknowledgement that it is being complied with by the parties to the decision or by others.[84]

Strategic scholars themselves thus acknowledge that threats of override and non-compliance are more credible when governments are litigants and when other governments signal their support for a particular government.[85]

Third, this literature generally assumes that ICs pursue one particular kind of strategy, one that is aimed at avoiding sanctions from states and gaining state acquiescence to their decisions. But ICs may employ an incremental approach to extending their authority or powers that does not raise the spectre of override or non-compliance.[86] They may also engage in forward-looking behaviour not because of the fear of punishment, but "in order to enhance their own reputations for fairness, their own flexibility in present and future cases, and the centrality of constitutional review as a mode of governance."[87] Conversely, they may also consider that it is preferable for their legitimacy and credibility to rule against powerful interests.[88] Most importantly, international judges may not see states as the only audience relevant to their credibility, authority and effectiveness. Like many IOs, the crucial actors for an IC are not simply its creators, but also its clients, sympathizers, opponents and rivals.[89] Many scholars have thus argued, for instance, that the ECJ's credibility and effectiveness depends on its standing with national courts and therefore that ECJ judges "have recognized an audience beyond the parties to the case at hand and have crafted their opinions to encourage additional cases by appealing to both material interests and professional ideals of prospective litigants or referring courts."[90] As such, depending on the context and their own strategic thinking, international judges may be concerned with a variety of target audiences, including particular non-state constituencies, such as domestic interests, epistemic communities, and transnational advocacy networks.

Accordingly, while the strategic model remains convincing in many respects, it must be adapted to take into account the strategic objectives of international judges and the particular institutional context in which they pursue these objectives. Of special importance will be the actors that an international judge identifies as a key constituency for extending the authority, standing, independence and influence of the judge's specific IC.

My qualitative research in the ICTY and ICTR has revealed that many judges are most concerned with the objectives of ensuring justice for victims

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[84] Alvarez, *supra* note 14 at 463.
[85] Carrubba, Gabel & Hankla, *supra* note 76.
[86] Helfer & Slaughter, *supra* note 5 at 308, 314-317.
[87] Stone Sweet, *Governing with Judges*, *supra* note 78 at 90.
[88] Alter, "Agents or Trustees?", *supra* note 12 at 42-43.
[89] Mouritzen, *supra* note 71 at 10-11.
[90] Damian Chalmers, "Judicial Preferences and the Community Legal Order" (1997) 60 Mod. L. Rev. 164 at 173-174; Helfer & Slaughter, *supra* note 5 at 308-312.

and facilitating the process of reconciliation in the Balkans and the Great Lakes region.[91] They have moreover pursued these objectives in highly politicized environments where they have often been accused by key constituencies of being partial to the interests of some and unresponsive to those of others.[92] As such, the audiences that ICTY and ICTR judges are most likely to care about are the various ethnic groups that are directly connected to the conflicts at the centre of their respective subject-matter jurisdictions. Official statements released by governmental and non-governmental spokespeople and media coverage ensure that ICTY and ICTR judges are aware that these ethnic groups are interested in case outcomes, particularly the conviction rates and average sentences of members of their groups and of those of other groups.[93] I therefore conceive of these constituencies as the true Beneficiaries of the mandate of Trusteeship with which ICTY and ICTR judges are endowed and expect that they will be responsive to the interests of these Beneficiaries.

The situation in the former Yugoslavia is one where the ICTY has to be responsive to the interests of multiple Beneficiaries: Serbs, Croats, Muslims, and Kosovar Albanians. Each of these groups has victims and accused persons in cases before the ICTY; their views matter equally in the overall process of reconciliation, and their cooperation is required in order for the ICTY to function.[94] In addition, each has a government or other representatives who voice their displeasure with specific decisions. I posit therefore that ICTY judges will be equally responsive to the preferences of all four groups as this is most likely to enhance the ICTY's standing and effectiveness, and to foster the process of reconciliation in the region. Accordingly, ICTY judges will convict defendants from all four groups at a relatively similar rate and will, *ceteris paribus*, hand them relatively similar sentences.

The situation in Rwanda is wholly different as the ICTR has essentially

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[91] These objectives are also frequently referred to in judgements: see e.g. *Prosecutor v. Anton Furundija*, IT-95-17/1-T, Judgement (10 December 1998) at para. 288 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <http://www.icty.org/>; *Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-T, Trial Judgement (1 December 2003) at para. 945 (International Criminal Tribunal for Rwanda, Trial Chamber), online: <http://www.ictr.org/>.

[92] James Meernik & Kimi King, "The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis" (2003) 16 Leiden J. Int'l L. 717 at 730-731; Ralph Zacklin, "The Failure of Ad Hoc International Tribunals" (2004) 2 J. Int'l Crim. Just. 541; Emily Haslam, "Law, Civil Society and Contested Justice at the International Criminal Tribunal for Rwanda" in Marie-Bénédicte Dembour & Tobias Kelly, eds., *Paths to International Justice* (Cambridge: Cambridge University Press, 2007) 57.

[93] Based on my time working in the Trial Chambers of the ICTR and the Appeals Chamber of the ICTY, I know that judges and staff members at both the ICTR and the ICTY receive regular summaries of press coverage of their respective courts as well as security advisories that refer to the security risks associated with certain case outcomes in particular regions.

[94] An alternative hypothesis is that ICTY judges might be inclined to judge Serbs more harshly, as they are generally acknowledged in the West as the aggressors in the conflict. However, a past study shows that judges hailing from France, the UK and the United States, states which most strongly conceived of Serbs as the aggressor states, were not more likely than judges from other countries to sentence convicted Serbian war criminals to longer sentences: see Meernik, King & Dancy, *supra* note 8 at 691-692, 698-700.

only one Beneficiary: the current government of Rwanda, which is composed of the Tutsis and Hutu moderates who came to power in the aftermath of the Rwandan genocide. The Rwandan government initially called for the creation of the ICTR; the ICTR could not function without its cooperation in providing access to victims, witnesses and crime locations within the country. The ICTR has not tried any Tutsis or former RPF members for crimes they are alleged to have committed in responding to the genocide. At the same time, the Rwandan government has also been one of the ICTR's most vocal critics, censuring the ICTR for acquittals or low sentences and requesting the right to try certain accused persons itself. Finally, the reconciliation process is essentially run by the Rwandan government itself, with heavy emphasis placed on the prosecution of Hutu génocidaires and the elimination of the relevance of ethnicity within society.

In this context, I posit that since ICTR judges will be more responsive to the preferences of the Rwandan government than any other constituency, a strategic model predicts that *ceteris paribus* they will therefore convict defendants at a higher rate and hand down higher sentences than those at the ICTY.

I derive the following two hypotheses from this discussion:

Strategic Hypothesis 1: All other variables being equal, the conviction rates and average sentences at the ICTY will be relatively similar for Serb, Croat, Muslim, and Kosovar Alabanian defendants. (SH1)

Strategic Hypothesis 2: All other variables being equal, the conviction rates and average sentences for defendants at the ICTR will be higher than those for defendants at the ICTY. (SH2)

The Interaction of Attitudes and Strategies

In developing the attitudinal and strategic hypotheses, I have emphasized the importance of recognizing the heterogeneous nature of the international judiciary. International legal scholars tend to stress that international judges are part of an epistemic community that generally favours an internationalist set of preferences.[95] Given their varying professional backgrounds, it is far from obvious that international judges are unanimous in their attitudes and values. Meanwhile, international relations scholars often assume that ICs are monolithic institutions that develop uniform preferences in response to external dynamics and pressures.[96] However, the multiple objectives of an IC and its multifaceted strategic landscape can give rise to differences between international judges on the preferences and strategies that should guide an IC in its decision-making.

Far from amounting to a process governed by the preferences and interests of unitary institutional actors, I argue that judicial decision-making is driven, in significant part, by variations in the ideas and interests of

[95] See e.g. Terris, Romano & Swigart, *supra* note 20 at 63. International lawyers are also conceived as being part of such a community: David Kennedy, "The Disciplines of International Law and Policy" (1999) 12 Leiden J. Int'l L. 9 at 83.

[96] Mattli & Slaughter, *supra* note 70 at 187.

international judges. In doing so, I take an eclectic position regarding the attitudinal-strategic debate, acknowledging that ideas and interests will matter on different terms and in different contexts. In particular, I predict that attitudinal factors are more likely to matter in decisions on issues where the preferences of judges are salient and the preferences of other actors are not; for instance, the aspects of decisions that act as precedents in ways that are not obvious to the actors most concerned with the legal issue resolved by this precedent. Conversely, I predict that strategic factors will matter more in decisions where the interests of relevant actors are obvious and where judges have no or few substantive commitments; for instance, the aspects of decisions that deal with the specific outcome that is most relevant to the parties of a case.[97]

In the context of the ICTY and ICTR, a confluence of factors determines the salience of the attitudinal and strategic models in any particular decision. While most judges at these institutions will have set ideas about the interpretation and application of international law, few judges will have biases regarding case outcomes in specific cases.[98] On the other hand, victim groups and their governments will have strong preferences about the latter and weak preferences, if any, regarding the former.[99] This enables judges to behave attitudinally with respect to issues concerning the interpretation and application of international law (as posited by AH1, AH2, and AH3) and to behave strategically with respect to case outcomes (as posited by SH1 and SH2).

III. Empirical Analysis

1. *Data, Coding, and Variables*

Attitudinal Hypotheses: AH1, AH2, and AH3

In order to test the relationship between the professional backgrounds of judges and their attitudes about international law, I created an original dataset comprising all of the judgements and decisions issued by the Appeals Chambers of the ICTY and ICTR from their inception to 1 June 2009 (N=58). Unlike the Trial Chambers, the Appeals Chambers exhibit the features, generally associated with appellate-level courts at the domestic level, required for application of the attitudinal model: judicial independence, lack of aspiration for higher office, finality of decisions and, to

[97] In fact, Alter has argued that the ECJ, playing off differences in time horizons between different actors in a regime, consciously pursues a strategy of rendering decisions where the case outcomes favour the interests of powerful states, but which nonetheless extend the reach of the ECJ's authority and powers in the long term in ways that are not obvious to states. See Alter, "Masters of the Treaty", *supra* note 80 at 130-133.

[98] See *supra* note 57 and accompanying text.

[99] As for states that might be concerned with decisions that expand the scope of application of international humanitarian law, their limited engagement with the *ad hoc* international criminal tribunals does not enable them to monitor the sovereignty costs of decisions, nor to signal their preferences in relation to these decisions.

some extent, docket control.[100] Due to the limited sample size, I decided to restrict my testing to the voting behaviour of judges who have participated in least 10% of these judgements and decisions. Without this restriction, the voting behaviour of certain judges might be established on the basis of their participation in one or two judgements only.

I coded the independent variable of the professional backgrounds of judges on the basis of the public biographies of judges. Consistent with earlier work,[101] I assigned judges to a single category based on the prominence of their former position as diplomats, academics and judges/practitioners. Of course, peak coding may not be the most appropriate way of capturing the professional background of international judges and as further work develops in this area, other coding paths may prove more useful.

I coded for two dependent variables that feature prominently in broader debates regarding the proper scope of international law.[102] The first variable, customary international law, captures the number of times a judge has recognized a norm of customary international law. A norm of customary international law results from the constant and uniform practice of states and their belief that this practice amounts to law.[103] Although such norms are meant to reflect state practice and opinion, the methodology and reasoning employed by international judges for the identification and recognition of these norms is often criticized as lacking in consistency and rigour and supporting expansive interpretations of international law. International judges at the ICTY and ICTR, in particular, have been criticized for vagueness in methodology and for creating rather than discovering customary international law.[104]

The second variable, inherent powers, captures the number of times a judge has recognized that his or her IC possessed inherent powers. An application of the interpretive doctrine of effectiveness, the concept of inherent powers enables an IC to claim powers not expressly granted to it by statute, but which are necessary to guarantee the full effect of their statute or which are essential to the performance of their duties.[105] I then added these two variables together and adjusted the sum in accordance with a judge's level of participation in Appeals Chamber judgements to create an International Activism score. A high number in this score suggests that a judge is an international activist while a low number suggests that a judge is a statist conservative.

This dataset also captures three control variables: a judge's legal system

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[100] This follows the approach set by Segal & Spaeth, *supra* note 25 at 92.
[101] Fred J. Bruinsma, "Judicial Identities in the European Court of Human Rights" in Aukje van Hoek *et al.*, eds., *Multilevel Governance in Enforcement and Adjudication* (Antwerp, Belgium: Intersentia, 2006) 203.
[102] Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007) at 284-285; Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002) at 72.
[103] Boyle & Chinkin, *ibid.* at 278-285.
[104] Zahar & Sluiter, *supra* note 40 at 79-105.
[105] Klabbers, *supra* note 102 at 67-73.

of origin, which tests an alternative account of the formation of attitudinal preferences; a judge's home state, which tests both the attitudinal model of appointment signalling and the strategic model of personal self-interest; and whether a judge's votes were in the ICTY or ICTR Appeals Chamber, which tests the strategic model of organizational self-interest and the period of their tenure at the Appeals Chamber.

In addition to the above, I also captured the rates at which judges issued dissenting and separate opinions, which I combined to produce an "individuation" score, and the subjects on which they issued dissents. These two variables promise to provide a better picture of the dynamics of decision-making at the ICTY and ICTR Appeals Chambers and thus enable me to identify judges whose voting behaviour may not reflect their individual preferences, but rather those of the majority in a given case.

Strategic Hypotheses: SH1 and SH2

In order to test the relationship between the ethnicity of accused persons and the outcomes of their cases, I built on and modified the dataset developed by James Meernik, Kimi King, and Geoff Dancy on sentencing by ICTY Trial Chambers[106] and replicated it for sentencing by ICTR Trial Chambers. This dataset is comprized of the cases of all accused persons for whom a judgement by a Trial Chamber has been rendered from the inception of the ICTY and ICTR to 1 June 2009 (N=126). In addition, I created an original dataset comprized of the cases of all accused persons for whom a judgement by an Appeals Chamber has been rendered from the inception of the ICTY and ICTR to 1 June 2009 (N=75).

In both datasets, I coded the independent variable of ethnicity for each accused as Hutu, Serb, Croat, Kosovar Albanian, Muslim and other.

In the trial chambers dataset, I coded the following five dependent variables, capturing the most relevant aspects outcomes of the cases of each individual accused: their plea, their guilt or innocence, the severity of their sentence (in number of months, with 999 representing a life sentence), the number of counts for which they have been indicted and convicted, and the crime(s) for which they have been convicted (war crimes, crimes against humanity and genocide).

In the appeals chamber dataset, I coded the following four dependant variables, capturing the most relevant aspects of the outcomes of the cases of each individual accused: whether the Appeals Chamber overturned Trial Chamber's findings relating to the guilty conduct of an accused and to sentencing factors and whether the Appeals Chamber changed the sentence and by how much.

Both datasets also capture control variables concerning a convicted person's position in military and civilian hierarchies[107] and the presence of

[106] Meernik, King & Dancy, *supra* note 8.

[107] Accused persons were coded 1 if they held top-level civilian and military positions, 2 if they held mid-level civilian and military positions and 3 if they held low-level civilian and military positions. An accused with a high level position might be expected to receive a harsher sentence

mitigating and aggravating factors.[108] Both of these test the influence of factual variables on sentencing.[109]

Results and Discussion

Attitudinal Hypotheses: AH1, AH2, and AH3

Table 1 presents the results regarding the relationship between the professional backgrounds of judges (independent variable) and their international activism scores (dependent variable) in their voting behaviour in judgements at the ICTY and ICTR Appeals Chambers.

Judge	Former Position	International Activism Score
MUMBA	Judge/Practitioner	91.8
WEINBERG DE ROCA	Academic	67.7
NIETO-NAVIA	Academic	58.0
GÜNEY	Diplomat	46.7
SCHOMBURG	Judge/Practitioner	45.6
POCAR	Academic	42.3
JORDA	Judge/Practitioner	32.2
SHAHABUDDEEN	Judge/Practitioner	21.8
VOHRAH	Judge/Practitioner	19.3
MERON	Academic	17.6
VAZ	Judge/Practitioner	13.6
DAQUN	Diplomat	4.5

Table 1: Attitudinal Data for ICTY and ICTR Appeals Chambers Judges having participated in at least 1% of Judgments.

There was little association in these results between the former positions of judges and their international activism scores. The correlation between the two variables in the sample in table 1 was not very significant, $r=0.29$, $p<0.50$. These results thus provide little support for any of the attitudinal hypotheses developed earlier.

However, given that these results did not track my qualitative research regarding the attitudinal commitments of certain judges, I decided to refine my sample further by limiting it to judges who had participated in 20% of judgements and with individuation rates of at least 20%.[110] The first

than an accused with a low level position.

[108] Mitigating and aggravating factors are taken into account by judges in the determination of a convicted person's sentence. The most common mitigating factors include a guilty plea; cooperation with the Prosecutor; expression of remorse; voluntary surrender; good conduct prior to the commission of crimes; any assistance given to victims; personal circumstances, including health, age, and family situation; and good conduct after the commission of crimes. The most common aggravating factors include breach of trust; discriminatory intent or zeal; the vulnerability, trauma, or number of victims; and bad conduct after the commission of crimes.

[109] Given the findings of previous studies (Meernik, King & Dancy, *supra* note 8 at 692-694, 698-700), I did not deem it necessary to test the relationship between individual judges and case outcomes. See also *supra* note 8, *supra* note 11 and accompanying text.

[110] The only judge to have an individuation rate of at least 20% to be excluded from this sample is Judge Güney, as his individuation rate was artificially increased by his identical dissents on

refinement provides more reliability to my results by ensuring that judges are coded on a greater number of decisions, and eliminating the role played by chance in the assignment of judges to particular cases. The second refinement ensures that the data is limited to those judges who have strong preferences and have acted on those preferences in their voting.[111] These results are shown in table 2.

Judge	Former Position	International Activism Score
WEINBERG DE ROCA	Academic	67.7
NIETO-NAVIA	Academic	58.0
SCHOMBURG	Judge/Practitioner	45.6
SHAHABUDDEEN	Judge/Practitioner	21.8
VOHRAH	Judge/Practitioner	19.3
MERON	Academic	17.6
DAQUN	Diplomat	4.5

Table 2: Attitudinal Data for ICTY and ICTR Appeals Chambers Judges having participated in 20% of Judgments and with Individuation Rates of at least 20%.

The correlation between the two variables in the sample in table 2 was significant, $r=.67$, $p<.50$. In fact, the results in table 2 almost perfectly track the attitudinal hypotheses developed earlier, as former academics have high international activism scores (AH1), former diplomats have lower international activism scores (AH2), and former judges or practitioners are somewhere in the middle (AH3). The only outlier in these results is Judge Meron, who has a very low international activism score. However, this is consistent with the view that Judge Meron, like many American international law academics, has adopted a more conservative approach to the development of customary international law.[112] Indeed, if one removed Judge Meron from the sample, the correlation between these two variables rose to $r=0.91$.

Notwithstanding the results of this second sample, my results as a whole provide modest support for my attitudinal hypotheses. In my current dataset, the limited sample size does not eliminate the role played by chance in the assignment of judges to particular cases. Further work along these lines on the ICTY and ICTR Appeals Chambers should capture the hundreds of interlocutory decisions issued by the Appeals Chamber, and not just final judgements. In addition, as the example of Judge Meron makes clear, the variable of professional background is probably not linked to attitudinal commitments as straightforwardly as the literature often assumes.

More importantly, my research on individuation in the Appeals Chamber reveals that issues relating to customary international law and

issues relating to cumulative convictions.

[111] In a way, this eliminates more passive judges in favour of focusing on more active judges. Although this change that may overstate the relevance of the individual-level approach, it makes it possible to focus on attitudinal variables affecting the decision-making of certain judges.

[112] Wessel, *supra* note 31 at 395.

implied powers have very infrequently been the focus of dissents. In fact, I only coded two dissents (less than 4%) centring on a disagreement relating to the interpretation of international law.[113] On the other hand, I coded 21 dissents (close to 41%) focusing on issues relating to the proper scope of liability and the fairness to the accused. This suggests that the most important attitudinal issue at the ICTY and ICTR is not so much the role of international law with regard to states, but rather the role of international criminal law with regard to accused persons.

What is more, these two sets of issues cut across each other in ways that may contradict my attitudinal hypotheses. While I expected academics to be international activists, their concern for the fair trial rights of an accused in an individual case might also lead them to be more conservative on issues where an expansion of international law is likely to encroach on those rights.[114]

Nonetheless, my results do show that the attitudes of individual judges in the Appeals Chamber are largely consistent across cases and, most tellingly, across both of the ICTY and ICTR. This is clear from the top seven ranked judges in the ICTY and ICTR Appeals Chamber in international activism rankings and individuation rankings, as seen below in tables 3 and 4.

Judge	International Activism Ranking (ICTY)	International Activism Ranking (ICTR)
NIETO-NAVIA	1	2
JORDA	2	1
POCAR	3	4
GÜNEY	4	6
SHAHABUDDEEN	5	5
VOHRAH	6	2
MERON	7	7

Table 3 – Rankings of Top Seven Ranked ICTY and ICTR Appeals Chamber Judges as per their International Activism Scores.

[113] See Dissent of Judge Schomburg in *Prosecutor v. Galić*, IT-98-29-A, Appeal Judgement (30 November 2006) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <http://www.icty.org/> [*Galić*]; Dissent of Judge Shahabuddeen in *Stakić*, *supra* note 39.

[114] See e.g, the dissents of Judge Pocar, a former academic, against the Appeals Chamber's power to enter a conviction or increase a sentence on appeal in *Galić, ibid.*; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeal Judgement (26 May 2003) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: <http://www.ictr.org/>; *Prosecutor v. Semanza*, ICTR-97-20-A, Appeal Judgement (20 May 2005) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: <http://www.ictr.org/>.

Judge	Individuation Ranking (ICTY)	Individuation Ranking (ICTR)
SHAHABUDDEEN	1	2
SCHOMBURG	2	4
VOHRAH	3	7
DAQUN	4	1
SNIETO-NAVIA	4	3
MERON	6	5
WEINBERG DE ROCA	7	6

Table 4 – Rankings of Top Seven Ranked ICTY and ICTR Appeals Chamber Judges as per their Individuation Scores.

It is also of interest to report the tendency for judges to have higher customary international law scores in the ICTY than in the ICTR. A qualitative review of ICTY and ICTR appeal judgements reveals that this is largely the result of the greater role that war crimes have played in the case-law of the ICTY as opposed to the ICTR. Many of the ICTY's most significant instances of the application and interpretation of customary international law have related to war crimes and international humanitarian law.[115] This, in turn, results from the higher number of different types of war crimes that were committed during the conflict in the former Yugoslavia as compared with the crimes committed during the conflict in Rwanda, and the greater emphasis which was placed on customary international law in the ICTY Statute as compared to the ICTR Statute.[116]

While my results only provide modest support for my posited independent variable (professional background) and none of the control variables (country of origin and legal system of origin)[117] yielded significant results in the aggregate, my results do demonstrate that judges have different attitudes that affect their judicial behaviour. With an admittedly limited sample, my results suggest that professional background may affect a judge's policy preferences, although this will not occur in a necessarily straightforward manner given the potential for conflicting preferences in certain cases (*e.g.*, international activism versus a concern for fair trial rights) and for the role of other attitudinal influences (*e.g.*, professional background versus particular ideologies or currents among certain groups of academics). In any case, these results and this discussion certainly evince that applications of the attitudinal model show promise for understanding the decision-making of ICs.

[115] Danner, *supra* note 11.
[116] Indeed, in addition to the Art. 2 jurisdiction over grave breaches of the *Geneva Conventions* provided, Art. 3 of the *ICTY Statute*, *supra* note 10, provides that it "shall have the power to prosecute persons violating the laws or customs of war." The equivalent provision of the *ICTR Statute*, *supra* note 10, is Art. 4, but it only grants jurisdiction over violations of common article 3 of the *Geneva Conventions*.
[117] I do not report these results here, but they are included in the quantitative data for this article.

Strategic Hypotheses: SH1 and SH2

Table 5 presents the results regarding the relationship between the ethnicity of accused persons (independent variable) and the outcomes of their cases (dependent variable) in judgements rendered by the Trial Chambers of the ICTY and ICTR.

	Serb	**Croat**	**Muslim**	**Kosovar**	**Hutu**
Number of Defendants	51	15	9	6	42
Conviction Rate	93.9%	92.3%	77.8%	33.3%	82.9%
Conviction Rate per Count (without acquittals)	54.0%	50.4%	42.3%	25.0%	44.8%
Average Sentence	220.9	198.4	93.4	114	676.1
Median Sentence	240	180	60	114	999
Percentage of Convictions for Genocide	5.9%	0.0%	0.0%	0.0%	82.9%
Average Sentence for Genocide	384	NA	NA	NA	676.1
Percentage of Convictions for Crimes Against Humanity	82.3%	66%	0.0%	0.0%	74.3%
Average Sentence for Crimes Against Humanity	230.4	224.4	NA	NA	676.1
Percentage of Convictions for War Crimes	66.7%	80.0%	77.8%	33.3%	11.4%
Average Sentence for War Crimes	227.2	199.5	93.4	114	830.25
Average Sentence for Hierarchy Level 1	205.2	202.5	NA	72	871.2
Average Sentence for Hierarchy Level 2	248	540	37.5	NA	513.5
Average Sentence for Hierarchy Level 3	180.9	123.6	168	156	434.6
Number of Aggravating Factors	2.06	1.1	2	2	1.7
Number of Mitigating Factors	2.4	0.6	3.6	1.5	0.8

Table 5 – Case Outcomes in the ICTY and ICTR Trial Chambers for Accused Persons by Ethnic Group (without guilty pleas).

These results provide tentative support for SH1 and strong support for SH2. With respect to SH1, the results demonstrate that the case outcomes for Serbs and Croats are remarkably similar in terms of conviction rates and conviction rates per count. Although Serbs tend to have received harsher

sentences in general than Croats, the results suggest that this may have more to do with the types of crimes for which Serbs have been convicted (as more convictions for genocide and crimes against humanity have been entered against Serbs than against Croats) and their positions in relevant hierarchies (the average hierarchy level (from 1 to 3) of convicted Serbs is 2.04 as opposed to 1.78 for Croats) than any sustained bias against them. As for Muslims and Kosovars, while the results appear to indicate that they have received preferential treatment from the ICTY trial chambers, the dataset is too limited to draw any reliable conclusions.

When Muslims and Kosovars were excluded from the sample in table 5, the correlation between ethnicity (Serb, Croat) and sentence was not significant, $r=.01$, $p<.50$. This finding of an absence of relationship between ethnicity and sentencing at the ICTY supports SH1 and is consistent with the findings of earlier studies.[118] In the end, these findings suffer from an important methodological weakness in that they may not adequately capture the gravity of the underlying conduct for which defendants have been charged and convicted. Other studies have reported that different factors relating to the gravity of the offence, most notably the number of offences and the rank of the accused are strong predictors of the length of sentences.[119] Future work could therefore compare sentences for killings by Croats with sentences for killings by Serbs as opposed to comparing sentences in terms of similar types of crimes. On the other hand, a focus on the underlying conduct may obscure the fact that strategically relevant constituencies and actors consider that almost all of the crimes committed against them or the groups with they are affiliated in cases before the ICTY and the ICTR are grave and should warranting the harshest sentences available under law.

With respect to SH2, the results show that while Hutu accused persons have lower conviction rates, either in general or by count, than Serbs or Croats, they have received much harsher treatment from ICTR trial chambers in terms of their overall sentences, the types of crimes for which they were convicted and their positions in relevant hierarchies. Indeed, the correlation between ethnicity (Serb, Croat, Hutu) and average sentence in the sample in table 5 was significant, $r=.54$, $p<.50$. When the sample was divided between Serbs and Croats on one hand and Hutus on the other, the correlation rose to $r=.58$. Of course, these results could in large part be explained by the greater gravity of the crimes committed by Hutus during the Rwandan genocide, a point which as noted above could be further explored by comparing the underlying conduct of convicted persons. However, although life sentences are permitted in both tribunals, only one convicted person has ever received a life sentence at the ICTY.[120] Seventeen accused persons—close to 46% of all convicted persons—have received life sentences at the ICTR. Given the overall seriousness of the crimes committed by Serbs, Croats and Hutus on

[118] Meernik & King, *supra* note 92 at 747.
[119] See, *e.g.*, Barbara Hola, Alette Smeulers & Catrien Bijeveld, "Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice" (2009) 22 Leiden J. Int'l L. 79.
[120] *Galić*, *supra* note 113.

the whole, it seems unlikely that differences in the underlying conduct of convicted persons could fully account for this discrepancy. Strategic considerations appear to be playing a role.

In order to further isolate the role played by the strategic context in explaining case outcomes at the ICTY and ICTR, it is of interest to look at the relationship between these two variables in the decision-making of the Appeals Chamber, which is presented in table 6. Since judges in the Appeals Chamber make decisions on appeal after key constituencies have expressed their views regarding the sentences handed out by the Trial Chamber, it is reasonable to expect that strategic considerations will have greater salience at the appellate level.

	Serb	**Croat**	**Muslim**	**Kosovar**	**Hutu**
Number of Defendants	30	13	7	2	27
Average Sentence	269.3	149	81.4	78	679.9
Median Sentence	240	120	42	NA	999
Average Sentence when changed by AC	319.36	124.8	22	NA	533.3
Rate of increase of sentence at AC	13.8%	7.7%	0.0%	0.0%	14.3%
Average increase of sentence at AC	189.0%	180%	NA	NA	224.2%
Rate of decrease of sentence at AC	31.0%	30.8%	42.8%	0.00%	23.8%
Average of decrease of sentence at AC	-17.2%	-47%	-50%	NA	-46.4%
Average change of sentence when changed by AC	46.3%	-1.6%	-50%	NA	55.1%[121]
Rate of increase of guilty conduct at AC	20.6%	7.7%	0.0%	0.0%	14.3%
Rate of decrease of guilty conduct at AC	37.9%	69%	42.8%	0.0%	47.6%

Table 6 – Case Outcomes in the ICTY and ICTR Appeals Chambers for Accused Persons by Ethic Group.

The results in table 6 provide little support for SH1, but the data is too limited, save for cases involving Serb accused persons, to draw any reliable conclusions. On the other hand, a comparison of case outcomes for Serbs and Hutus yields strong support for SH2. Once again, results for accused from the other three ethnic groups have been excluded due to the low sample size. When the sample is limited to these two groups only, the correlation between ethnicity and severity of sentence is significant, r=.67, p<.50.

[121] This percentage rises to 69.5% if one excludes the *Kajelijeli* Appeals Judgement, where the Appeals Chamber reduced the convicted person's sentence by a significant margin as a result of the violations of his human rights: *Prosecutor v. Kajelijeli*, ICTR-98-44A, Appeal Judgement (23 May 2005) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: <http://www.ictr.org/>.

In sum, the results presented in table 5 provide only tentative support for SH1 in terms of the outcomes of cases involving Serbs and Croats. Ethnicity does not appear to have been an independent factor in the sentencing of convicted individuals at the ICTY. There are some observable variations between ethnic groups, however, and a variable that more accurately captures the gravity of the charged conduct may provide stronger support for SH1. The results in tables 5 and 6 provide strong support for SH2 in terms of the sentences given to Hutu convicted persons (but not in terms of conviction rates). Convicted Hutus are on average given more severe sentences than Serbs who have been convicted for the same offence.

Of course, my findings cannot prove that any strategic considerations actually influence the sentencing decisions of judges at the ICTY and ICTR in individual cases, and cannot exclude the possibility that such decisions reflect the proper assessment of the facts and sentencing determinants in these cases. It is important to note that the same factors in sentencing must be considered by judges at the ICTY and ICTR; these factors include the sentencing practice that has developed in the tribunals' respective case-law[122] as well as the general practice regarding prison sentences in the former Yugoslavia or Rwanda.[123] But to the extent that these factors affect sentencing practice, they can in fact be seen as institutionalized expressions of the strategic objectives pursued by the tribunals' judges. The former factor ensures consistency between groups in sentencing outcomes within an IC, reflecting SH1. The latter factor expresses the tribunals' underlying strategic goal of ensuring that sentencing outcomes speak to their particular Beneficiary or Beneficiaries.

My findings also do not exclude the possible influence of prosecution bias, whereby prosecution decisions in terms of allocation of resources and indictment may have a significant impact on case outcomes. Nonetheless, the apparent similarity in sentencing outcomes within the ICTY and the significant differences in the sentencing outcomes between the ICTY and ICTR are suggestive. What I have shown with respect to the strategic hypotheses is that there are significant discrepancies between the sentencing practices of the ICTY and ICTR. These practices suggest that differences in sentencing trends may depend, in large part, on the strategic context that judges are faced with, particularly whether they are dealing with one or

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[122] See *Prosecutor v. Krstić*, IT-98-33-A, Appeal Judgement (19 April 2004) at para. 248 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <http://www.icty.org/>.

[123] See International Criminal Tribunal for the former Yugoslavia, *Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev.7 (1996), rule 101(B)(iii); International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, U.N. Doc. ITR/3/REV.1 (1995), rule 101(B)(iii). It should be noted that sentencing practices in Rwanda tend to be harsher than sentencing practices in the former Yugoslavia: see *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Judgement (22 February 2001) at paras. 829-835 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) (summarising the sentencing practices in the former Yugoslavia); *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Judgement (25 February 2004) at paras. 810-811 (International Criminal Tribunal for Rwanda, Trial Chamber) (summarising the sentencing practices in Rwanda).

more Beneficiaries among the constituencies that they identify as most relevant to their work.

IV. Conclusion

This is the first study to quantitatively examine the decision-making of the ICTR Trial Chambers and of the ICTY and ICTR Appeals Chambers.[124] As my article has shown, the similarities and differences between these ICs have created a rich empirical environment rife with natural experiments.

In terms of the attitudinal hypotheses, a comparison of decision-making in the ICTY and ICTR Appeals Chambers demonstrated that the judges in these two ICs displayed stable patterns of judicial behaviour—patterns that reflected their attitudinal commitments regarding international law and their conception of the judicial role. Former academics tended to be more international activist, former diplomats tended to be more statist conservative and former judges/practitioners did not appear to tend towards either preference. The results also suggested that another powerful attitudinal issue to model may be a judge's position on the appropriate emphasis to be placed on the fair trial rights of the accused.

Meanwhile, in terms of the strategic hypotheses, a comparison of decision-making between the ICTY and ICTR suggested that judges within these two ICs evinced divergent patterns of judicial behaviour in terms of sentencing practices, reflecting dissimilarities in their environments. Indeed, the results show that ICTY conviction rates and sentence lengths tended to be relatively similar for Serbs and Croats while Hutus tended to receive harsher sentences than either Serbs or Croats. Although my approach and methodology can serve as a possible template for studying decision-making in other ICs, my results are not necessarily generalisable for a number of reasons. First, my dataset, especially with respect to the attitudinal hypotheses, is too limited to draw any reliable conclusions. As mentioned above, further work on decision-making at the ICTY and ICTR would gain from coding the hundreds of interlocutory decisions produced by the Appeals Chambers, refining the coding approach adopted with respect to professional background and sentencing outcomes and applying multivariate regression analysis for testing the control variables identified above. Nonetheless, my findings are suggestive and are also consistent in many respects with the findings of previous qualitative and quantitative studies of the decision-making of other ICs.[125]

Second, the *ad hoc* international criminal tribunals represent an other-binding, as opposed to self-binding, form of delegation,[126] one that comes

[124] For the first quantitative study of the decision-making of the ICTY Trial Chambers, see Meernik, King & Dancy, *supra* note 8.
[125] See sections II.1 and II.2, above.
[126] Karen J. Alter, "Delegating to International Courts: Self-binding vs. Other-binding Delegation" (2008) 71 Law & Contemp. Probs. 37 at 37. Alter defines "other-binding" delegation as delegation through which "states primarily bind other actors (citizens, businesses, government employees, administrative agencies, police, et cetera) to follow the interpretation and application of legal rules by courts" and "self-binding" delegation as delegation through

with low, or at least unapparent, sovereignty costs for its creators. If the *ad hoc* tribunals were able to significantly develop and broaden the scope of international humanitarian law and international criminal law, it is in part because the sovereignty costs of their decisions were not immediately obvious to concerned states and because these states did not signal their preferences on these issues.[127] This may, in some ways, reflect the particular mandate of international criminal tribunals, which focus on the individual criminal responsibility of individuals. The other-binding nature of international criminal tribunals stands in sharp contrast with the nature of ICs operating in the fields of regional integration, human rights or international trade, where sovereignty costs for many states (and powerful states) are higher and more obvious. Indeed, such ICs exercise judicial oversight authority over state compliance with international provisions implemented at the domestic level. That said, as the experience of the ECJ shows,[128] other ICs have managed to expand the scope of international law in ways that go against state preferences in the long term by deciding case outcomes in accordance with state preferences in the short term.

Third, the individual-level perspective employed in this article may not be appropriate to the study of some ICs. Decisions in ICs are generally made by panels of three or more judges and can thus be influenced by small group dynamics of conformity, deviance and leadership,[129] as well as the norms of collegiality that have been found to structure deliberative decision-making.[130] In addition, the legal support staff found in most ICs play varying roles in the decision-making process,[131] which may be more or less bureaucratic as a result.[132] Finally, ICs can be seen as social systems in which judicial decision-making will be inter-subjective, driven by the socialization of judges and legal staff.[133] Accordingly, as table 7 shows, the individual-level perspective may be more appropriate to the study of certain ICs than others, depending

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which states bind themselves, "subjecting their decision-making authority to judicial oversight so as to enhance their own credibility as a 'rule of law' political system." She notes that while self-binding delegation comes with significant sovereignty costs, other-binding delegation does not.

[127] It is important to note that this observation need not be limited to tribunals with the circumscribed jurisdictional mandate of the ICTY and ICTR. The ICC also has the potential to expand the scope of international humanitarian law and international criminal law in ways that may frustrate the interests of powerful Western states, even if its focus in terms of prosecutions is largely on crimes committed by non-Western leaders in the developing world.

[128] Alter, "Masters of the Treaty", *supra* note 80 at 130-133.

[129] S. Sidney Ulmer, *Courts as Small and not so Small Groups* (Morristown, NJ: General Learning Press, 1971); Lewis Kornhauser & Lawrence Sager, "The One and the Many: Adjudication in Collegial Courts," (1993) 81 Cal. L. Rev. 1; Jonathan Matthew Cohen, *Inside Appellate Courts. The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals* (Ann Arbor: The University of Michigan Press, 2002); Posner, *How Judges Think*, *supra* note 3 at 31-35.

[130] Harry T. Edwards, "The Effects of Collegiality on Judicial Decision-Making," (2003) 151 U. Pa. L. Rev. 1639.

[131] Terris, Romano & Swigart, *supra* note 20 at 203-204.

[132] Elizabeth A. Thompson & Robert S. Thompson, "Research Staff at Appellate Courts: Function, Personalities and Ethical Constraints" in Shimon Shestreet, ed., *The Role of Courts in Society* (Dordrecht: Martinus Nijhoff, 1988) 244; Wolf Heydebrand & Carroll Seron, *Rationalizing Justice: The Political Economy of Federal District Courts* (Albany: SUNY Press, 1990).

[133] Clayton, *supra* note 21 at 32.

on the extent to which decision-making in an IC is essentially individual or organizational in nature.[134]

IC	Level of Collegiality	Level of Bureaucratization	Appropriate Perspective
ICJ	Unanimity rate of 7.5%.[135]	Limited involvement of legal staff in decision-making.[136]	Individual-level
ICTY/ICTR	Unanimity rate of 48.3%.	Involvement of legal staff in decision-making.	Individual-level
ECJ	Decisions often made by consensus.[137] No individual opinions allowed.	Judiciary organized in a hierarchical manner.[138]	Organizational
WTO AB	Consultation with the entire roster of panellists.[139] No individual opinions allowed.	Legal staff highly involved in decision-making.	Organizational

Table 7 – The Individual-level Organizational Perspectives.

Ultimately, the eclecticism of the approach advanced in this article, embracing as it does both ideas and interests, has its limits. To be sure, further work on the ways in which institutionalist and constructivist accounts may both complement and compete with the account of decision-making in ICs presented here would be useful. There is little doubt that constructivist research setting out the constitutive pathways through which international judges or ICs as a whole may develop certain social norms and structures would be a useful competing avenue for research on the behaviour of ICs. Of greater interest still would be research combining the individual-level insights developed in this article with broader ideational influences in a structurationist perspective, conceiving of international judges and the broader social structures as mutually constitutive of one another.[140]

[134] Although this point is not considered here in any depth, it may also be of interest to reflect on the locus of organisational influence itself. For certain ICs, the IO within which they are embedded may be a more relevant unit of analysis than the IC itself. Both the ECJ and the WTO AB, for instance, are perhaps more committed to protecting and extending the legitimacy of the WTO or the EU than their own legitimacy as an IC.
[135] Kuijer, *supra* note 64 at 64.
[136] Connie Peck & Roy S. Lee, eds., *Increasing the Effectiveness of the International Court of Justice. Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Leiden: Martinus Nijhoff, 1997) at 207-232; Alvarez, *supra* note 14 at 609; Terris, Romano & Swigart, *supra* note 20 at 203-204.
[137] Chalmers, *supra* note 90 at 168.
[138] *Ibid.*; de S.-O.-l'E Lasser, *supra* note 19 at 303-307.
[139] Terris, Romano & Swigart, *supra* note 20 at 60-61.
[140] Moshe Hirsch, "Sociology of International Law" (2005) 55 U.T.L.J. 891 at 904.

Notwithstanding these limits to my study's generalizability, future work on the decision-making of the International Criminal Court (ICC) could build on the approach adopted in this article. The attitudinal model employed here could certainly be extended to the ICC, since the tension between internationalism and statism is and will continue to be a dominant theme in judicial decision-making at the ICC. Although the strategic context of the ICC will shift from case to case, making such analysis more difficult, this will provide a natural testing ground for different models of judicial strategic behaviour.

My results also do intimate two conclusions that are interesting for the study of ICs and international relations generally. First, my results tend to show that both the ideas of individual judges, and their perceptions of their organization's strategic interests, can account for variations in the decision-making of ICs. The posited attitudinal and strategic models, taken together with the data presented in this article, imply that the way in which institutional actors are influenced by ideas and interests will vary with changing contexts and issues. My attitudinal model is most closely connected with rationalism, to the extent that it focuses on the causal role of ideas and conceives of judges as rational and pre-social actors. My strategic model is most closely connected with liberalism, to the extent that it emphasizes the preferences of non-state actors and interest groups. Judicial decision-making in ICs may thus constitute an exercise whereby judges rationally pursue their own attitudinal preferences on certain matters, while on other matters conforming to liberal theory by strategically taking into account the preferences of relevant actors. In the specific contexts of the ICTY and ICTR, I have argued that the rationalist/attitudinal model is most relevant when judges adjudicate questions of law, and that the liberal/strategic model is most relevant when judges make decisions on the guilt of an accused, or on the quantum of sentencing. This conclusion is not only of interest for further rationalist or liberal work on ICs, but also a useful starting point or counterpoint for constructivist and institutionalist research.

Second, my results suggest that while external interests can influence judicial decisions, they are only able to do so in circumstances where they have a basis in the ideas and interests of judges. Unlike much of the strategic literature, I have conceived of an IC's strategy in non-material terms, focusing on the relevance of external actors to the IC's aims and objectives, rather than the actors' threats of sanction or override. Accordingly, I have assumed that the relative role in decision-making of the ideas of judges and the interests of external actors will depend on the particular objectives of judges as well as the context in which they operate. ICs are not therefore simply responsive to state interests as assumed by realists and institutionalists, nor is their behaviour as consistent with overall regime aims as assumed by functionalists. In sum, ICs are not an escape from international politics, nor are they completely consumed by them. Judicial decision-making in ICs may instead amount to a form of autonomous decision-making undertaken by judges who pursue certain objectives and who, like other actors, react and adapt to their environments in the pursuit of their objectives. Perhaps it is more helpful to think about the modes and

structure of international courts' decision-making, like all law, as necessarily existing within a dynamic interplay of institutional interests and jurisprudential norms—forever suspended somewhere in between apology and utopia.[141]

Ultimately, understanding the decision-making of ICs has obvious implications for institutional design. Different models of judicial behaviour predict that decision-making will be influenced by different variables, which in turns affects how an IC will function within a given regime and how effective it will be in addressing different regime objectives and challenges. My approach advocates understanding the array of preferences that animate the decision-making of ICs from the perspective of the attitudinal and strategic thinking of judges. In this way, it may be possible for policy-makers to move beyond the idea that the inherent institutional structure of some ICs makes them more likely than others to act as agents than trustees, and to begin understanding in which circumstances ICs may or may not do so. In this way, policy-makers could design regimes in accordance with how the preferred outcome for IC behaviour—agency or trusteeship—enhances the overall effectiveness of the regime.

Likewise, quantitative studies of trends in decision-making can be of use to the judges in ICs. They can use studies such as this to revisit their assumptions and commitments and reflect upon some of the trends and associations that tend to emerge in their decision-making. This latter process of judicial self-examination will probably meet with more resistance than the less personal policy insights that could be offered to institutional designers: not only because of the entrenched nature of the norms that animate judicial decision-making, but also because of the norms of judicial independence that are meant to govern it. In either case, both sets of actors stand to gain from better understanding, or even acknowledging, the complex relationship that binds them to one another.

[141] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 1989).

Partial Compliance
A Comparison of the European and Inter-American Courts of Human Rights

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I. Introduction

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 such as Louis Henkin[1], and Abram Chayes and Antonia Chayes,[2] 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, the result is either stable compliance with international rules or an even deeper transformation of

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[1] Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2d ed. (New York: Columbia University Press, 1979) at 47.

[2] Abram Chayes & Antonia Chayes, "On Compliance" (1993) 47 Int'l Org. 175.

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state interests to match international norms.[3] In contrast, other scholars are skeptical. Some suggest that international institutions are little more than cheap talk that reflect existing state preferences and practices.[4] Any observed compliance is the result of states designing easy rules that they already follow. Other scholars stress instead the large gaps between international rules and state behaviour, and argue that the independent effect of international institutions is negligible.[5] In the first skeptical version, international institutions are epiphenomenal, and in the second, they are redundant or even useless.

In this article, we will conceptualize and explore the middle ground between these opposing positions. Just as scholars of domestic governance systems have broken down the dichotomy between democracy and autocracy by examining imperfect democracies and varieties of autocracies,[6] we aim to break down the dichotomy between compliance and non-compliance by exploring partial compliance. While scholars are undoubtedly aware of the possibility of partial compliance, many write as if conditions of partial compliance are way stations on the path to full compliance.[7] Often, scholars suggest that the socialization of states by international institutions is a transformative experience, leading to the convergence of state interests.[8] In both views, partial compliance is thus merely transitional. No doubt, both patterns hold in many cases. We suggest, however, that partial compliance appears to be a relatively stable end point in many other cases—one that is more common than is often supposed.

This article will study the role of partial compliance in the context of the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECtHR),[9] two adjudicative bodies with significantly different compliance regimes. The differences between the two courts are methodologically constraining, but they allow us to use the "most different cases" research strategy. According to this strategy, if an empirical phenomenon is present in political systems that are strikingly different, this increases confidence that it may be present in other systems as well.[10] The

[3] Jeffrey Checkel, "International Institutions and Socialization in Europe: Introduction and Framework" (2005) 59 Int'l Org. 801.
[4] George Downs, David M. Rocke & Peter Barsoom, "Is the Good News About Compliance Good News About Cooperation?" (1996) 50 Int'l Org. 379.
[5] Emilie Hafner-Burton & Kiyoteru Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises" (2005) 110 Am. J. Soc. 1373.
[6] Andreas Schedler, "Electoral Authoritarianism" in Todd Landman & Neil Robinson, eds., *The Sage Handbook of Comparative Politics* (Newbury Park, CA: Sage Publications, 2009) 381; Larry Diamond, "Thinking about Hybrid Regimes" (2002) 13 J. Democracy 21.
[7] Thomas Risse & Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction" in Thomas Risse, Stephen Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).
[8] David Bearce & Stacy Bondanella, "Intergovernmental Organizations, Socialization, and Member-State Interest Convergence" (2007) 61 Int'l Org. 703.
[9] Following standard practice, we reserve the acronym *ECHR* for the Treaty that established the Court: *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, 4 November 1950, E.T.S. 5, 213 U.N.T.S. 222 (entered into force 3 September 1953).
[10] Arend Lijphart, "The Comparable-Cases Strategy in Comparative Research" (1975) 8 Comp.

presence of partial compliance at both the IACHR and the ECtHR is therefore highly suggestive of the important role that partial compliance plays in international adjudication.

Through the cases of the IACHR and the ECtHR, this article explores the middle ground of partial compliance, defining its extent and contours and conceptualizing different types of partial compliance. The argument proceeds at two levels of analysis. At the regional level, we identify two different compliance regimes that nevertheless display shared outcomes of partial compliance. At a state level, we identify four different types of partial compliance—types that generally can be observed in both regions. A clear view of the extent and contours of partial compliance seems necessary before scholars can turn to the subsequent step of explaining those patterns, a step beyond the scope of the current article.

The next section will define our notion of partial compliance and place it within the broader International Relations literature on compliance and the effectiveness of legal norms. The third section will then outline how Europe and the Americas have built two quite different adjudicative institutions, with two contrasting compliance regimes.[11] The IACHR orders a series of clear, specific steps and then vigorously monitors compliance itself, often through multiple state-specific compliance orders. We will refer to this as a regime of "checklist compliance". In contrast, the ECtHR exercises what we call "delegative compliance", whereby its rulings will identify a violation, but not make orders on how to end the violation, compensate for its effects, or prevent future infringements. These decisions on the modalities of compliance are delegated to states and monitored by the Committee of Ministers, which itself is a political body. This difference between the two regimes is important from a methodological perspective: it affects the ways in which partial compliance can be observed and measured in each system and shapes the possibilities for comparison between them.

The fourth section will argue that despite these methodological constraints, partial compliance is observably widespread in both regimes. In the IACHR context, partial compliance is more common than either total compliance or non-compliance. We find that 83% of the cases for which we have compliance reports (n=81) can be coded as partial compliance, with complete non-compliance at 11% and full compliance at 6%. From these patterns, we also find preliminary clues as to the sources of partial compliance. The data supports the common sense notion that compliance is higher when it is at its least complicated. For example, states are more likely to comply with judgments requiring monetary compensation than with those

Pol. Stud. 158.

[11] We adopt Stephen Krasner's classic definition of the concept of a regime: "a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." ("Structural Causes and Regime Consequences: Regimes as Intervening Variables" in Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983) 1 at 2). Specifically, we refer to the routine practices and procedures of the Courts on compliance issues and the shared understandings of related states and non-state actors about those practices and rules.

requiring action, and the broader the action, the less likely they are to do anything. We also find some evidence that partial compliance can be more frequent than full compliance when the Court is less diligent in its monitoring; this supports the hypothesis that the Court can increase compliance through careful follow-up to initial state inaction.[12]

In the ECtHR context, we find that most states do comply fully with most judgments. Even in the three most recent years, arguably the busiest in the Court's history, full compliance was achieved in nearly 700 cases per year. At the same time, however, about twice that number of new judgments was being handed down each year.[13] It will be argued that there is far more scope for partial compliance in the last decade due simply to the great leap in cases "pending", that is, where the Court has found against a state, but the state has not yet shown evidence of full compliance. Of over 8,000 such cases that existed at the end of 2009, over 40% had been pending for over two years and some for much longer. Only about one third of the highest profile cases are closed each year (compared to about one half for all cases), and in 15 of 18 issue types, still pending cases outnumber cases closed in a given year. These are necessarily very indirect measures, and we treat them with caution. Looking in more detail at case studies of all leading cases in four countries, however, we find clear and direct evidence that 85 of the 90 pending cases we investigate are ones of partial compliance, rather than full compliance or non-compliance. We find also that the monitoring mechanism of the ECHR has undertaken substantial follow-up measures in the form of interim resolutions directed at states in 38% of the cases pending at the time of data collection. We show that virtually all of these are cases of partial compliance.

In the fifth section, we will explain how the patterns of partial compliance observed in both Europe and the Americas can be sorted into four types (that are not mutually exclusive): 1) split decisions, where states do some of what a court orders but not all; 2) state substitution, where states sidestep a court order, implementing an alternative response to the decision; 3) slow-motion, where states move so slowly that it is difficult to say that full compliance occurs; and 4) ambiguous compliance amid complexity, in which states face particularly daunting or demanding tasks.

In the concluding section, we will summarize and briefly elaborate on our major findings: despite the stark differences between the European and American human rights systems, states in each region consistently engage in partial compliance. They do so despite repeated efforts by international

[12] This evidence is consistent with recent studies finding that international courts are most effective when they create ways to connect with interested domestic groups: James L. Cavallaro & Stephanie Erin Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court" (2008) 102 Am. J. Int'l L. 768.

[13] Council of Europe, Committee of Ministers, *Supervision of the Execution of Judgments, Third Annual Report 2009* (Strasbourg: Directorate General of Human Rights and Legal Affairs, 2010) at 35, online: <http://www.coe.int/t/DGHL/MONITORING/EXECUTION/Source/Publications/CM_annreport2009_en.pdf> [COE, Committee of Ministers, *Third Annual Report 2009*]. The aggregate figures for 2007-2009 were 2067 cases closed and 4307 new final judgments against states.

institutions to bring them to full compliance and despite the fact that their prior behaviour suggests they would prefer non-compliance. We approach compliance from a number of different analytical perspectives—examining compliance by state, by issue area, across time, and so forth—but always find remarkably durable levels of partial compliance.

II. Defining and Explaining Compliance: Clarifying the Current Debate

This section distinguishes between compliance and effectiveness, showing how the two differ, but then identifying a class of cases (examined in this paper) in which compliance is a useful proxy for effectiveness. In subsequent sections, this will allow us to proceed to the trickier task of identifying empirical examples of partial compliance. We will also in this section distinguish our concept of partial compliance from important recent work on the "reception" of ECtHR rulings, and show how it improves on and often complements the existing literature. Specifically, the major existing theories used to explain compliance can all be deployed with our concept of partial compliance, which should greatly facilitate subsequent tests with the more subtle dependent variables we suggest.

It is first important to distinguish between compliance and effectiveness.[14] For Kal Raustiala,[15] compliance is conformity between behaviour 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 behaviour. Effectiveness, in contrast, is the degree to which a legal rule or standard induces the desired change in behaviour. Thus, international rules display some degree of effectiveness even when compliance is low (by inducing behavioural changes in some but not all), and international rules with high compliance can be totally ineffective (because they were drafted to fit pre-existing behaviour, for example).[16]

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

[14] Mark Janis, "The Efficacy of Strasbourg Law" (2000) 15 Conn. J.Int'l L. at 39-46; Andreas von Staden, "Assessing the Impact of the Judgments of the European Court of Human Rights on Domestic Human Rights Policies" (Paper presented to the annual meeting of the American Political Science Association, Chicago, August 2007), online: <http://www.allacademic.com/meta/p212106_index.html>.
[15] Kal Raustiala, "Compliance and Effectiveness in International Regulatory Cooperation" (2000) 32 Case W.Res.J.Int'l L. 387.
[16] *Ibid*. at 388.

behaviour long enough for an international court to rule against that country's practices, and the country subsequently changes its practices, we assume that the court's ruling helped trigger the change in behaviour, even if other factors may also have been important. Likewise, when a court orders a specific behaviour, such as the payment of monetary damages, to a particular individual, and the state complies, one can assume that the court's order played a role in the state's compliance. Compliance in these circumstances is very unlikely to be the result of chance: most international litigation takes years and costs states significant money to defend; it is therefore reasonable to assume that the state prefers to persist in the behaviour being challenged in court. Hence, any resulting behavioural changes after an adverse court ruling can suggest court effectiveness. This creates a class of cases where instances of compliance will be coextensive with those of effectiveness and where effectiveness can therefore be objectively measured through the proxy of state compliance.

If our approach shows compliance to be functionally similar to effectiveness in these cases, it also is narrower than a second competing dependent variable, namely the domestic "reception" of norms advanced by international courts. For example, a team led by Helen Keller and Alec Stone Sweet[17] studied the reception of ECtHR norms in nine matched pairs of European states. The study considered very broad questions about the way in which Court decisions were treated by all branches and levels of government, and even extended to whether the Court was a subject of wide media coverage and an important topic in law curricula.[18] In reporting its findings, this important study clearly recognized ECtHR frustrations for both ECtHR judges and the Council of Europe bureaucracy that some judgments are not fully complied with. With that said, its authors did not use the category of partial compliance, which focuses more specifically on state behaviour than the broader observation of domestic attitudes and institutional reform that is involved in the study of reception. We thus see our article as complementary to the literature on reception.

These observations about what compliance is (and is not) lead directly to a larger question: Why do states comply with international rules? Scholars have identified a variety of factors that push states either towards compliance or away from it. Yet they almost always conceptualize compliance as a fairly simple dichotomous variable: either compliance occurs, or it does not. We wish to provide a constructive way forward by conceptualizing compliance as a more complex phenomenon where states commonly engage in varying types of partial compliance. In the process, we suggest that each of the causal factors highlighted by compliance scholars could actually produce partial compliance rather than full compliance or no compliance. Partial compliance is thus a useful analytical category,

[17] "Introduction: The Reception of the ECHR in National Legal Orders" in Keller & Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008) 3.
[18] *Ibid*. at 24-26.

complementary to the vast literature seeking to explain compliance.

Scholars have highlighted three types of factors influencing state compliance: 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.[19] In an influential piece, Beth Simmons[20] suggested that states are likely to comply with international commitments in order to maintain their good international reputations for predictable and law-abiding behaviour. States that enjoy 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 the area of human rights, Emilie Hafner-Burton[21] 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[22] or domestic politics,[23] reviewed next.

The difficulty is that important international actors have mixed motives and records with respect to promoting human rights elsewhere. Multinational corporations, for example, do not necessarily want the developing countries in which they invest to comply fully with rights guarantees for labour unions. Powerful states like the United States reward allies who engage in anti-terrorist operations, which may involve less than full compliance with human rights norms. Hence, many states face mixed incentives for human rights compliance and may decide that partial compliance is optimal.

Another approach, most closely associated with Chayes and Chayes,[24] emphasizes the ways in which management problems obstruct compliance. Management problems are related to the nature of the international rules and the capabilities of states, rather than state motives and the rewards or punishments linked to rule-following. In some cases where non-compliance appears widespread, a closer examination may show that the international rules are quite ambiguous, which makes 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

[19] Beth Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs" (2000) 94 Am. Pol. Sci. Rev. 819; David Cortright & George A. Lopez, eds., *Smart Sanctions: Targeting Economic Statecraft* (New York: Rowman and Littlefield, 2002); Judith Kelley, "International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions" (2004) 58 Int'l Org. 425; Milada Anna Vachudova, *Europe Undivided: Democracy, Leverage and Integration After Communism* (Oxford: Oxford University Press, 2005).
[20] Simmons, *ibid*.
[21] Emilie Hafner-Burton, "Trading Human Rights: How Preferential Trade Agreements Influence Government Repression" (2005) 59 Int'l Org. 593.
[22] Jonas Tallberg, "Paths to Compliance: Enforcement, Management, and the European Union" (2002) 56 Int'l Org. 609.
[23] Checkel, *supra* note 3; Kelley, *supra* note 19.
[24] Chayes & Chayes, *supra* note 2.

implement international rules. Alternatively, non-compliance may simply be a timing issue: many international rules are quite difficult to implement and require a fair amount of time. This is an important issue with the ECtHR, 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.[25] Finally, an important management debate has revolved around the question of which types of international courts are better for compliance.[26]

Rather than leading to complete non-compliance, however, these same factors could easily produce partial compliance. Low-capacity state bureaucracies struggling to understand and comply with international rules are unlikely to be utterly incompetent and devoid of resources; such transparent ineptitude seems unlikely to survive politically. Chayes and Chayes do not paint such a cartoonish picture of bureaucracies. Instead, they view bureaucracies as sincere but under-resourced, especially in developing countries. Such circumstances are likely to produce half-measures that might better be classed as partial compliance rather than complete non-compliance.

A third approach to compliance focuses on domestic politics. For some scholars, compliance is a matter of calculating the costs and benefits of changing policy. Where policy changes are difficult for political actors because there are domestic incentives to defect from the international rules, compliance is likely to be low.[27] Relatedly, compliance might be the result of local factors that are difficult to observe, such as "political will."[28] In this view, compliance is likely to result from pre-existing 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 that wish to behave in a particular way are likely to create and accept international rules that codify that behaviour. For example, Gerda Falkner and Oliver Treib[29] emphasize the importance of domestic "cultures of compliance," with the European Union member states falling into four compliance patterns. A more dynamic, actor-oriented approach suggests that compliance is more likely as domestic actors that favour compliance gain greater influence in the government.[30] Alternatively, other scholars have focused on domestic

[25] "The Committee of Ministers has so far always been able to conclude that respondent states have fully executed the judgments rendered against them": Council of Europe, Committee of Ministers, *Supervision of the Execution of Judgments, First Annual Report 2007* (Strasbourg: Directorate General of Human Rights and Legal Affairs, 2008) at 9-10, online: <http://www.coe.int/t/DGHL/Monitoring/Execution/Source/Publications/CM_annreport2007_en.pdf> [COE, Committee of Ministers, *First Annual Report 2007*].

[26] Eric Posner & John Yoo, "Judicial Independence in International Tribunals" (2005) 93:1 Cal. L.Rev. 3; Laurence Helfer & Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93:2 Cal. L. Rev. 3 .

[27] Downs, Rocke & Barsoom, *supra* note 5.

[28] Jana Von Stein, "Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance" (2005) 99 Am. Pol. Sci. Rev. 611.

[29] Gerda Falkner & Oliver Treib, "Three Worlds of Compliance or Four? The EU-15 Compared to New Member States" (2008) 46 J. Common Market Stud. 293.

[30] Wade Jacoby, "Inspiration, Coalition, and Substitution: External Influences on Postcommunist Transformations" (2006) 58 World Pol. 623; Frank Schimmelfennig, "Strategic Calculation and

political structures, such as the nature of the linkages between international courts and domestic judicial systems or the robustness of domestic civil societies.[31]

On any given international compliance issue, the preferences of various powerful domestic groups are unlikely to be homogenous, and thus compliance is likely to be a matter of political contestation. Decision-makers attempting to maximize support and avoid costly political battles should be interested in a compromise position that embraces partial compliance. Alternatively, policy changes in most countries are relatively common as different coalitions gain and lose power; fluctuating policies can easily produce partial compliance as new regulations are layered on top of old.

This is a large and complex literature, yet much of it fails to conceptualize the key dependent variable, the nature of compliance. Compliance is often treated as a dichotomous term, but we wish to add nuance by exploring the middle ground of partial compliance. Moreover, many of the factors that scholars hypothesize to cause either compliance or non-compliance could just as easily produce partial compliance. International enforcement, state bureaucratic capacity and domestic political systems and actors do not uniformly point toward compliance or non-compliance. The competing pressures within each of these categories could very well produce partial compliance as decision-makers attempt to balance the various actors with heterogeneous compliance preferences and as they attempt to accomplish tasks with limited resources. The evidence presented in subsequent sections suggests that although partial compliance occurs to varying degrees and in different forms in the ECtHR and IACHR compliance regimes, in both it has been the most common outcome.

III. Comparing Regimes: Checklist vs. Delegative Compliance

We argue in this section that the ECtHR and IACHR exemplify two different types of compliance regimes, which we refer to as delegative compliance and checklist compliance, respectively. After briefly introducing these terms, we discuss the difficulties of measuring compliance in the context of the only other cross-regional comparative study of which we are aware. We then go into some detail on our compliance measures for the two different regimes. While the differences between them mean that we must measure compliance quite differently in the two cases, it is still possible to identify a range of compliance in each region and to make some judgment as to the distribution of compliance within this range.

International Socialization: Membership Incentives, Party Constellations, and Sustained Compliance in Central and Eastern Europe" (2005) 59 Int'l Org. 827; Kelley, *supra* note 19; Mitchell Orenstein, Stephen Bloom & Nicole Lindstrom, *Transnational Actors in Central and Eastern European Transition* (Pittsburgh: University of Pittsburgh Press, 2008).

[31] Todd Landman, *Protecting Human Rights: A Comparative Study* (Washington: Georgetown University Press, 2005); Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" (2005) 49 J. Confl. Resol. 925; Robert Keohane, Andrew Moravcsik & Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 Int'l Org. 457.

The IACHR gives offending states a list of highly specific steps that they must undertake as remedies to adverse judgments. Each of these steps is known as a compliance order. Any given judgment contains what amounts to a checklist of multiple specific orders. The Court then uses that checklist to follow up on the state's behaviour in subsequent years by issuing a series of compliance reports in which it carefully examines the list of steps originally given to states. It makes a clear and specific judgment about whether a state has complied with each and every step and then continues to issue such reports indefinitely until compliance is complete.

The ECtHR works in a very different fashion. Though the Court is empowered by Art. 41 *ECHR* to specify precise monetary payments by states in order to provide "just satisfaction," the Court has no power to make other remedial orders that would legally bind the state in question.[32] Rather, the state, once notified that it is the object of an adverse ruling, is expected to pay the just satisfaction and then conceive and execute other steps to bring itself into compliance, both in the short and long term.[33]

We thus contrast IACHR "checklist" compliance with ECtHR "delegated" compliance. This broad distinction between the courts has an important implication for how partial compliance arises under each regime. The kinds of partial compliance observed in each case are quite different. For the ECtHR, partial compliance often emerges from cases in which states design remedies that take less than full account of the Court's judgment, a point long acknowledged by Court insiders.[34] As already noted above, the extent to which state remedies effectively respond to Court judgments is entirely a matter for the Committee to judge.[35] These Committee judgments often find fault with state responses. For the IACHR, partial compliance emerges when states accomplish some items on the checklist but not others. Each of these courts is thus 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 ECtHR setting, in which partial compliance is more often in the eye of the beholder (but where the Committee has the final say).

1. *Measuring Compliance*

These differences in court practices make it impossible to measure partial compliance in the same way in both regions. Other problems also beset

[32] We deal with some recent exceptions in the discussion of "pilot judgments", below in Section IV.3.
[33] Article 46 *ECHR* simply provides that "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."
[34] Rolv Ryssdal, "The Enforcement System Set Up Under the European Convention on Human Rights" in Mielle Bulteman & Martin Kuijer, eds., *Compliance with Judgments of International Courts* (The Hague: Nijhoff, 1996) 49.
[35] Some have argued that the Court ought to be involved in monitoring compliance with its judgments, as the IACHR is. See S.K. Martens, "Commentary" in Bulterman & Kuijer, eds., *ibid.* at 71.

attempts to measure compliance, such as the difficulties in judging whether a behaviour is consistent with Court preferences, whether slow progress counts as partial compliance or something else, and who gets to judge whether compliance has occurred. Yet these difficulties do not mean that scholars should give up on the enterprise. A large number of social science concepts are difficult to measure, especially in cross-regional perspective.

Perhaps as a result of these difficulties, systematic studies of state compliance with the rulings of international courts are in short supply. Eric Posner and John Yoo[36] have authored the only study we have found that explicitly measures compliance rates across different international courts.[37] When they reviewed the data on compliance with the IACHR in 2004, they found only one case of full compliance with a court ruling, though their measurement of compliance is fairly unclear and seems to be drawn in part from reading secondary sources.[38] Taking partial compliance into account, they gauged overall compliance with the IACHR to be 5%. However, they also found that compliance with judgments ordering monetary compensation was somewhat higher, at 23.6% full compliance. Posner and Yoo could not find good compliance data on the ECtHR. Although they did mention one measure, taken from the Court's own *Survey of Activities*, suggesting that compliance with ECtHR judgments (as measured by domestic law adjustment in the wake of an adverse decision) hovered around 64% between 1960 and 1995,[39] they expressed doubt that compliance is as high as this.

In contrast to Posner and Yoo, we will present our criteria and identify our data sources for judging various levels of compliance in some detail. We explore various levels of compliance—non-compliance, partial compliance and full compliance—at different levels of analysis: within particular cases, at the case level, and aggregating across cases. We also take different analytical cuts at the question of compliance by examining levels of compliance according to factors such as year, state, right violated, and the type of remedy ordered by the Court.

2. *Measuring Compliance: The Inter-American Court*

In order to measure compliance with the IACHR, it is first important to understand the workings of the Court.[40] It issues several forms of

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[36] Posner & Yoo, *supra* note 26.

[37] Druscilla L. Scribner & Tracy H. Slagter, "Domestic Institutions and Supranational Human Rights Adjudication: The ECtHR and the IACtHR Compared" (Paper presented to the annual meeting of the American Political Science Association, Toronto, September 2009), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1449192>.

[38] Posner & Yoo, *supra* note 26 at 43-44. The authors do not clearly detail their methodology or data sources in these two pages. They refer in the key paragraph on page 43 to "our survey" of the cases, but all citations in that paragraph are to secondary sources or to the Inter-American Commission. In the subsequent paragraph, Posner and Yoo refer to their review of the cases in the Court's annual reports, but provide no other information on coding decisions.

[39] *Ibid.* at 65.

[40] An excellent overview of the Court is found in Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2003).

jurisprudence: decisions and judgments on contentious cases, advisory opinions, provisional measures, and reports on compliance with judgment. The compliance reports detail the measures taken by states in response to the Court's decisions on contentious cases. We rely primarily on those reports for our understanding of compliance levels. We ignore provisional measures and advisory opinions because the Court does not issue compliance reports on those rulings (relying instead on the Commission in the case of provisional measures) and hence compliance information is less systematic and not comparable with the data we consider here.

The Court's decisions and judgments are broken down into three categories: decisions on preliminary objections, decisions on the merits of the case, and decisions on reparations in the case. From its inception through June 2010, the Court issued decisions and judgments on 123 cases. During the Court's early years, however, the caseload was extremely light. The Court was officially established in 1979, but did not receive its first case until 1986; it issued its first judgment, decisions on preliminary objections in *Velásquez-Rodríguez v. Honduras*, in 1987.[41] More recently, the Court has carried a significantly higher caseload, processing more than a dozen new cases each year.[42] At the end of 2009, the Court was considering decisions on 14 new contentious cases and was monitoring compliance with 104 previously decided cases.[43]

The Court's procedures have changed in various ways over the years and so have the behavioural patterns of actors involved with the Court, including states, the Inter-American Commission on Human Rights, victims, and victims' advocates.[44] One interesting development is that states have increasingly admitted violations before the Court and taken partial or full responsibility for their actions. Such behaviour is analytically distinct from compliance: just because a state acknowledges responsibility does not mean that it will make the reparations ordered by the Court. Once states acknowledge responsibility (in those cases in which they do), the Court still proceeds to issue reparations judgments and to monitor compliance.

Each reparation decision 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 a 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 IACHR. To illustrate the nature of these orders, we replicate here verbatim the reparations section of

[41] *Velásquez Rodríguez Case (Honduras)* (1987), Inter-Am. Ct. H.R. (Ser. C) No. 1, *Annual Report of the Inter-American Court of Human Rights: 1987*, OEA/Ser.L/V/III.17/Doc.13 (1988).
[42] Cavallaro & Brewer, *supra* note 12 at 781-783.
[43] OAS, Inter-American Court of Human Rights, *Annual Report of the Inter-American Court of Human Rights: 2009* (San José: Inter-American Court of Human Rights, 2010) at 77, online: IACHR, <http://www.corteidh.or.cr/docs/informes/eng_2009.pdf>.
[44] Cavallaro & Brewer, *supra* note 12 (a helpful summary of the most important changes).

one relatively recent Court decision of moderate complexity:[45]

> 6. The State must secure, within a reasonable time; that the domestic proceedings instituted in order to investigate and punish those responsible for the events in the instant case be operative, as set forth in paragraphs 245 to 248 herein.
>
> 7. The State must, within the term of six months, publish at least once in the Official Gazette and in another nationwide daily newspaper, Chapter VII–Proven Facts–of the instant Judgment, without its footnotes, as well as the operative paragraphs herein, as set forth in paragraph 249 herein.
>
> 8. The State must keep developing an education and training program for staff in health care, psychiatry, psychology, nursing, and for any person involved in mental health services, in particular, covering the principles that govern treatment to patients with mental illness, according to international standards and the provisions of the instant Judgment, as set forth in paragraph 250 herein.
>
> 9. The State must pay in cash to Albertina Viana-Lopes and Irene Ximenes-Lopes-Miranda, within the term of one year, as compensation for pecuniary damage, the amount fixed in paragraphs 225 and 226 herein, as set forth in paragraphs 224 to 226 herein.
>
> 10. The State must pay in cash to Albertina Viana-Lopes, Irene Ximenes-Lopes- Miranda, Francisco Leopoldino Lopes and Cosme Ximenes-Lopes, within the term of one year, as compensation for non-pecuniary damage, the amount fixed in paragraphs 238 herein, as set forth in paragraphs 237 to 239 herein.
>
> 11. The State must pay in cash, within the term of one year, as costs and expenses incurred in the domestic proceedings as well as in the international proceedings under the Inter-American system of protection of human rights, the amount fixed in paragraph 253 herein, which shall be delivered to Albertina Viana-Lopes, as set forth in paragraphs 252 to 253 herein.

According to Art. 68(1) of the *American Convention*, state parties must comply with all Court rulings in all cases in which they are parties. The Court typically suggests that states have six months to one year from the date reparations are issued to comply with the Court's judgment.[46] Yet unlike in the European system, the *American Convention*'s adjudication mechanism does not include a formal mechanism for monitoring state compliance. The Court has thus taken it upon itself, beginning in 1996, to issue periodic reports monitoring compliance with its judgments. In November 2003, after this practice was challenged by state parties, the IACHR held that the issuance of compliance reports was implicitly within its authority as granted

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[45] *Ximenes Lopes Case (Brazil)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 149, at 92-93, *Annual Report of the Inter-American Court of Human Rights: 2006* (San José: Inter-American Court of Human Rights, 2007), online: IACHR, <http://www.corteidh.or.cr/docs/informes/20063.pdf>.

[46] This impression of the Court's typical behaviour is based on reading all of the Court's judgments. Summaries of the Court's judgments that sometimes include the designated timelines may be found in the Court's annual reports. See, for example, OAS, Inter-American Court of Human Rights, *Annual Report of the Inter-American Court of Human Rights: 2008* (San José: Inter-American Court of Human Rights, 2009) at 28-31, online: IACHR, <http://www.corteidh.or.cr/docs/informes/eng2008.pdf> [IACHR, *Annual Report 2008*].

by the American Convention.[47] To evaluate a state's compliance, the Court asks victims' representatives, the Inter-American Commission of Human Rights, and the state to submit reports regarding the state's actions.[48] In some cases, the Court may request a private hearing of those same actors to determine state compliance.[49]

The IACHR issued its first compliance report on September 10, 1996. As of June 23, 2010, we believe the Court had published 191 compliance reports, of which we located 184.[50] 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 and judgments have been issued recently also do not have compliance reports.

We have compliance reports for 81 cases as of June 23, 2010, the cutoff date for our data. The Court issued 703 compliance orders for those 81 cases. Most of these cases have more than one compliance report. Some, such as the *Loayza-Tamayo v. Peru* case,[51] have as many as seven compliance reports.[52] The Court's additional compliance reports in each case do not impose new compliance orders, but rather evaluate state compliance with the original orders. We have been unable to identify a pattern as to how soon after a judgment and how often the Court publishes compliance reports. 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 of its compliance orders, paragraph by paragraph.

In the analysis that follows, we simply adopt the Court's perspective on whether compliance has occurred on each of its compliance orders.[53] While

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[47] The Court reasoned—apparently through the principle of effectiveness—that although the practice is not explicitly authorized by the Convention, "the effectiveness of the judgments depends on compliance with them." *Baena Ricardo et al. Case (Panama)* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 104, at para. 129, *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser.L/V/III.61/Doc. 1 (2004).

[48] OAS, Office of the Secretary-General, *Annual Report of the Secretary General 2005-2006*, OR OEA/Ser.D/III.56 (2006) at 122.

[49] IACHR, *Annual Report 2008*, *supra* note 46 at 15-17. See also an example of the president of the Court ordering such a hearing, *Saramaka People v. Suriname*, Monitoring Compliance with Judgments, "Order of the President of the Inter-American Court of Human Rights" (20 April 2010), online: IACHR, <http://www.corteidh.or.cr/supervision.cfm>.

[50] The compliance reports issued after 2001 are available on the Court's website. Before 2001, however, there were several reports issued. We have not been able to locate seven of those reports despite repeated requests to the Court. See Inter-American Court of Human Rights, "Jurisprudence, Monitoring Compliance with Judgments", online: <http://www.corteidh.or.cr/supervision.cfm?&CFID=578183&CFTOKEN=81389875> [IACHR, "Monitoring Compliance"].

[51] *Loayza Tamayo Case (Peru)* (1997), Inter-Am. Ct. H.R. (Ser. C) No. 33, *Annual Report of the Inter-American Court of Human Rights: 1997*, OEA/Ser.L/V/III.39/Doc. 5 (1998) [*Loayza Tamayo Case*].

[52] We exclude presidential reports from our count. The Court's president sometimes issues presidential reports, which appear to be efforts to move states toward compliance, but do not officially report on compliance.

[53] 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.

this introduces the Court's own possible institutional biases into our coding, the Court has access to a wealth of information about compliance that is either unavailable to others or would be prohibitively costly to gather independently. This includes transcripts of victims' statements, and state correspondence with the Court. We believe the Court's informational advantage justifies the risk of introducing its biases into the coding.

The Court reports compliance clearly in each compliance report for each of its orders. For each order, we code compliance dichotomously: comply or not. This is a methodological simplification because compliance with each discrete order could also be partial. The state could, for example, pay some of the individuals specified by a given compliance order but not others. The Court in fact sometimes does code states as having partially complied with discrete compliance orders. We could not be sure the Court consistently used this category, however, and hence we opted to code partial compliance as non-compliance at the level of compliance orders. We thus probably understate the extent of partial compliance because we treat partial compliance in this part of the analysis as an aggregate quality that occurs only as states combine full compliance with non-compliance across compliance orders within a given case. In reality, partial compliance also occurs at the lowest level of analysis in these discrete compliance orders as well, as we discuss in section V below. Additionally, we coded no compliance when the court requested further information because the state had not submitted a report, which occurred quite frequently. We believe this coding decision is justified because it seems likely that if a state has complied, it would want that fact to be known and would have submitted the relevant information. For each case, then, a state might be in full compliance, complete non-compliance, or partial compliance. A state will be in partial compliance if it complies with some of the Court's discrete compliance orders, but not all.

We then can analyze compliance in a variety of ways: by date of the case, by the number of compliance reports issued within a given case, by right violated, by state, and so forth. Most of these require little comment. One analytical category requiring more detail is the type of action required by the Court, what we call "type of judgment". Jo Pasqualucci[54] has posited a typology along this dimension for the Court's compliance orders, which we replicate here. We coded each compliance order according to Pasqualucci's typology, which is 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 aimed at restoring rights to the victim while the latter attempts to compensate for the violation.[55]

[54] Pasqualucci, *supra* note 40 at 283.
[55] We will see a similar distinction between individual and general measures with the European Court.

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	
Investigate, identify, publicize & punish	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…
Amend, repeal, or adopt domestic laws or judgments	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…
Take action or refrain from taking action	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…
Apologize	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-raking State authorities…
Pay fair compensation	
Material damages	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, *supra* note 40; IACHR, "Monitoring Compliance", *supra* note 50, reports for *Baldeon v. Peru* (February 7, 2008), *Cantoral-Benavides v. Peru* (February 7, 2008), *Bamaca Velasquez v. Guatemala* (November 27, 2003).

Compliance with an order may take 10 years and the Court may have judged that non-compliance occurred in nine of the previous years, but once the Court determines that compliance has occurred, then we count it as compliance. Such a method possibly overstates compliance because some observers might prefer to consider delayed compliance as partial compliance or even non-compliance if the delays create additional problems.

This issue is especially applicable to older cases, and so we create a second measure labelled "resistance" to reflect the extent to which a state delays in complying with an order. The straightforward interpretation of our resistance measure is the average number of times the Court has found states failing to comply with each compliance order. Resistance is calculated as the number of instances of non-compliance divided by the number of compliance orders in that case. An instance of non-compliance occurs when the Court issues a compliance report and finds the state has not complied with the order. Because any given order could repeatedly be subject to such a finding, average resistance rates can easily go above one, and could, over time, become quite large. For example, if the Court gives 10 compliance orders in a given case and then issues one compliance report in each of the subsequent five years and the state repeatedly fails to comply with all of orders, then the resistance level is five (50 instances of non-compliance divided by 10 orders). If in the sixth year the state complies with all of the 10 orders, its compliance rate would be 100% but its resistance level would still be five. In this way we can incorporate long delays in compliance into the analysis. The resistance measure is a useful counterpart to the compliance measure in part because it can help reveal whether "full compliance" should be qualified by the observation that significant delays occurred on the path to full compliance.

3. *Measuring Compliance: The European Court*

The ECtHR, far busier than the IACHR, has a very different compliance regime. Most importantly, there is no "checklist" for states to comply with. Instead, we call the ECtHR regime one of "delegated compliance," and we describe it below. While it is more difficult to distil data about partial compliance from ECtHR and Committee of Ministers publications than it is for the IACHR, it is becoming increasingly possible. This section discusses our measures.

The ECtHR was established in 1959 by the *ECHR* and hears cases against states parties. As of 2010, the Convention and Court had 47 members—from plaintiffs who have exhausted all available domestic remedies. Crucially, the Court can only rule on whether an individual has had his or her rights violated by a state party to the Convention. Upon the publication of such judgments, the states, according to Art. 46, "undertake to abide by the decision of the Court in any case to which they are parties." In practice, this means the Court does not overrule the decisions of domestic courts, invalidate national laws, or even make specific orders for legislative reform. Instead, states generally must reason backwards from the violation to understand the appropriate remedy in a specific case, and the actions

required to avoid similar future violations. The Court thus draws a line between finding that an individual's rights have been violated, and commenting on specific state practices. Put differently, the Court, in the words of one of its presidents, has not been "prescriptive" in its judgments.[56]

Several particular characteristics of the ECtHR impact patterns of state compliance. For example, unlike the highest courts in domestic legal orders, the ECtHR has no power to remand its cases to lower courts.[57] It is also quite unlike the European Court of Justice (ECJ), which has developed linkages to other actors that have become more uniformly substantial over time.[58] While the Council of Europe—the ECtHR's parent organization—tries to inform national officials, including judges, police, and bureaucrats, of ECtHR jurisprudence, formal links between the ECtHR and domestic courts vary widely across Europe.[59] Moreover, whereas rulings of the ECJ are generally superior to domestic law, European states have a wide variety of approaches to ECtHR law. For example, while ECtHR jurisprudence is superior to the national constitution in the Dutch case and has become co-equal with it in the Austrian case, in many other states the ECtHR's judgments hold a position in the legal hierarchy somewhere between constitutional and ordinary statutory law.[60] As the number of cases grows, the Court has suggested that elevating the legal status of its decisions would spare states the difficulty of "complex and lengthy legislative work."[61] Nevertheless the Court continues to presume that individual states are best suited to devise remedies compatible with their different traditions and legal principles.

Compliance with ECtHR judgments is monitored by the Committee of Ministers, comprising states parties' Ministers of Foreign Affairs (or their deputies). After an adverse ruling against a state, the Committee "invites" the state to report on the measures it has taken to address violations found by the Court. The Committee may, "where appropriate, adopt decisions or interim resolutions to express concern, encourage and/or make suggestions with respect to execution."[62] The Council of Europe's Parliamentary Assembly also issues rapporteur reports that regularly examine state implementation of ECtHR judgments, but the Committee remains the

[56] Ryssdal, *supra* note 34 at 50; COE, Committee of Ministers, *First Annual Report 2007*, *supra* note 25 at 19.
[57] John Cary Sims, "Compliance Without Remands: The Experience Under the European Convention on Human Rights" (2004) 36 Ariz. St. L. J. 639.
[58] Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2000); Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca: Cornell University Press, 2002).
[59] Helen Keller & Alec Stone Sweet, "Assessing the Impact of the ECHR on National Legal Systems," in Keller & Stone Sweet, eds., *supra* note 17 at 682-89.
[60] Georg Ress, "The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order" (2004-2005) 40 Texas Int'l L.J. 359 at 371-373.
[61] COE, Committee of Ministers, *First Annual Report 2007*, *supra* note 25 at 11.
[62] *Ibid.* at 17. For more detail on the Committee's compliance tools, see *ibid.* at 17-21; Peter Leuprecht, "The Execution of Judgments and Decisions" in Ronald St. J. Macdonald, Herbert Petzold & Franz Matscher, eds., *The European System for the Protection of Human Rights* (Dordrecht: Nijhoff, 1993) 791.

principal actor in monitoring compliance.[63]

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.[64] Typically, just satisfaction takes the form of payment to the victim, often to remedy a combination of pecuniary losses, non-pecuniary losses (e.g. psychological damages), court costs, and interest payments, all of which the Court specifies.[65] In addition, the Court also invites the state to take either individual and/or general measures, which, with a few exceptions noted below, are designed by the states.[66] 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 ECtHR 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.

The complexity of measuring compliance with these different measures varies widely. Whereas just satisfaction payments are relatively easy to monitor, individual and general measures are a source of more ambiguity. As ECtHR caseload expands rapidly, the Committee is not able to track individual measures as carefully as those for just satisfaction.[67] The Committee recently began issuing annual reports, and the first three (2008-2010) all dwell extensively on this growing dilemma and sound warnings about, for example, the danger of states taking a "minimalist approach" to compliance that an overextended Committee may not be able to monitor adequately.[68] The Committee also has strong incentives to make sure that states take appropriate general measures, since these are critical preemptive tools against the flood of applications that arrive each month. The Committee does catalogue the individual and general measures chosen by states, and its monitoring reports on individual cases convey these steps in substantial detail. As we show below, the Committee often refuses to close cases even when just satisfaction has been paid and some individual and/or general measures have been taken by the states. The key point is that while compliance is "delegated" to the states, it is hardly the case that it is therefore straightforward for states to comply, a claim we demonstrate in the next section.

The growth of the Court's docket has made the Committee's monitoring

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[63] There have been 11 reports and recommendations issued since 2000. See Council of Europe, P.A., Committee on Legal Affairs and Human Rights, *Implementation of Judgments of the European Court of Human Rights*, Documents, AS/JUR (2009) 36 at 2.
[64] COE, Committee of Ministers, *Third Annual Report 2009*, *supra* note 13 at 18-19; Ryssdal, *supra* note 34 at 50.
[65] Sims, *supra* note 57 at 643-645.
[66] COE, Committee of Ministers, *First Annual Report 2007, supra* note 25 at 16.
[67] Sims, *supra* note 57 at 655.
[68] Council of Europe, Committee of Ministers, *Supervision of the Execution of Judgments, Second Annual Report 2008* (Strasbourg: Directorate General of Human Rights and Legal Affairs, 2009) at 7 [COE, Committee of Ministers, *Second Annual Report 2008*], online: <http://www.coe.int/t/DGHL/Monitoring/Execution/Source/Publications/CM_annreport2008_en.pdf>.

tasks much harder. Like the IACHR, the ECtHR caseload was relatively light in its initial years. In its first two decades in existence, the Court ruled on only 84 cases.[69] Far more than the IACHR, however, the ECtHR caseload has exploded in recent years, reaching over 1000 rulings per year by 2004 and with a new case load that averaged just over 1300 per year from 2004 through 2009. Of these new cases, about 200 "leading cases" each year raised novel issues, while the remainder were so-called "clone" cases.[70] This surge has hampered both the Court's and the Committee's ability to monitor compliance. This is especially the case with 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 not easy: ECtHR compliance data is compiled in ways very different from that of the IACHR. Unlike the IACHR, there are no multi-pronged judgments that allow 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. Committee data on compliance have recently been made much more readily available, however, in the above-mentioned series of Annual Reports begun in 2007. For cases where violations were found, Committee databases include three major categories—closed cases, pending cases, and interim resolutions—analyzed more fully below:

I. We look first at closed cases for which general and/or individual[71] measures were taken by the states and for which the Committee has been satisfied by state remedies. We code these cases as full compliance because the Committee has explicitly stated that it is satisfied with the state's response to the judgment of the Court.
II. Second, we look at pending cases of adverse judgments transmitted by the Court to the Committee for monitoring. These are a complex amalgamation of cases. In a few cases, where states refuse even to pay just compensation or take any individual or general measures, we code them as cases of non-compliance. If just compensation is paid late, however, we count this as partial compliance. Such cases amounted to 7% of cases in 2007, 5% in 2008, and 11% in 2009.[72] Yet many

[69] Darren Hawkins & Wade Jacoby, "How Agents Matter" in Darren Hawkins *et al.*, eds., *Delegation and Agency in International Organizations* (Cambridge: Cambridge University Press, 2006) 199 at 217.
[70] COE, Committee of Ministers, *First Annual Report 2007*, *supra* note 25 at 16; COE, Committee of Ministers, *Second Annual Report 2008*, *supra* note 68 at 10; COE, Committee of Ministers, *Third Annual Report 2009*, *supra* note 13 at 10.
[71] Including just satisfaction payments, technically a form of individual measure. Following convention, we exclude just satisfaction when reporting on individual measures, unless specifically noted.
[72] COE, Committee of Ministers, *First Annual Report 2007*, *supra* note 25 at 219;
COE, Committee of Ministers, *Third Annual Report 2009*, *supra* note 13 at 51. Note this is a very conservative estimate of partial compliance, as on time payments average only around a third of total cases. The balance is cases where just satisfaction may have been paid late. We don't count these cases for two reasons. First, they may have been paid too close to the deadline to be picked

pending cases are ones in which full compliance will later result but where such full compliance has not been achieved at the time of the data being reported, so we also report on the length of time these cases have been pending. We then look to the Committee's Annual Reports to distil their views of which patterns of pending cases warrant further investigation. This exercise yields important clues about the extent and duration of partial compliance, but because it is based on the Committee's selection of pending cases (and not the full universe), we turn next to a database on execution of judgments that does allow us to code full, partial, and non-compliance from a different sample in the universe of pending cases. We count as non-compliance only those (very few) narratives that contain no evidence of compliance. Partial compliance can be attributed to the bulk of the cases, where there is clear evidence that states have taken some constructive steps but where the Committee asks for evidence of further action. Full compliance is coded for those older pending cases where the case narrative strongly suggests that adequate steps have occurred. Finally, some very new pending cases contain too little information for coding. We note these and then drop them from further consideration.

III. The third category, interim resolutions (IRs), gives a more accurate sense of the overall size of the partial compliance cases. Where data on pending cases requires the complex sorting just noted (mostly because many new pending cases will achieve full compliance relatively quickly), IRs typically occur in cases of longer-term partial or non-compliance. IRs are formal communications from the Committee to the states asking for evidence that a prior judgment has been complied with.[73] In practice, they occur when the Committee has good reason to suspect that full compliance is not imminent. We demonstrate that states almost invariably take some individual and/or general measures, and thus we treat IRs as evidence of partial compliance. The number of case with IRs is substantially lower than the numbers of pending cases but are far more likely to include problematic cases of partial, along with a very few cases of non-compliance.

IV. Partial Compliance: General Patterns

In this section, we survey the available data on compliance in the Americas and Europe. Our primary intent is to provide a nuanced and sophisticated yet big-picture overview of the shape of partial compliance in both regions. Hence, especially in the inter-American case, where more data is available, we analyze compliance through different categories, such as whether compliance varies by the type of order the Court issues, over time, or by state. With some exceptions, we find relatively little variance within these categories, suggesting that multiple paths lead to partial compliance. In the ECtHR, we find that partial compliance is extremely widespread among

up in the data as "on time." This is consistent with the idea of states delaying payment as long as possible. Second, these data do not allow us to distinguish late payment from non-payment (e.g non-compliance).

[73] A major difference with the IACHR is that the latter relies heavily on victims to report on state compliance. While the ECtHR 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 Committee is communicating somewhat more with victims on compliance matters, but much more research would be needed to substantiate the claim (COE, Committee of Ministers, *First Annual Report 2007*, *supra* note 25 at 16.)

long-term (more than two years) pending cases. European states very often comply fully and quickly, and they rarely ignore Court judgments completely. But a very large number of cases result in partial compliance, a behavioural pattern concentrated in a number of problematic states but which is also displayed less frequently by many other states. We do not explicitly state or test hypotheses about why variation sometimes occurs in compliance levels. Where we observe variation in compliance levels (e.g., where one state exhibits more compliance than another), we suggest factors that may explain that variation but leave the systematic exploration of those hypotheses for future research.

1. The Inter-American Court

As of 23 June 2010, the IACHR has ordered states to engage in 703 discrete actions—what we label compliance orders—and states have complied with 50% of these. Many of these instances of compliance, however, only occurred after repeated requests by the Court. This is significantly higher than Posner and Yoo's reported compliance rate of around 5%.[74] The difference is partly a result of different units of analysis. Posner and Yoo apparently only reported the cases in which states had complied with every aspect of the Court's rulings. Using that measure, we find more similar results: full compliance has occurred in five of the 81 cases for which there are compliance reports, or 6% of the time. In nine of those 81 cases, the state has not complied with any compliance orders, for an absolute non-compliance rate of 11%. Thus, 83% of the cases should be coded as having partial compliance, though some of these partial compliance cases could of course be on their way to full compliance. By this unit of analysis, partial compliance is the most common outcome, observed in a significant majority of cases. 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, i.e. complying with some compliance orders in any given case but not others.

[74] Posner and Yoo, *supra* note 26 at 43-44.

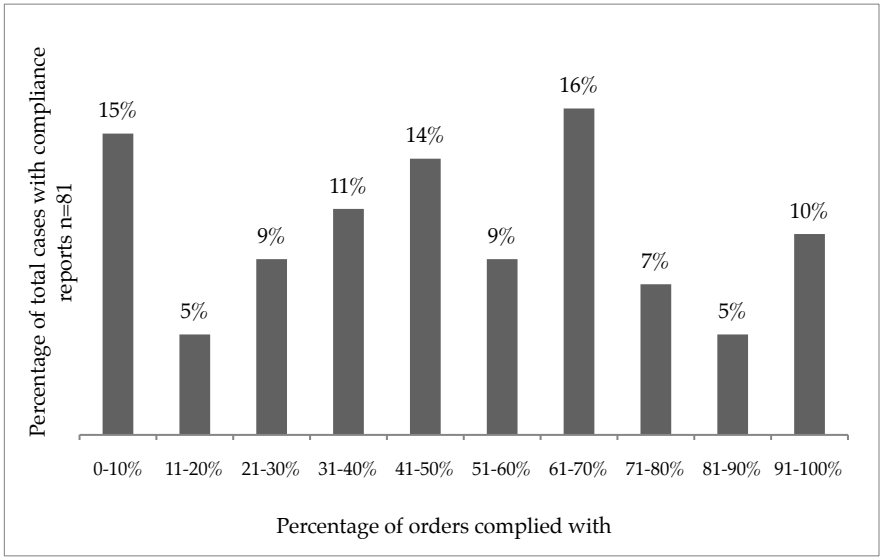

Figure 1: IACHR Percent Compliance by Case.

Figure 1 offers one representation of partial compliance, by graphing the distribution of the percent of compliance orders with which a state complies in any given case. For example, 14% of the cases fall in the fifth decile where states have complied with 41-50% of the compliance orders in those cases. The distribution of compliance is fairly normal, with higher tails on both ends representing cases with complete (or nearly complete) non-compliance and complete (or nearly complete) compliance.

Rates of state compliance vary by the type of reparation required by the Court, as illustrated in figure 2a. States comply most with Court orders to pay moral damages (43%), material damages (40%), and Court costs and expenses (43%), and to apologize (40%). Posner and Yoo also found rates of compliance with orders for pecuniary remedies to be above average, but reported them at 24%.[75] Compliance rates are lowest with Court orders to amend, repeal or adopt domestic laws or judgments (7%). States comply 17-19% 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 violated. Figure 2b depicts resistance by type of compliance order. Resistance mostly mirrors compliance, where resistance is higher when compliance is lower. Yet there is some variation. For example, states resist paying material damages more than they resist apologizing even though compliance is ultimately the same.

[75] *Ibid.* at 44.

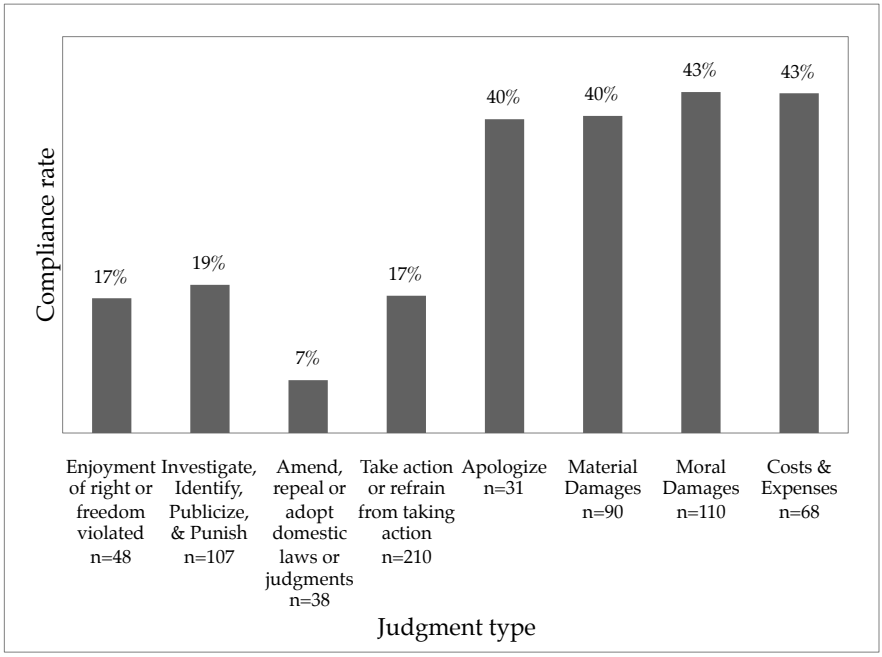

Figure 2a: IACHR Compliance by type of reparation.

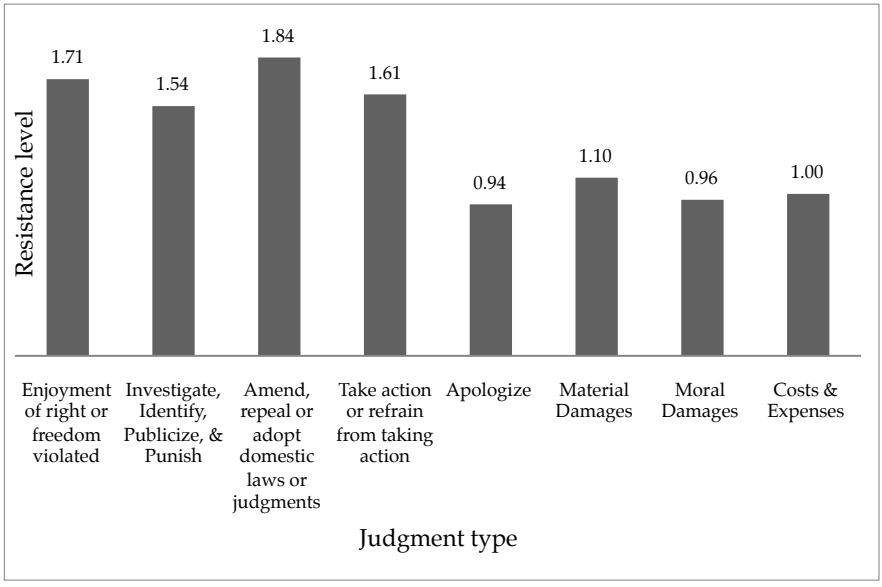

Figure 2b: IACHR Resistance by Type of Reparation.

Overall, these figures provide some evidence that states comply when the costs are relatively low. It is probably easiest for states to pay monetary damages or apologize and walk away. Although the monetary cost for such damages can be higher than some of the other actions required of states, monetary costs probably do not require as many political capital expenses, coordination efforts, or reputational expenses as some of the other types of reparations. These more demanding reparations can involve punishing perpetrators, altering government behaviour in a way that ends the violations of rights, and changing rules and institutions.[76] These types of actions receive lower compliance.

Figure 3a lists compliance by date of the Court's judgment. It is difficult to identify a pattern: significant variation exists from year to year, and compliance rates after 2003 may be low because it typically takes a few years for states to comply. The same is true for figure 3b, which displays resistance levels by date of judgment. There may appear to be relatively low resistance starting in about 1999, but one might expect it to be lower because the Court has had less time to issue compliance reports, and therefore states have had less time to resist them.

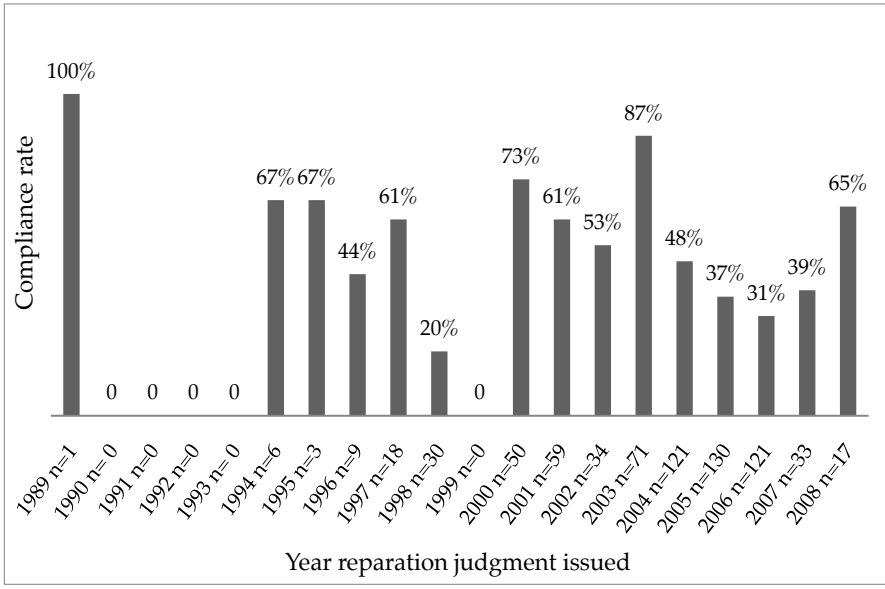

Figure 3a: IACHR Compliance by judgment date.

[76] Trinidad and Tobago officially withdrew from the IACHR because it could not accept the Court's rulings against the use of the death penalty.

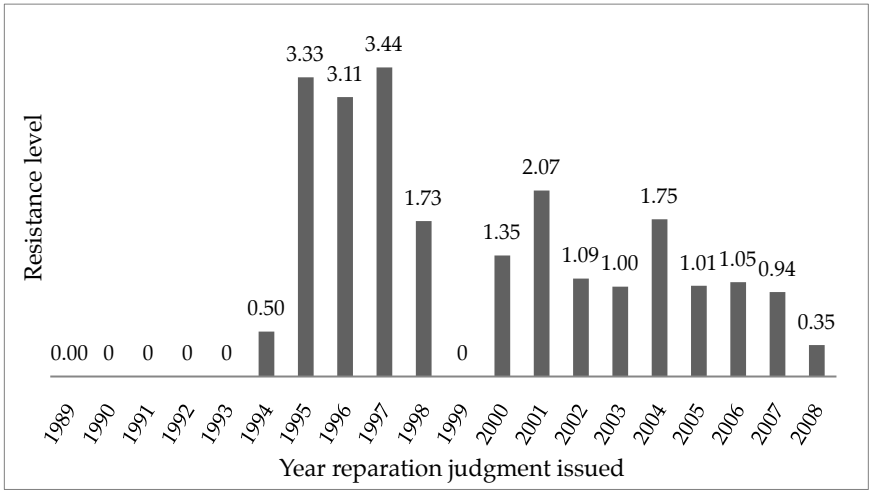

Figure 3b: IACHR Resistance by judgment date.

Figure 4, which examines compliance by the year of the compliance report—rather than by the year of the original judgment—corrects for some of these issues, and suggests that beginning in 2003, compliance has improved dramatically. 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% per year. Since 2003, the lowest annual compliance rate has been 20% and the highest has been 39%, with no discernible pattern over time in these years. This change coincides with the Court's 2003 determination that it could monitor compliance, and with its renewed effort to do so. The Court's more focused and persistent efforts appear to have increased state compliance.

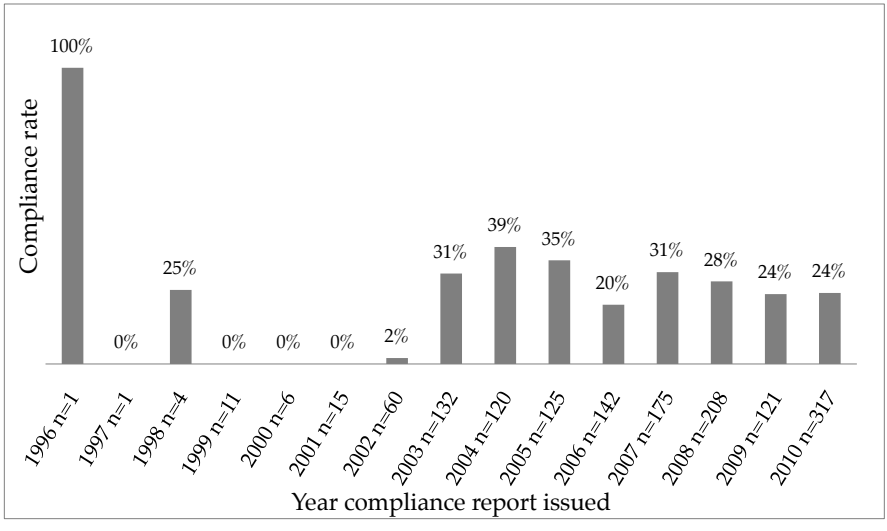

Figure 4: IACHR Compliance by date of compliance report.

Figure 5 addresses the question of whether persistent 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.

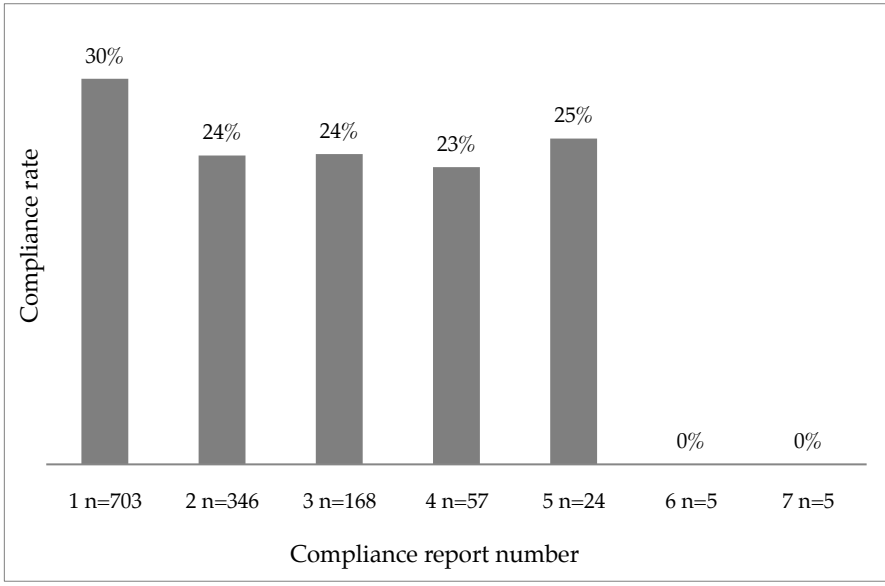

Figure 5: IACHR Compliance by Compliance Report.

The data suggest a possible diminishing return for each compliance report but also suggest that the Court does indeed make some progress each time it follows up. The highest compliance rate is at the first report, with 30%, 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 24% of the Court orders they did not comply with in the previous report. In the third, fourth and fifth compliance reports, states comply with 23-25% of the outstanding Court orders. There have been too few instances of orders beyond five to analyze fruitfully, though the minimal evidence (from the aforementioned *Loayza-Tomayo* case) suggests the Court may eventually run out of influence, as compliance reports mount.[77] In the *Loayza-Tomayo* case, the Court has issued a sixth and seventh report, without Peru responding at

[77] *Loayza Tamayo Case*, *supra* note 51.

all. Cavallaro and Brewer[78] have argued that the Court is most effective when it is able to connect with interested domestic actors through publicity or through legal procedures. Multiple compliance reports give the Court a mechanism to maintain contact with such actors and to maintain some public awareness of the case. Additionally, the Court has devised mechanisms such as ordering states to publish Court decisions in national newspapers that create public awareness and perhaps increase domestic pressure on the state to comply with other orders in the judgment at subsequent points of time. This suggests that the court's persistence may be rewarded: even the minimal results observed after multiple compliance reports may have long term effects on state behaviour.

Figure 6a examines compliance by state. The top five compliers are Bolivia (87%), Honduras (85%), Brazil (83%), Costa Rica (80%) and Chile (76%). States with very low compliance rates are Trinidad and Tobago (eight%), Paraguay (17%), Colombia (40%), Peru (40%) and Venezuela (44%). It is difficult to identify any patterns here that correspond to differences in domestic politics.

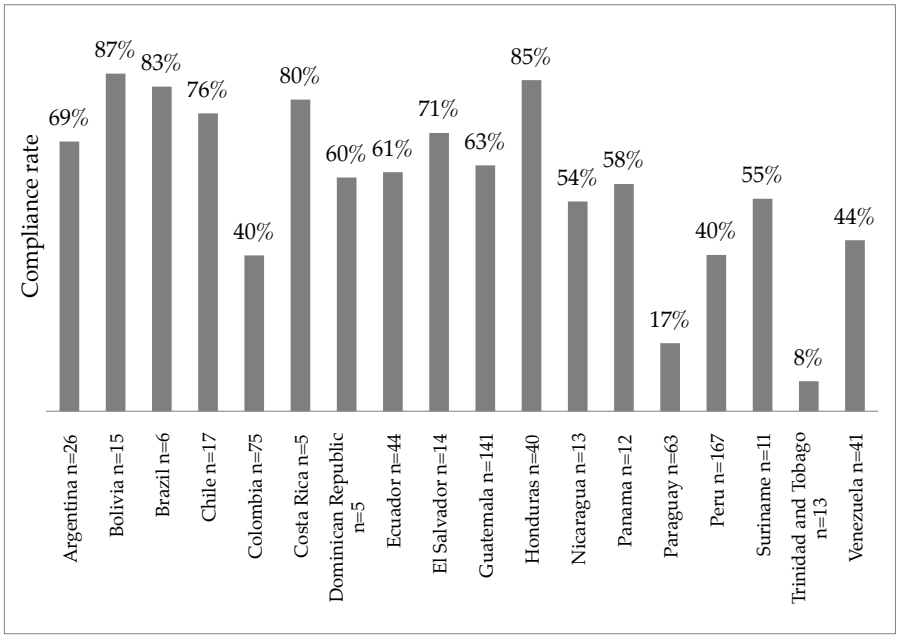

Figure 6a: IACHR Compliance by State.

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 40 compliance orders, we are left with seven states that can be split into two groups. Venezuela, Peru, Colombia and Paraguay fall in the lower category with compliance rates of 44, 40, 40 and 17% respectively. No obvious similarities

[78] Cavallaro & Brewer, *supra* note 12.

exist among these states. Paraguay is a clear outlier and may merit further study. Colombia has faced an ongoing civil war, which may account for its low compliance rate. Peru faces significantly more cases than any other state and may be overwhelmed by the sheer number of compliance orders. Venezuela has struck a separate ideological and political path in recent history, which may affect its desire to comply with the Court. Ecuador, Guatemala and Honduras have higher compliance rates of 61, 63, and 85%, respectively. Guatemela and Honduras are small Central American states still struggling to overcome many years of violence and authoritarian rule. It is possible that compliance rates are higher because most of their cases come from old, discredited regimes and their governments have a strong desire to distinguish themselves from those regimes, and secure their own authority.[79] Figure 6b shows resistance by state. Among the low compliers with a reasonably high number of orders (Venezuela, Peru, Colombia, Paraguay), resistance varies significantly, from 1.05 for Venezuela to 2.0 for Paraguay. While Peru's compliance rate is 40% and Paraguay's is 17%, they have virtually identical resistance rates. This provides some further evidence that Peru is overwhelmed by the number of cases because it resists them as much as Paraguay, but then complies at a higher rate—suggesting some difficulties in processing everything. Among the high compliers with a significant number of cases (Ecuador, Guatemala, Honduras), Honduras's resistance is quite a bit higher, but so is its compliance. This is an interesting pattern that could also suggest a lack of capacity, despite the lower number of orders.

[79] This possible explanation could be supported by Andrew Moravcsik's work in the European context, arguing that newly emerging democracies join human rights regimes to secure external support for nascent institutions: "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 54 Int'l Org. 217.

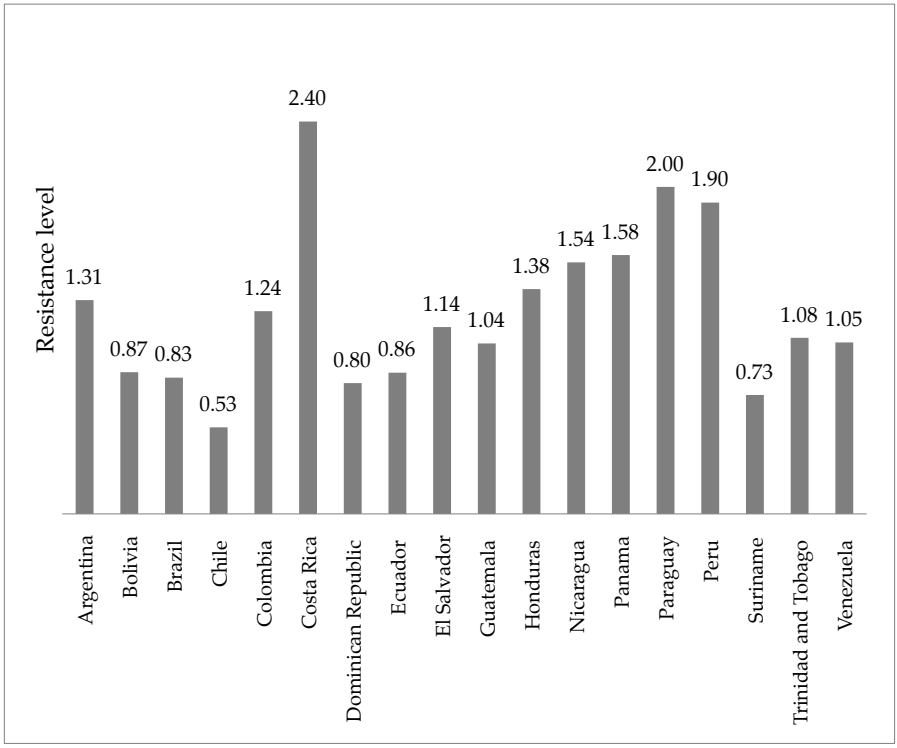

Figure 6b: IACHR Resistance by State.

Figure 7a examines compliance by the type of right violated. Most of the compliance rates fall in the range of 40-55%. Some rights with lower compliance rates tend to cluster around political participation issues: assembly, association, and participation in government, though these also have small numbers of orders. Resistance levels reported in figure 7b also do not vary greatly, but again high resistance levels correspond to political participation issues such as free conscience, assembly, association and participation in government—again with the caveat of low numbers of orders in these categories.

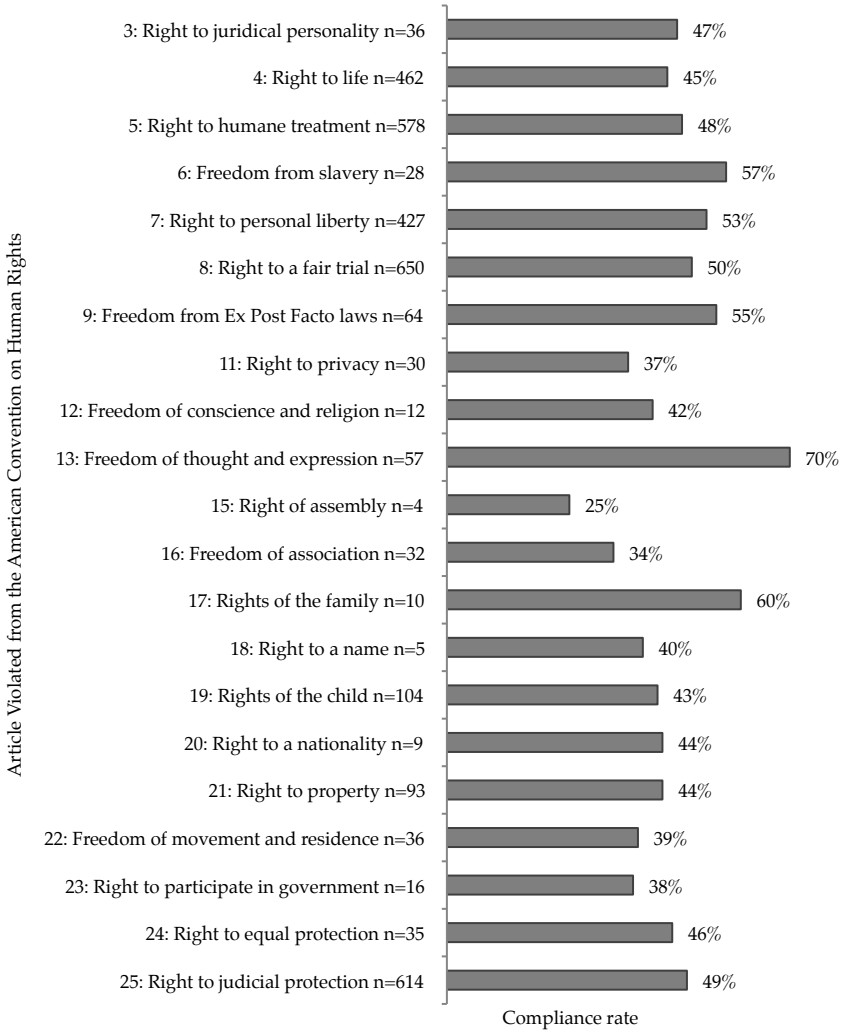

Figure 7a: IACHR Compliance by Issue Type

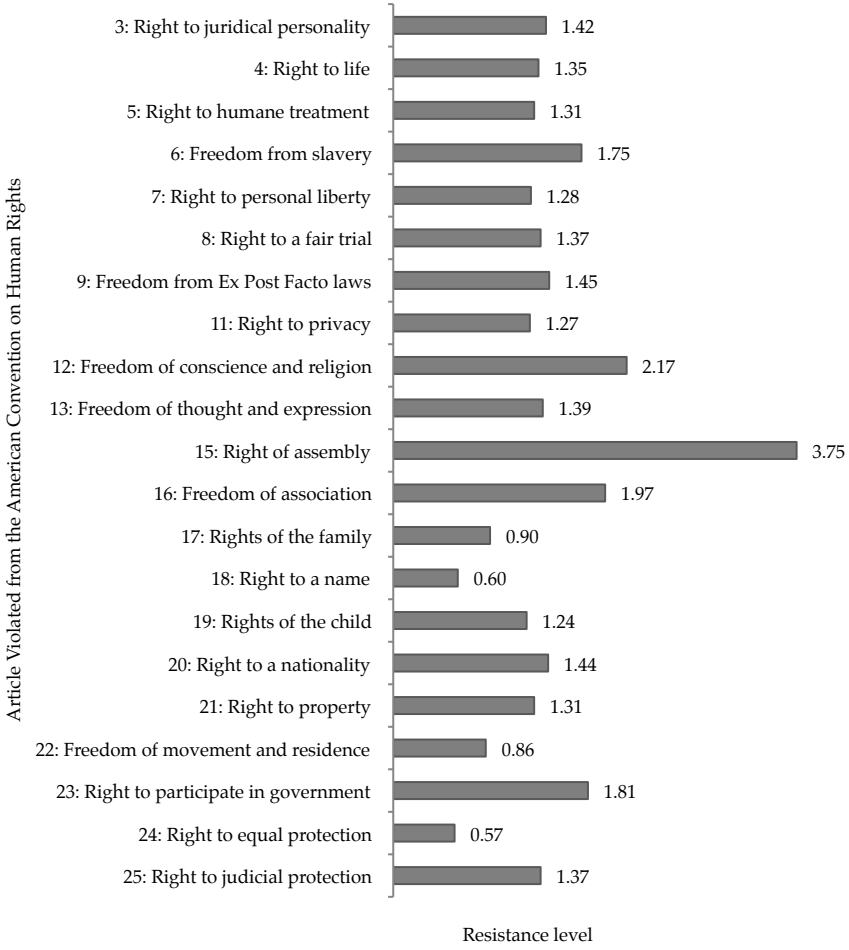

Figure 7b: IACHR Resistance by Issue Type.

2. *The European Court*

This section introduces five pieces of evidence for partial compliance: trends in pending cases, length of pending cases, high profile pending cases, execution of judgment data, and interim resolutions from the Committee. Together these sources paint a picture of a court that regularly continues to achieve full compliance with its judgments, but which also faces a substantial minority of cases in which compliance is partial for quite extended periods, and some other cases in which partial compliance may be the long term outcome.

First, section III noted that cases on which the ECtHR has already

rendered judgment can either be closed (which equates to a Committee judgment of full compliance), or pending (which means the Committee has not yet closed the case).[80] Through its *Execution of Judgements of the European Court of Human Rights* portal, the Committee makes available "snapshots" of currently pending cases, and these can be used to discover cases of partial compliance.[81] All such cases remain pending before the Committee, which examines them at its 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. Again, this means that 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).

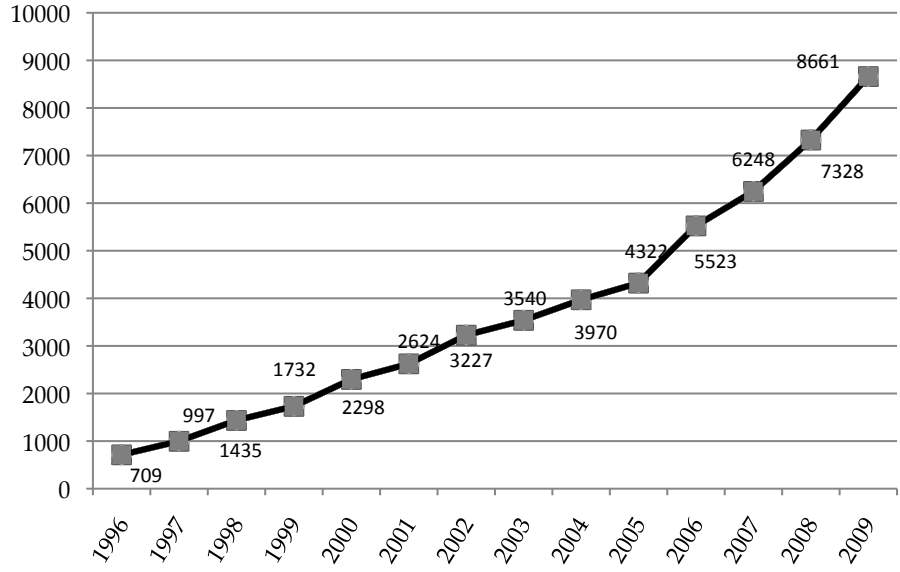

Figure 8: Development in the Number of Cases Pending, 1996-2009.

Source: COE, Committee of Ministers, Third Annual Report 2009, supra *note 13 at 32.*

Figure 8 shows the development of pending cases in recent years, from fewer than 800 in 1996 to well over 8000 by 2009. Figure 9 further distinguishes pending cases from the three most recent years by dividing

[80] In some cases, the state may already have satisfied Court requirements but not adequately reported these actions. There is a long dispute about whether the Court could express disapproval of the Committee closing a case by agreeing with a plaintiff that state actions were, in fact, not consistent with the Court's ruling. See Ryssdal, *supra* note 34 at 49; Martens, *supra* note 35.

[81] Council of Europe, "Supervision of execution: Implementation of judgments of the European Court of Human Rights", online: <http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp> [COE, "Supervision of Execution"].

leading cases from clone cases.[82] Even as the total number of pending cases has grown, leading cases have consistently constituted fewer than 1 in 8 of all pending cases. As a result of the high proportion of clone or isolated cases, states that can manage the general measures to resolve leading cases can simultaneously resolve many others as well (provided that appropriate individual measures are also taken). These patterns tell us only that the scope for full compliance, partial compliance, and non-compliance is large and growing, though it tells us little about the distribution of such compliance.

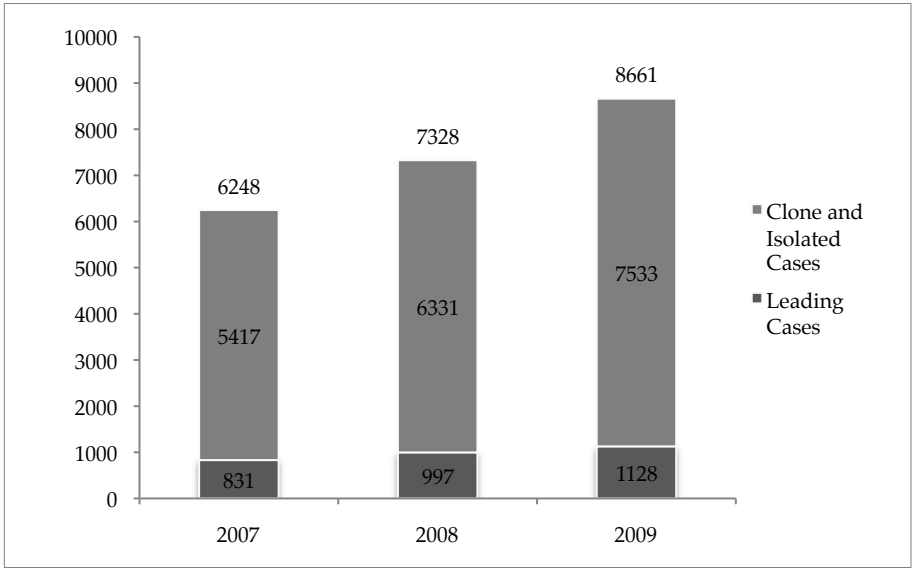

Figure 9: Pending cases on 31 December, 2007-09.

Source: COE, Committee of Ministers, Third Annual Report 2009, supra *note 13 at 33.*

[82] As noted earlier, the ECHR distinguishes "leading" cases from "clone/repetitive" and "isolated" cases. Data through 2009 shows essentially the same picture: COE, Committee of Ministers, *Third Annual Report 2009*, *supra* note 13 at 62.

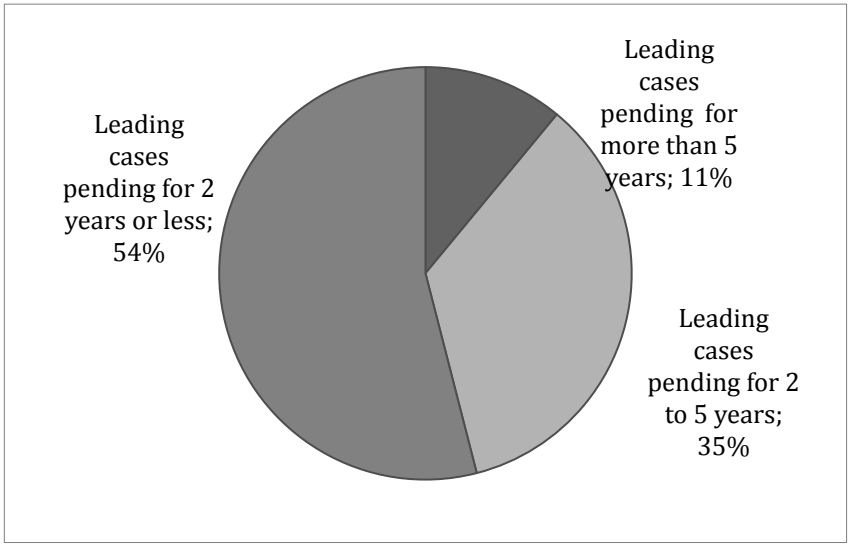

Figure 10: Length of leading cases pending before the Committee of Ministers, December 31, 2009.

The second piece of evidence is the length of pending cases. Long-pending cases are more likely to be instances of partial compliance than are recent judgments, which are either so new as to be complete non-compliance or are rapidly complied with. To get a first clue about this distribution, we turn to figure 10, which summarizes the length of pending cases that are leading cases and shows that just over half have been pending for less than two years (data as of December 2009), while just over a third have been pending for two to five years and a further 11% pending for more than five. This is highly suggestive evidence insofar as while one could expect that general measures—including complex legal and administrative changes—might take a year or two under the best of circumstances, compliance delays approaching and indeed exceeding five years might be good indicators of more stable partial compliance or non-compliance. This is particularly true when five years is more than the usual lifespan of most European governments. A significant minority of pending cases are potential examples of stable partial compliance outcomes.

Figure 11 then shows the geographical distribution of those pending leading cases that had in 2007 been outstanding for at least two years. Turkey, Italy, and Bulgaria have the most cases. Together with Romania, these four states contribute half of the long term pending leading cases before the Committee. When one expands the list to include all cases still pending at the end of 2008 (e.g. including clone cases), the pattern changes a bit, though Italy and, to a lesser extent, Turkey still stand out among a range of other ECtHR members. Countries with more than 30 pending cases were:

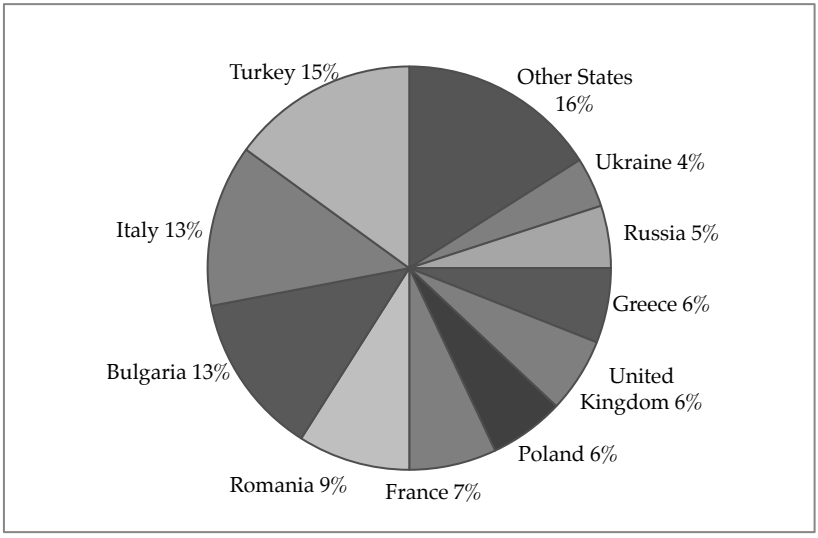

Figure 11: Leading cases pending for more than two years.

Country	# of pending cases
Italy	2428
Turkey	977
Russia	467
Poland	463
Ukraine	420
Romania	289
Greece	247
Slovenia	206
Bulgaria	174
France	119
Hungary	111
Czech Republic	91
Moldova	104
Slovakia	58
Croatia	54
Portugal	45
Belgium	41
UK	34
Finland	32

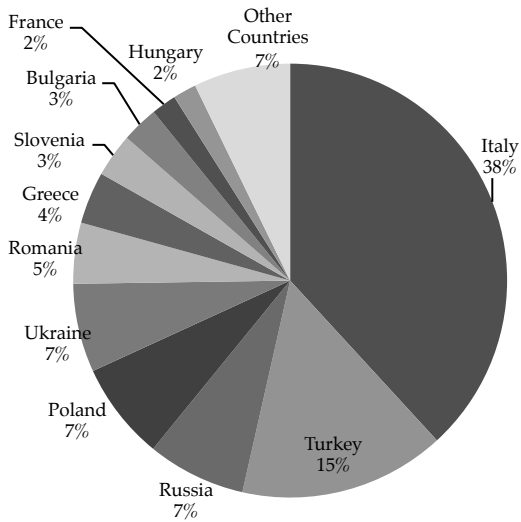

Figure 12: Distribution of Cases Pending.

This data has important ramifications, as it shows that many of the countries with the most long-pending cases are precisely those countries that we know from non-ECHR literature to be least responsive to the implementation of, for example, EU directives.[83] Meanwhile, non-EU members such as Turkey, Russia, Ukraine, and Moldova clearly have a number of outstanding human rights issues. Together, these two patterns lend more credence to the idea that many of these long-pending cases are unlikely to turn rapidly into full compliance.[84] It also is clear that countries have not compiled larger numbers of pending cases just because they have been CoE members longest. To the contrary, the relative "lateness" of Italy (1973) and Turkey (1990) to full ECtHR membership means they have required less time to compile a worse record, to say nothing of the many members who joined after 1990.

The third source of evidence is the Committee's assessments in its Annual Reports of trends in high profile leading cases. These reports suggest that apparent delays in full compliance actually reflect many cases of partial compliance. States often have taken many measures to comply, but not enough to see the case closed. For example, in many of these cases, just satisfaction has been paid, but individual and/or general measures are stalled. This is partial compliance. To illustrate, Italian law has not allowed the courts to re-open closed cases, a remedy available in almost all other European states. Of the pending Italian cases, nearly 2,200 are connected to one broad issue—the excessive length of judicial proceedings.[85] Italian authorities long ago began developing legislation to address this issue, a process which itself has gotten so troublesome that the Council of Europe's Parliamentary Assembly began issuing reports on the problems as well.[86] But this problem has been many years in the making, and may yet be many years in unwinding.

[83] Falkner & Treib, *supra* note 29.
[84] That said, the point raised in the previous section, concerning the long term societal effects of pressure from international human rights institutions, would also apply here.
[85] COE, Committee of Ministers, *First Annual Report 2007*, *supra* note 25 at 209.
[86] Council of Europe, P.A., *Implementation of the Judgments of the European Court of Human Rights*, R 1516, Assembly Debate, 24th Sitting, Doc. 11020 (2006) online: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1516.htm>. This report urges states to develop new domestic mechanisms to speed compliance and to make responsibility for compliance much more transparent. Traditionally, the Parliamentary Assembly has not been an important factor, but the Committee seems to be outsourcing to the Assembly reporting on some of the most persistent cases. In future research, we plan to use decay models to look into a random sample of the huge pool of pending cases to distinguish among cases of stable non-compliance, stable partial compliance, and trajectories that seem likely to lead to full compliance.

	2007		2008		2009	
Areas of Judgment	Cases Reviewed 2007	Cases Closed 2007	Cases Reviewed 2008	Cases Closed 2008	Cases Reviewed 2009	Cases Closed 2009
Access to efficient justice	111	46	65	30	34	12
Protection of private and family life	37	8	20	9	17	4
Protection of rights in detention	36	12	18	5	9	3
Right to life and protection against torture	35	5	16	1	12	1
Percentage of Cases Closed	32%		38%		28%	

Table 1: Cases Reviewed and Cases Closed by Committee of Ministers, 2007-2009.

Source: COE, Committee of Ministers, First Annual Report 2007, supra *note 25;* Second Annual Report 2008, supra *note* 68; Third Annual Report 2009, supra *note 13*.

The Annual Reports, which began in 2008 (for 2007 data), summarize the leading cases of most concern to the Committee and thus give us a clue as to where the most acute problems lie. Table 1 arrays the data discussed by the Committee in calendar years 2007-09. It contains those cases that the Committee declared required "further general measures."[87] Following section 3, cases closed (or slated for closure) during that year are counted as full compliance, while those remaining open on December 31 of each year count either as non-compliance or partial compliance.

Of 18 total issue types categorized by the Committee in each report, the data show four issue types with the largest numbers of total cases overseen by the Committee: access to efficient justice, protection of private and family life, protection of rights in detention, and right to life and protection against torture. This rank order is consistent across all three years of available data. Moreover, all four issue types reveal instances where compliance that was

[87] COE, Committee of Ministers, *First Annual Report 2007*, *supra* note 25 at 27. In subsequent Annual Reports, the language shifted slightly to indicate that these were cases in which the general and/or individual measures required were "particularly interesting" (e.g. COE, Committee of Ministers, *Second Annual Report 2008*, *supra* note 68 at 27; COE, Committee of Ministers, *Third Annual Report 2009*, *supra* note 13 at 99).

still pending outweighed instances of full compliance. The same pattern holds when one considers issue areas with fewer pending cases. For example, in 2007 data, cases closed outnumbered cases still pending in only three out of 18 total issue types (see figure 13).[88] The lengthy qualitative case descriptions are replete with cases in which just satisfaction and individual measures have been completed but in which some or all general measures remain unconvincing or unreported to the Court.

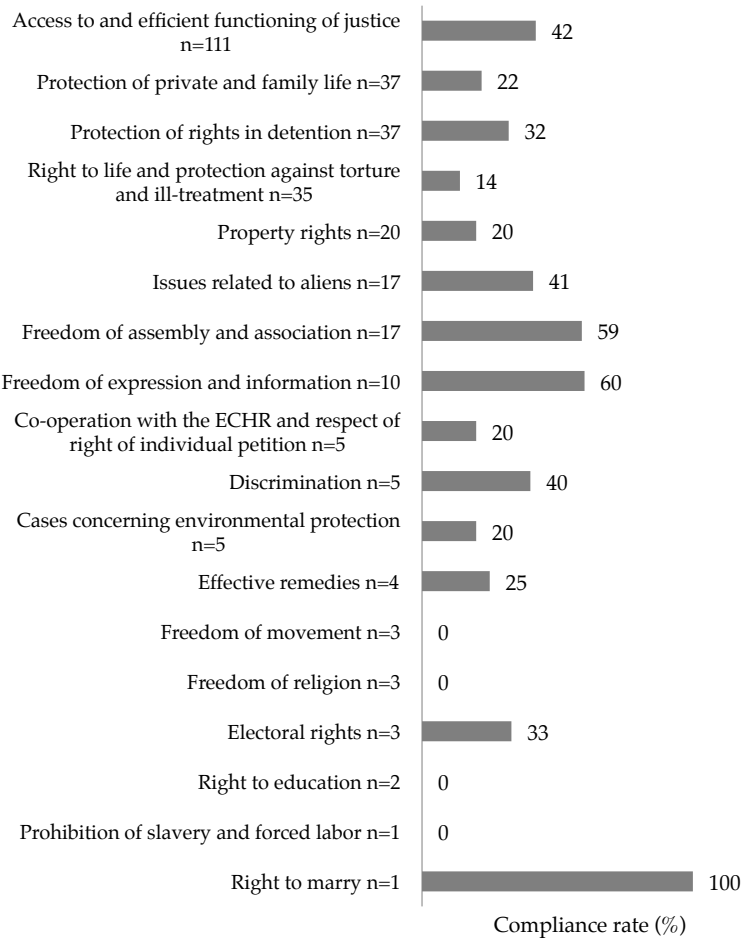

Figure 13: ECHR Compliance by Issue Type in 2007.

[88] Because 2007 was the first Annual Report, it contained the largest number of case descriptions because subsequent reports only repeated case descriptions when substantial new developments occurred. Thus, 2007 data represent the broadest single picture of the state of partial compliance, with 2008 and 2009 data reported as supplements.

Our fourth piece of evidence is the comprehensive set of reports available in the Committee's Execution of Judgments Database.[89] This data is critical because, unlike the selected cases in the Annual Reports, it provides information on *all* currently pending cases (though each quarter, as cases are closed, they are dropped from the database of pending cases). Because this includes over 8,000 cases, many with very long case narratives, it was not practical to code each one. Instead, we chose two countries with between 12 and 30 pending leading cases (Finland (14) and Belgium (18)) and two countries with high numbers (France (31) and Poland (60)).[90]

Of Finland's 14 leading cases (including one with an additional 28 clone cases), there was adequate information available on nine cases, all of which clearly were cases of partial compliance. In most cases, for example, both just satisfaction (if required) and all other individual measures had been satisfied, while the Committee had not yet been satisfied on one or more general measures. In Belgium, there were 18 pending cases in which there was sufficient information available, of which four were associated with a further 81 clone cases. Of the 18 cases, only one was a case of non-compliance and one further now seems a case of full compliance (likely to be judged so at the next opportunity). The other 16 were cases of partial compliance. As noted, some cases of partial compliance might be driven by the relatively recent date of judgment. We indeed see that eight of the individual cases are from 2007-2009, possibly suggesting that many may soon be cases of full compliance. On the other hand, five of the individual cases go back at least five years, and when considering the 81 clone cases, we find another 22 that go back that far.

Turning to states with higher numbers of cases, the pattern remains largely unchanged: partial compliance remains the dominant outcome. Take France, with 31 leading cases in the execution dataset. Again, there are a number of cases decided in 2009 for which there have yet been no Committee hearings and where it is thus impossible to judge the current state of compliance from the information provided.[91] Of the remaining 20 French leading cases in the dataset, however, 17 show clear evidence of partial compliance, while two show likely full compliance and one shows complete non-compliance. Finally, an examination of the 60 leading cases from Poland show 17 cases in which information is insufficient to judge (all from 2009 judgments), while all 43 other leading cases show clear evidence of partial compliance.

In short, while most ECtHR cases are still complied with in the first two years, a very substantial number of older pending cases show clear evidence of partial compliance. When states do not comply quickly, it is still rare that they do nothing. Having taken some steps, they quite often are unable or unwilling to comply fully to the satisfaction of the Committee, often for

[89] COE, "Supervision of Execution", *supra* note 81.
[90] 31 countries have 12 or fewer pending cases in the execution database.
[91] Of 11 French leading cases deficient in information, 9 are from 2009 judgments.

many years. Indeed in the four countries just considered, we see clear evidence of partial compliance in 85 of the 90 leading cases that contain adequate information.

To see this picture more fully, we turn to the fifth piece of evidence: data on the Committee's interim resolutions (IR).[92] According to the Council of Europe, IRs are a way for the Committee to facilitate discussion on the compliance process:

> 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 needed to comply with the judgment.[93]

The typical inclusion in IRs of "interim measures already taken" clearly implies that IRs often concern instances of partial compliance by states. For example, in one of the many IRs directed at the aforementioned problem of the length of judicial proceedings in Italy, the Committee followed the Council of Europe's Parliamentary Assembly recommendations in recommending that, "although recognizing the measures, legislative and others, taken in the meanwhile, urged the Italian authorities at the highest levels to maintain their political commitment to resolving the problem."[94] Italian authorities responded by setting up a special commission (Mirabelli Commission) to outline further steps and engaged in a series of meetings with the Council Secretariat in which they provided "an exhaustive presentation of the legislative measures already taken and those on the way to adoption by Parliament."[95] The Committee asked for further legal and administrative changes and a timetable for implementation, but the 2009 Annual Report showed that insufficient progress was made, and another IR was then released (2009/42).[96]

IRs have become quite common, especially as a way of efficiently addressing large numbers of clone cases. Cumulatively, the 7815 cases pending as of April 2009 have, to date, generated 7560 IRs.[97] As in the IACHR, some cases have required multiple follow-ups. We note each IR separately since this is an important measure of partial compliance, roughly akin to the "institutional nagging" that we noted in the IACHR data. As cases are closed by the Committee, IRs associated with them later drop from the database, such that the numbers are in constant flux. Nevertheless, this snapshot reveals several interesting pieces of information. First, a substantial

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[92] Although they very occasionally also occur in cases of complete non-compliance.
[93] Council of Europe, "About Execution: A Unique and Effective Mechanism", online: <http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp>.
[94] Committee of Ministers, *Second Annual Report 2008*, *supra* note 68 at 129.
[95] *Ibid*.
[96] Committee of Ministers, *Third Annual Report 2009*, *supra* note 13 at 124.
[97] All data in this paragraph are compiled from the Council of Europe's *Execution of Judgments* database located online: COE, Human Rights and Legal Affairs, <http://www.coe.int/t/e/human_rights/execution/02_documents/PPIndex.asp>.

number of pending cases have generated IRs (just over 2900 (38%) have generated at least one IR). Second, most IRs are relatively new, although this is a feature of Committee practice to make more use of IRs and does not mean that only recently have cases become hard to resolve. Indeed, 2005 was the first year in which the bulk of the (many very old) Italian cases received IRs, and of the then-7815 pending cases, 3046 went back to 2004 or earlier and 1430 went back to the 1990s.

Third, many cases have generated more than one IR. The Italian cases generated new IRs in 2007 and 2009. Of the 2186 cases that have received three IRs, only 11 are from non-Italian cases. Fifty-six further cases have received two IRs, and here many different countries are represented. There are three cases (two of them Turkish and one from Moldova) where four IRs have been required (so far) and one Turkish case still pending despite five IRs.[98] Fourth, a certain rhythm has developed around the most intractable sets of cases. As noted, the Italian cases are generally being reviewed every other year, while the Turkish cases seem to be on a three-year cycle (the Committee only did IRs on Turkey and Ukraine in 2008).[99] Because there are not multiple compliance orders, it is not possible to generate a resistance measure or ratio as in the IACHR case. Again, delegated compliance is not a checklist. But it is clear that for very many cases, partial compliance is not a brief transitory way station on the road to full compliance.

This section developed five indicators of partial compliance in the ECtHR. The first indicator, pending cases, simply outlined the contours of the compliance challenge and established, uncontroversially, that the ECtHR generates many more judgments each year than the IACHR. The second, length of pending cases, showed that a substantial number of cases remained pending for between two and five years, and a smaller number remained pending even after five years. The third, based on detailed case studies from the Committee's Annual Reports, showed that many cases in both of these pending categories are indeed ones of partial compliance and that the largest problems occur in the same kinds of cases over time. The fourth, data from the execution database, allows us to separate partial compliance in pending cases from cases of full (or soon to be full) and complete non-compliance. Both are unusual among long-pending cases. The fifth, interim resolutions, takes a closer look at the magnitude of the long-term partial compliance pattern and establishes that some partial compliance is a relatively stable outcome. This cumulative picture is in tension with the older claims of the ECtHR itself—echoed by many scholars—that state compliance with the ECtHR judgments was nearly universal[100] and tracks more much closely with a growing alarm in the Court and Committee that compliance is a major and growing issue.[101]

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[98] A case now closed went to 6 IRs.
[99] In a small handful of cases, the Committee has delivered two IRs on the same case in the same year.
[100] Martens, *supra* note 35.
[101] COE, Committee of Ministers, *First Annual Report 2007*, *supra* note 25; COE, Committee of

3. *Types of Partial Compliance: The IACHR and ECtHR Compared*

We have examined general patterns and levels of compliance with court rulings, but what does partial compliance look like in practice? Our final section identifies four types of partial compliance at the state level: split decisions, state substitution, slow motion compliance, and ambiguous compliance amid complexity. We illustrate each with examples from Latin America and Europe. We do not intend these four forms to be exhaustive or mutually exclusive. In any given case, partial compliance could take on characteristics of one or more of these forms or perhaps fall outside all four of these categories. We generate these categories inductively from the patterns we observe.

Split Decision

In a "split decision," the offending state complies with part of the overall checklist in a given case (e.g. monetary compensation) but not with other parts (e.g. legal changes). In delegated compliance, the state most often takes adequate individual measures but, in the Committee's judgment, inadequate general measures.

In *Maritza Urrutia v. Guatemala*,[102] 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.[103] 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 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.

Regarding the ECtHR, 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 (e.g. *Scordino (1) v. Italy*).[104] In *H.L. v. the United Kingdom*,[105] the Court found the state's procedures for obtaining consent for commitment to a psychiatric hospital were inadequate. In the interim, the patient in question, who had been diagnosed with autism, has long been

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Ministers, *Second Annual Report 2008*, *supra* note 68; COE, Committee of Ministers, *Third Annual Report 2009*, *supra* note 13.

[102] *Maritza Urrutia Case (Guatemala)* (2003), Inter-Am. Ct. H.R., (Ser. C) No. 103, *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser.L/V/III.61/Doc.1 (2004), online: Human Rights Library - University of Minnesota <http://www1.umn.edu/humanrts/iachr/Annuals/annual-03.pdf>.

[103] See compliance reports for this case from 2005 (Spanish only) and 2007 at IACHR, "Monitoring Compliance", *supra* note 50.

[104] *Scordino v. Italy No. 1* (2006), [GC] No. 36813/97, [2006] V E.C.H.R., 45 E.H.R.R. 7.

[105] *H.L. v. The United Kingdom* (2004), No. 45508/99, [2004] IX E.C.H.R., 40 E.H.R.R. 761 [*H.L v. U.K.*].

released, and the operative laws and procedures have been changed in England, Wales, and Scotland. But until they are also changed in Northern Ireland, the Committee has indicated its refusal to close the case.

State Substitution

In "state substitution," the state sidesteps a specific court order from the checklist and offers a different response than the one the Court demanded.[106] In such cases, the state can reasonably argue it is obeying the general spirit of the compliance order, but not the letter of the order. It is reasonable to call such behaviour partial compliance because the state is not completely fulfilling the Court's compliance order, but it also seems unfair to say the state is completely disregarding that order. Partial compliance offers a helpful way to characterize such behaviour.

In *Villagrán-Morales et al. v. Guatemala,*[107] the Court ordered the government to rebury a victim in a place to be chosen by the victim's next of kin.[108] 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, the government can make a reasonable case that it acted in a way that respected the intent behind the compliance order—perhaps even in cooperation with a victim's relative. Still, because the government did not do exactly as the Court requested and did not provide a compelling reason for its failure to comply that might have convinced the Court to alter its order, the case seems properly coded as partial compliance.

ECtHR cases are harder to code this way since it is rare for the Court to make specific orders. Yet states often try to circumscribe their reactions to the Court in ways that arguably offer analogous kinds of "substitutes." Sometimes this is done in good faith and in the expectation that the Committee will accept the state response and close the case. In other cases, however, it seems that states have sought to offer the Committee a response that it is unlikely to accept or to continue offering a response already rejected in the past as inadequate. For example, in *Skibinscy v. Poland*,[109] the Court

[106] This category is necessarily different across our two cases. In the IACHR, a state substitutes a response to a specific order from the Court. In the ECtHR, the Committee judges that what a state has undertaken as a general measure is not, in fact, adequate to solve the problem going forward. What they clearly share is an unresolved tension between state and court over the adequacy of a state response.

[107] *Villagrán Morales et al. Case (the "Street Children" Case) (Guatemala)* (1999), Inter-Am. Ct. H.R. (Ser. C) No. 63, *Annual Report of the Inter-American Court of Human Rights: 1999*, OEA/SerL/V/III.47/doc. 6 (2000) 665, online: Human Rights Library - University of Minnesota <http://www1.umn.edu/humanrts/iachr/Annuals/appendix-1999.html>.

[108] See IACHR, "Monitoring Compliance", *supra* note 50 (compliance report of 27 November 2003, online: <http://www.corteidh.or.cr/docs/supervisiones/villagran_27_11_03_ing.pdf>).

[109] *Case of Skibinscy v. Poland* (14 November 2006), No. 52589/99, E.C.H.R., online: European Court of Human Rights <http://www.echr.coe.int/echr/en/hudoc/>.

ruled that state land use laws had violated individual rights, and in a series of cases, the state responded by paying just compensation and by changing the law governing *subsequent* planning disputes. The Committee, however, has refused to close the case on the grounds that additional complainants may come forward, and the state has not yet made general provisions for those cases.[110] *Görgülü v. Germany*[111] resulted in a judgment for custodial rights for a man whose girlfriend had given their biological child up for adoption without his knowledge or consent. But because the man only enjoys visitation rights rather than custody, the Committee has held that the state is not yet in full compliance and has kept the case open.[112]

And in *Baucher v. France*,[113] the Court held that an individual's rights were violated when, upon conviction by a French court, he was not informed of the specifics of his conviction in such a way as to make possible an appeal within the operative 10-day window. Individual measures taken included just satisfaction (for non-pecuniary damages) and the Committee was satisfied. However, on general measures, France argued that heavy court workloads sometimes meant that the appropriate documents (upon which foundation an appeal could be lodged) could only be produced after an appeal was lodged. The Committee has rejected this position, arguing that further "measures appear necessary to ensure that defendants may always obtain the reasons for their conviction early enough to be in a position to lodge an appeal."[114]

Slow Motion

In "slow motion" compliance, the state takes steps towards remedial action with respect to a specific action required by the Court or that follows from the Court's decision but does not fulfil that demand completely. This category differs from split decisions because it applies to a specific action rather than to a set of actions within a case. It differs from state substitution because the state suggests (implicitly or explicitly) that it will do more later. Cases with high levels of resistance (meaning, by definition, some absence of compliance across time) and full compliance most clearly fall in this category. But slow-motion compliance can also occur in cases of high resistance and no full compliance if the state seems to be making progress.

In the case of *Carpio-Nicolle et al. v. Guatemala*,[115] the state argued that it could not pay compensation to the victims all at once because it was in a

[110] COE, "Supervision of Execution", *supra* note 81, "Poland".
[111] *Görgülü v. Germany* (26 February 2004), No. 74969/01, E.C.H.R., online: European Court of Human Rights <http://www.echr.coe.int/echr/en/hudoc/>.
[112] von Staden, supra note 14 at 18.
[113] *Baucher v. France* (24 July 2007), No. 53640/00, E.C.H.R., online: European Court of Human Rights <http://www.echr.coe.int/echr/en/hudoc/> (French only).
[114] COE, "Supervision of Execution", *supra* note 81 at "France".
[115] *Carpio Nicolle Case (Guatemala)* (2004), Inter-Am Ct. H.R. (Ser. C) No. 117, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/Doc.1 (2005), online: Human Rights Library - University of Minnesota <http://www1.umn.edu/humanrts/iachr/Annuals/annual-04.pdf> (Spanish only).

fiscal crisis due to Hurricane Stan.[116] It proposed paying the victims 33% of their money each year, but the victims rejected the offer. The state proceeded with its plan despite the objections. The state eventually achieved full compliance on this particular matter, according to the Court. One of the victims receiving compensation passed away before the state made the final payment, which thus went to the victim's next of kin. This circumstance illustrates the way in which slow-motion compliance, even when it ultimately turns into full compliance, might still be considered ethically or morally incomplete and partial. In this case, the victim himself never did receive his due recompense because of the state's choice to comply in slow motion. Justice delayed is not necessarily justice denied, but it does seem fair to call it justice partial.

On the ECtHR side, the Committee's 2010 Annual Report stated that "the issue of slowness and negligence in execution has attracted special attention."[117] The Court has been informed by authorities in Northern Ireland that measures to resolve *H.L. v. United Kingdom* (described above) will likely be in place by 2013, although the judgment became final in 2004.[118] Analogous to the Honduran case just noted, in *Stran Greek Refineries v. Greece*, the Committee explicitly rejected the Greek government's proposed payment schedule.[119] However, state refusal to pay just compensation is rare. More common is state foot-dragging on general measures. For example, in *Zwierzynski v. Poland*,[120] Poland sought to defend its 1992 expropriation of private property. At the time the ECtHR held against the state for excessive length of civil proceedings, the case had dragged on in the Polish civil courts without resolution for over eight years. The case, decided by the ECtHR in 2001 but then subject to at least five further appeals by Poland, has still not been closed by the Committee. Poland has, however, taken a number of individual measures in that time, and the case now seems closer to a conclusion than in prior years.[121] Thus, while this case is also a split decision (satisfactory individual measures having long since been taken), the state has been markedly slow about pushing through general measures that would satisfy the Committee. More generally, while any given IR could be evidence of all four kinds of partial compliance, multiple IRs noting very slow progress on one individual matter often are a marker of slow motion compliance.

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[116] See compliance reports for *Carpio Nicolle Case* case: IACHR, "Monitoring Compliance", *supra* note 50.
[117] COE, Committee of Ministers, *Third Annual Report 2009*, *supra* note 13 at 25.
[118] *H.L v. U.K*, *supra* note 105; COE, "Supervision of Execution", *supra* note 81 at "United Kingdom".
[119] See Interim Resolution 96/251, in Council of Europe, *Collection of Interim Resolutions 1988-2008*, H/Exec(2008)1 (13 October 2008) at 42-43, online: <http://www.coe.int/t/dghl/monitoring/execution/Documents/InterimResolutions2008_en.pdf>; *Stran Greek Refineries and Stratis Andreadis v. Greece* (1994), 301B E.C.H.R. (Ser. A), 19 E.H.R.R. 293.
[120] *Zwierzynski v. Poland* (2001), No. 34049/96, [2001] VI E.C.H.R. 73, online: European Court of Human Rights <http://www.echr.coe.int/echr/en/hudoc/>.
[121] COE, "Supervision of Execution", *supra* note 83 at "Poland".

Ambiguous Compliance Amid Complexity

In "ambiguous compliance amid complexity," states face particularly daunting or demanding tasks. State compliance is problematic because the task is complicated enough that it is difficult to say with certainty whether state behaviour is completely congruent with Court opinions. In some cases, full compliance may be so complex as to require actions beyond the state's capabilities. This category differs from the others because the disparity between state behaviour and court preferences is much clearer in the other categories. In this category, compliance rests much more in the eye of the beholder.

In *Garrido and Baigorria v. Argentina,*[122] the Court ordered Argentina to pay compensation to the families of the victims, who had been "disappeared" by the government.[123] 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 classified this as a case of partial compliance as a result.

In *Myrna-Mack Chang v. Guatemala,*[124] the Court ordered the state to investigate the facts with the "aim" of prosecuting and punishing the perpetrators.[125] The Court decided Guatemala failed to do so, in part because it could not find the perpetrators. The task of punishing perpetrators is far more difficult than paying compensation. It may be beyond the resources of some states to prosecute some human rights violations successfully. Likewise, it is inherently difficult to tell whether a state is faithfully complying with its duty to "aim" for prosecution and punishment. The Court of course cannot order a conviction or a punishment and hence must decide whether the state was sincere in its efforts or not. In such situations, compliance will frequently be ambiguous and is reasonably categorized as partial.

In the ECtHR, it is tempting to argue that the bulk of pending cases with IRs are ones in which ambiguity is a central feature. As noted in several places earlier, states have clearly tried to take some measures to satisfy the Court, but have often failed to do so in a way that satisfied the Committee. At the same time, the ECtHR has found a number of ingenious solutions,

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[122] *Garrido and Baigorria Case (Argentina)* (1996), Inter-Am. Ct. H.R. (Ser. C) No. 26, *Annual Report of the Inter-American Court of Human Rights: 1996*, OEA/Ser.L/V/III.35/Doc.4 (1997) 75.
[123] See IACHR, "Monitoring Compliance", *supra* note 50 (compliance report of 27 November 2007, online: <http://www.corteidh.or.cr/docs/supervisiones/garrido_27_11_07_ing.pdf>.)
[124] *Myrna Mack Chang Case (Guatemala)* (2003), Inter-Am. Ct. H.R., (Ser. C) No. 101, *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser.L/V/III.61/Doc.1 (2004).
[125] See IACHR, "Monitoring Compliance", *supra* note 50 (compliance report of 26 November 2007, online: <http://www.corteidh.or.cr/docs/supervisiones/mack_26_11_07_ing.pdf>.)

including the ability to satisfy claims of people who are dead or who have disappeared (e.g. *Müller v. Switzerland*).[126] Thus, problems that have challenged Latin American states have been successfully managed in the European context.

Far more challenging are cases like those that have arisen from the Chechen wars in Russia, some of which relate to torture, extrajudicial killings and disappearances of Chechen activists.[127] Russia has set up a special Investigating Committee in its Prosecutor General's Office to investigate these cases and to oversee the implementation of individual measures.[128] But the daunting list of general measures required speaks to a huge gulf between the Court's expectations and even a partially motivated Russian state's willingness to meet those expectations. In this sense, the Court can signal the distaste of much of the Council of Europe for the way Russia has conducted itself in the two Chechen Wars. But it seems increasingly implausible that signalling displeasure—through Court judgments, Committee reports, and IRs—can be, itself, an indications that Russia might be prepared to be more compliant. Put differently, if adequate general measures are taken in these cases (over 100 are associated with Chechnya), they would seem likely to come *after* the resolution of the Chechen conflict and not prior to it. In that sense, the ECtHR faces a different kind of ambiguity problem than does the IACHR, but one that is no less daunting.

In the face of such complexity in many very difficult cases, the Court and Committee have, in recent years, developed several new tools that have been transforming the way the Court works.[129] Since 2004, the Court has issued so-called pilot judgments, which do in fact lay out some general measures in cases of "wide-scale, systemic human rights violations."[130] Broadly, states have so far complied with these very specific judgments, though they remain quite exceptional. The Court has also delivered judgments ordering specific individual measures in a few cases. Some appear to have worked well (e.g. *Assanidze v. Georgia*) while others again show the ambiguity references in this category.

For example, in *Ilascu v. Moldova and Russia*,[131] four political activists in Moldova's breakaway territory of Transdniestria won a judgment against both Moldova and Russia, the latter of which was held to exercise substantial control over the region. Despite the Court's specific judgment and several

[126] *Müller v. Switzerland* (5 November 2002), No. 41202/98, E.C.H.R., online: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=41202/98&sessionid=59023880&skin=hudoc-en>.

[127] See e.g. *Khash*iyev *v. Russia* and its associated clone cases, *Khashiyev and Akayeva v. Russia* (24 February 2005), Nos. 57942/00 & 57945/00, E.C.H.R., online: European Court of Human Rights <http://www.echr.coe.int/echr/en/hudoc/>.

[128] COE, Committee of Ministers, *Third Annual Report 2009*, *supra* note 13 at 103-04.

[129] We thank Mikhail Lobov for his suggestions on this matter.

[130] Human Rights & Social Justice Research Institute, London Metropolitan University, "Pilot Judgments: Warsaw Seminar Programme and Papers", online: < www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm> (A good recent symposium on pilot judgments).

[131] *Ilascu v. Moldova and Russia* (2004), [GC] No. 48787/99, VII E.C.H.R., online: European Court of Human Rights <http://www.echr.coe.int/echr/en/hudoc/>.

resolutions from the Committee, demanding two of the applicants' immediate releases, Russia long argued that the measure ordered was neither in its competence nor in its power, given Moldovan sovereignty. Such cases may also fit the category of ambiguous orders, at least if the Russian position is taken seriously.[132]

This section has shown that partial compliance varies, and that four patterns can be found across both very different regimes. Meanwhile, previous sections suggested a pattern in which, over time, the IACHR seems to be achieving more compliance than in the past, while the ECtHR may well be achieving less. In that context, the initial indications that the ECtHR and the Committee may be, in some cases, prepared to move towards more checklist compliance are certainly worthy of further scrutiny.

V. Conclusions

We have dealt above with two quite different regional human rights courts. The IACHR essentially tells state violators, "Complete this list of remedies, and tell us when it's finished. We will then check what you have done." By contrast, the ECtHR essentially tells states, "You've done wrong. Find a way to undo or compensate for the harm you've caused and to avoid future harm. When it's done, tell our designated third party, and they will check." Our central finding is that notwithstanding these very different approaches, states in both systems often find various forms of partial compliance to be a preferred response, which they often attempt to sustain in the face of monitoring and explicit warnings not to do so.

While scholars tend to discuss compliance as a dichotomous, all or nothing outcome, we suspect that partial compliance is likely to be very common and sometimes the most common outcome for many international rules. The presence of similar state behaviour despite the large differences between the European and American regimes suggests that regime type is not driving the most important observed outcomes. Partial compliance is a remarkably stable and common outcome even when examined from a variety of analytical perspectives. In the Americas, levels of partial compliance do not vary much by the year in which a judgment is issued, by the date of the compliance report, by the number of compliance report within a given case, or by the nature of the right violated. Compliance varies a bit more by state in the American system and by the type of right violated in the European system, but compliance levels are still generally in the middling range.

In Europe, conventional wisdom suggests that compliance with Court rulings is very high. In the Americas, there is not much conventional wisdom

[132] In addition, the Committee also may try to mandate very specific steps, as it has in high-profile Turkish and Russian cases but also, e.g., in *McKerr v. United Kingdom* (2001), No. 28883/95, [2001] III E.C.H.R., online: European Court of Human Rights <http://www.echr.coe.int/echr/en/hudoc/>; *Kress v. France* (2001), No. 39594/98 [2001] VI E.C.H.R..

because of the Court's lower profile, but Posner and Yoo[133] suspect compliance is very low, around 5%. We have found some initial evidence that both assessments are wrong. That evidence is stronger in the Americas, where compliance is easier to monitor because of very specific judgments. The European picture is muddied by the fact that compliance is less objective and harder to judge, where the ECtHR 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.[134]

In the Americas, compliance with payments is the most common form of compliance, hovering around 40-50%. In Europe, compliance with payments appears to be even higher. For example, in 2009, only 5% of just satisfaction payments were not made on time.[135] But most cases that have been pending for over two years are, in fact, ones in which states have partially complied, and data from interim resolutions from the Committee showed a similar pattern of relatively stable partial compliance.

What drives partial compliance? While that is beyond the scope of this paper, we note that the dependent variable we offer is amenable to further research from within all three major approaches to compliance that we introduced. At the most basic level, since each points to factors that push both for and against compliance, these factors, considered together, might well lead to partial compliance. Some scholars point to international enforcement in the form of diffuse penalties and rewards, both material and social. In the case of human rights (and perhaps in other international issues), those rewards and penalties can point in very different directions. States, multinational corporations and other actors can push others to either increase or decrease their respect for human rights. Strategic actors might easily respond with partial compliance and adjust compliance levels as necessary. Other scholars relate compliance to management capability, which is likely to vary by issue area and by state. Hence, states with middling capabilities may have partial compliance outcomes. Courts sometimes impose difficult demands on states that might desire to comply fully but find it difficult to do so in practice. Finally, still others argue that domestic actors most strongly influence compliance. Domestic actors are likely to vary substantially in their attitudes toward compliance. As a result, strategic political actors may prefer middling compliance levels that can be adjusted as domestic preferences shift over time.

These findings have implications for existing theories and suggest additional theoretical questions that deserve more exploration. First, political science scholars of all theoretical persuasions need to more carefully consider a range of outcomes when considering the effects of international institutions and international law. Scholars have missed the prevalence of partial compliance because they have failed to conceptualize it. The effects of

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[133] Posner & Yoo, *supra* note 26.
[134] Even if the Committee has been increasingly sharp in its warnings about partial compliance. See COE, Committee of Ministers, *Third Annual Report 2009*, *supra* note 13 at 8-9, 12-14.
[135] *Ibid*. at 51.

international institutions are often portrayed as either deeply transformational (as in the socialization approach) or barely noticeable (as in realist-style approaches). The middle ground is worth exploring—and some scholars have begun exploring it[136]—partly because it seems quite common and partly because many partial compliance outcomes do not seem to be merely transient waypoints on the road to full compliance.

Second, the mechanisms by which international institutions influence state behaviour might include more subtle means than either incentives (rewards, threats) or persuasion. Here, strategic theories from political science might be fruitful ways to reflect on older international legal process theories. After all, courts facilitate repeated interaction between legal specialists and state policy-makers. Those interactions are potentially costly to both sides, though those costs are frequently intangible, involving goods such as bureaucratic, state or court reputations and precedents for future cases. The interactions also involve careful legal reasoning and repeated discussion. In these interactions, various actors may adjust their positions on issues to preserve their reputations, to advance shared understandings that they prefer, to set particular precedents for future cases, or to engage in reciprocity. These repeated small scale interactions that occur in the give-and-take of the legal process may shape state behaviour in important ways. Partial compliance seems like an optimal outcome in such an environment. State officials and judges sometimes win and sometimes lose, but they both want to keep playing the game of bringing cases and implementing decisions. State behaviour changes slowly and gradually, not merely as a result of rewards and punishments on the one hand or deep changes in values and interests on the other, but also due to the legal processes of institutional negotiations. This at least is one paradoxical possibility suggested by our research: that sustained interaction between courts and politicians may both reflect the unsatisfactory nature of partial compliance and, by pitting them against one another in years of iterated exchange, generate plenty more of it.

[136] Cavallaro & Brewer, *supra* note 12; Keller & Stone Sweet, eds., *supra* note 17.

State Interests and the Creation and Functioning of the United Nations Human Rights Council

ERIC COX*

I. Introduction

In its final years, the United Nations Commission on Human Rights (CHR) came under increasingly intense criticism from multiple actors. These criticisms were rooted in diverse perspectives on the appropriate role of inter-governmental human rights institutions. Many Western states and non-governmental organizations, as well as some bodies within the UN system, were dissatisfied for a number of reasons with the capacity of the CHR to aggressively promote state compliance with human rights norms. First, the CHR's membership commonly included states with poor human rights records; the procedure for elections even made it possible for such states to assume leadership positions. As noted by the UN's High-level Panel on Threats, Challenges and Change: "standard-setting to reinforce human rights cannot be performed by States that lack a demonstrated commitment to their promotion and protection. We are concerned that in recent years States have sought membership… not to strengthen human rights but to protect themselves against criticism…."[1] Second, the CHR was greatly criticized for a

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[1] High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2004) 8 at para. 283 [High-level Panel].

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perceived overall inefficiency, exemplified by the low number of sessions held annually, and its inability to call emergency sessions.[2]

On the other hand, the criticisms of many non-Western states were based in perceptions that the work of the CHR was motivated by the political interests of the most powerful. These states were frequently critical of what they saw as overt attempts to politicize the work of the body, and to selectively target states with which powerful UN member states had a disagreement. In particular, many developing states believed that the use of country-specific resolutions served to undermine the standard-setting function of the CHR.[3]

It was out of this context—one of dissatisfaction that was nearly unanimous, yet driven by several fundamentally different perspectives—that a strained compromise was forged, and a new human rights institution created. On 15 March 2006, the UN General Assembly resolved to abolish the CHR, and replace it with a new Human Rights Council (HRC).[4] The 170 states that voted in favour were opposed by a bloc of four members led by the United States.[5] There were three abstentions, and 14 states were non-voting.[6] The resolution was the result of months of negotiations among the various states that had agreed on little more than the need to reform UN human rights protection.

The structure and behaviour of the HRC is best understood in light of the diverse preferences that informed its creation. Like all human rights regimes, the HRC is an institutional compromise, a product of competition between the preferences of several blocs of states. For the purposes of parsimony, this article makes generalizations about the preferences and characteristics of groups of states; it should be recognized there is no uniformity within a particular bloc with respect to domestic political institutions, norms regarding human rights practice, or UN negotiating positions.

The argument in this article proceeds in three steps. The second section will rely on recent work in the liberal and constructivist literature to build an approach in which state preferences for the structure of human rights regimes are understood as a function of their perceived domestic and

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[2] Paul G. Lauren, "'To Preserve and Build on its Achievements and to Redress its Shortcomings': The Journey from the Commission on Human Rights to the Human Rights Council" (2007) 27 Hum. Rts. Q. 307 at 327-329; Ladan Rahmani-Ocora, "Giving the emperor real clothes: The UN Human Rights Council" (2006) 12 Global Governance 15; Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All* (New York: United Nations Dept. of Public Information, 2005); Philip Alston, "Reconceiving the UN human rights regime: challenges confronting the new Human Rights Council" (2006) 7 Melbourne J. Int'l L. 185 at 187-188, 192; Nico Schrijver, "The UN Human Rights Council: A new 'society of the committed,' or just old wine in new bottles?" (2007) 20 Leiden J. Int'l L. 809 at 812-814.

[3] Alston, *ibid.* at 205-206.

[4] *Human Rights Council*, GA Res. 251 (LX), UN GAOR, 60th Sess., UN Doc. A/RES/60/251 (3 April 2006).

[5] The other three member states voting against the Resolution were Israel, the Marshall Islands, and Palau.

[6] The abstaining states were Belarus, Iran, and Venezuela. The states that did not vote on the resolution were Central African Republic, Chad, Cote D'Ivoire, Democratic People's Republic of Korea, Dominica, Dominican Republic, Equatorial Guinea, Eritrea, Georgia, Republic of Kiribati, Liberia, Republic of Nauru, Papua New Guinea, and Seychelles.

international interests.

In the third section, this approach will be used to explain the preferences exhibited by each bloc during the reform process, with respect to their support for the abolition of the CHR, and their specific preferences for the structure of the HRC. Many Western states, including the United States and the members of the Western Europe and Others Group (WEOG), sought a more interventionist organization with limited membership that would be able to issue resolutions regarding specific human rights violations. Other states, organized primarily in the G-77, thought that the HRC's ability to criticize individual states should be limited, emphasizing instead the development of common standards and the pursuit of a "cooperative" approach to human rights. It will be argued that the resulting institutional design—and particularly the decision to base representation on region without formal standards of participation—more closely reflects the preferences of those in the G-77.[7]

By comparing the first three and a half years of work of the HRC with the last three years of the CHR, the fourth section will explain how the HRC's behavioural outcomes reflect this underlying structural reality. This will be done by comparing the human rights records of states elected to the two bodies, the procedures for member elections, and the use of country-specific resolutions. The creation and functioning of the Universal Periodic Review (UPR) will also be analyzed.

The article concludes that the voting power of developing states allowed them to significantly shape the final structure of the HRC. Although the HRC is able to pass country-specific resolutions—a major goal of the United States and Western Europe—its institutional structure permits non-democratic states with poor human rights records to affect significantly the outcomes in the HRC. This influence is possible because the final size of the institution, 47 states, is not significantly smaller than the 53 that comprised the CHR, and the seats continue to be distributed regionally with no formal human rights standards serving to bar states with poor human rights records from participating. Given that the distribution of state type has changed very little in the transition from the CHR to the HRC, one should not expect the HRC to function differently than did the CHR, as both are fundamentally political institutions that reflect the will of their membership. The article's conclusion also suggests further avenues of research based on state type and engagement with the UPR.

II. Explaining State Engagement with Human Rights Institutions

While a consensus did emerge that the CHR should be replaced, the type of institution that would replace it was subject to much debate. International Relations scholars have often had difficulty in determining the factors that shape state preferences toward institutions and how institutional design can shape outcomes. The following literature review focuses on four theoretical

[7] On the regional distribution of seats, see Schrijver, *supra* note 2 at 815.

perspectives—realism neoliberalism, constructivism, and a domestic politics approach—to develop an explanation of why different states approached the negotiations regarding the formation of the HRC in the manner they did.

Realist theories view the formation of institutions as reflections of great power interests: institutions are viable so long as they correspond to these interests, but will fall by the wayside as the interests of the member states shift over time. Institutions themselves will rarely have a meaningful effect on state behaviour, and the institutions that do come into existence must be careful not to alter the existing distribution of power globally.[8] Yet these realist arguments fail to account for the formation of institutions that occurs without the input of major powers. For example, both the International Criminal Court (ICC) and the HRC were created despite the objection of the world's most powerful country, the United States. They also fail to explain the ability of many institutions to endure even after the alignment of interests underlying their creation has shifted.

In response to these perceived failures of realist theory, neoliberal scholars developed various theories for the formation and endurance of regimes that relied on the same basic assumptions as realist scholars. Neoliberals largely agreed with realists that the state system was anarchic and that cooperation in the international system was difficult; where the two differ was in their view of the possibilities of cooperation. Whereas neorealists believe cooperation is unlikely outside of temporary military alliances, neoliberals believe that greater cooperation is possible. Neoliberal theory emphasizes the role of institutions in helping to overcome the problem of distrust between states: by providing a mechanism to lengthen the time frame of inter-state relationships (according to neoliberal insights, a longer "shadow of the future" makes defection from an agreement less likely), a way for states to monitor and observe the actions of states with which they had agreements, and, in some cases, a formal mechanism to punish states that violated agreements.[9] Forming the institutions themselves was the initial challenge, and often depended on the presence of a hegemon willing to bear the cost of the initial regime formation. Once a regime formed and proved its usefulness in facilitating cooperation, it could take on a life of its own and no longer be dependent on the hegemon.[10]

The neoliberal account has two major failings in explaining state preferences toward the HRC. First, neoliberals, like neorealists, largely

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[8] See e.g. Kenneth Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley, 1979); John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton and Company, 2001); John J. Mearsheimer, "The false promise of international institutions" (1994) 19 Int'l Security 5; J. M. Grieco, *Cooperation Among Nations: Europe, America, and Non-Tariff Barriers to Trade* (Ithaca: Cornell University Press, 1990).

[9] Robert Keohane, "The Demand for International Regimes" (1982) 36 Int'l Org. 325; Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984) [Keohane, *After Hegemony*]; Kenneth Oye, ed., *Cooperation Under Anarchy* (Princeton: Princeton University Press, 1986) (See especially chs. 1, 2, and 9); Robert Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder: Westview, 1998), ch. 1.

[10] Keohane, *After Hegemony*, *ibid.*, chs. 5 and 6.

believe that state preferences are uniform, regardless of characteristics internal to the state, such as the nature of the political system. The empirical evidence presented below suggests that such preferences are not.[11] Second, neoliberalism normally depends on the role of the hegemon in shaping new institutions. But in the case of the HRC, the primary hegemon, the United States, had little effect on the final institution, and the next most powerful block of states, the WEOG, was unable to create the institution as it desired.[12]

Both of these theoretical approaches failed to provide a satisfying endogenous account of state preferences. In an effort to fill this gap, the developing constructivist literature has focused on the diffusion of international norms, positing theories that explain phenomena such as the formation of international institutions;[13] the role of transnational actors;[14] the rhetorical and persuasive power of norms;[15] and, related to each of these, the use of tools such as "naming and shaming" to persuade states to meet international norms.[16] In a similar vein, Ryan Goodman and Derek Jinks have suggested that human rights institutions and treaties may have an acculturation effect that leads to a slow transition toward greater respect for human rights among member states.[17] Kathryn Sikkink, writing with both Margaret Keck and Thomas Risse, has provided perhaps the most prominent model of the constructivist view of the norm life cycle. They argue that after a norm emerges, it diffuses throughout the state system until a "cascade" occurs, in which the norm is widely adopted, followed by norm internalization, the process by which the norm moves from the realm of ideas into a meaning shared within a state or society. In the initial phases, norm adoption may be the result of domestic or international pressure, rather than sincere belief by the actor in the content of the norm. But ultimately, they argue, the norms alter state behaviour, and norm compliance emerges.[18] As will be discussed below, critics of constructivism

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[11] *Ibid.* at 26.

[12] Neorealist scholars have a different critique of neoliberal scholarship. Neorealists argue that mistrust is not the largest obstacle to cooperation, but rather that fear of states achieving relative power gains from unequal distributions of benefits from cooperation are the major obstacle. This critique is the heart of arguments made by Mearsheimer, *supra* note 8, and Grieco, *supra* note 8.

[13] Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996).

[14] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 Int'l Org. 887; Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); Thomas Risse-Kappen, "Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War" (1994) 48 Int'l Org. 185.

[15] Thomas Risse, "'Let's Argue!': Communicative Action in World Politics" (2000) 54 Int'l Org. 1; Darren Hawkins, "Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms" (2004) 48 Int'l S.Q. 779; Alastair I. Johnston, "Treating International Institutions as Social Environments" (2001) 45 Int'l S.Q. 487.

[16] Alejandro Anaya, "Transnational and Domestic Processes in the Definition of Human Rights Policies in Mexico" (2008) 31 Hum. Rts. Q. 35.

[17] Ryan Goodman & Derek Jinks, "How to influence states: socialization and international human rights law" (2004) 54 Duke L. J. 621 at 638-655.

[18] Keck & Sikkink, *supra* note 14; Thomas Risse & Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction" in Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and*

argue that nominal adoption of norms in the diffusion/cascade phase does not necessarily translate into improved state observance of the norms. While the constructivist approach may be able to explain a state's initial decision to join human rights conventions without any intention to abide by them, it has yet to provide a persuasive, falsifiable explanation for the failure of norm internalization, or actions by states that serve to undermine the very norms they claim to be supporting.

In contrast to realists and neoliberals, who assume that all states are driven by similar interests, and constructivists who argue that states and state leaders internalize the norms with which they agree, several recent works have suggested that internal state characteristics, particularly the nature of the regime, will affect a state's decision to join international human rights treaty regimes. In a test of constructivist arguments regarding norm internalization, states acceding to human rights conventions frequently do not abide by the norms contained in those treaties. Further, this research finds, in contrast to the norm internalization expected by constructivists, that norm compliance does not markedly improve post ratification, though improved practice in the future cannot necessarily be ruled out.[19] What this body of literature suggests is that the decision to promote human rights regimes is driven not only by a desire to promote human rights, but also by a complex calculation that balances the domestic and international political gains resulting from the ratification of a particular international human rights convention, with the combined costs of compliance and of enforcement (domestic or international).

Each of the following works suggests that state type is a strong explanatory variable for the manner in which states will engage international human rights institutions, though each examines state type from a slightly different perspective. Andrew Moravcsik's work focuses on the incentives facing new democracies through an analysis of the creation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. He argues that the need to lock in domestic political institutions in newly emerging democracies is the primary driving force for the formation of binding international human rights obligations, at least in the European context. These states desire to commit to rights protection at home, but lack adequate institutions to implement the necessary protections. The incentives of leaders in new democracies are shaped by their political context; their primary fear is a collapse of democratic institutions and efforts to undermine liberal democracy by opposition leaders. Committing to external human

Domestic Change (Cambridge: Cambridge University Press, 1999) 1. On internalization, see especially Risse & Sikkink at 22, 29-45.

[19] Eric Neumayer, "Do international human rights treaties improve respect for human rights?" (2005) 49 J. Confl. Resol. 925; Oona A. Hathaway, "Do human rights treaties make a difference?" (2002) 111 Yale L.J. 1870 [Hathaway, "Difference"]; James R. Vreeland, "Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture" (2008) 62 Int'l Org. 65; Suzannah Linton, "ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children" (2008) 30 Hum. Rts. Q. 436 [Linton].

rights protection mechanisms enables these states to delegate their domestic protection of human rights to outside institutions. Moravscik argues that this set of incentives makes newly emerging democracies even more likely than more established democracies to support the creation of strong external human rights institutions. He finds this argument to hold true in the creation of the *European Convention*, in which more established democracies were less likely to support the creation of a binding regional human rights commitment than less established democracies.[20]

Oona A. Hathaway has also sought to explain why states choose to ratify or accede to human rights treaties once opened for signature. Her work is driven by two core questions: which types of states join treaties, and whether or not states actually comply with them. Hathaway argues that in deciding to ratify or accede to a human rights convention, states consider the costs of compliance and the costs associated with enforcement of their obligations should they fail to do so. Enforcement of human rights treaties is most likely to occur on a domestic level, so in weighing commitment costs, the leaders of states are primarily concerned with whether or not they will comply, and in the absence of compliance, whether or not they will face a cost for non-compliance.[21]

Hathaway uses this framework to find empirical support for the argument that democracies with strong human rights records are more likely to join human rights treaties than democracies with relatively weak human rights records. The reason is straightforward. Democracies with strong human rights records are likely to face lower enforcement costs since they are consistently in compliance.[22] Democratic human rights violators, on the other hand, are more likely to be subject to enforcement measures and therefore their costs of compliance are higher.

The same logic suggests that dictatorships, which face minimal internal enforcement mechanisms, may not be reluctant to join human rights regimes that lack an external enforcement mechanism, even if human rights abuses are domestically prevalent. Indeed, "disingenuous ratification" by dictatorships may be a low-cost way of creating the "external appearance of improvement without the cost associated with actually improving human rights practices."[23] In this way, joining a treaty provides a small benefit with little net cost, a benefit that would be foregone by not joining a human rights treaty. Hathaway further finds that joining a human rights treaty does not

[20] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 54 Int'l Org. 217.
[21] Oona A. Hathaway, "The cost of commitment" (2003) 55 Stan. L. Rev. 1821 at 1836-7 [Hathaway, "Commitment"].
[22] Elizabeth Heger Boyle & Melissa Thompson, "National Politics and Resort to the European Commission on Human Rights" (2001) 35 L. & Soc'y Rev. 321, suggest that Hathaway's argument could be incomplete by showing that more "open" societies – marked by a high level of individual freedom – are more likely than states with lower levels of freedom to face cases before the European Commission on Human Rights. These findings are probably specific to Europe, however, as no other region has a true intergovernmental human rights mechanism with enforcement power similar to Europe's.
[23] Hathaway, "Commitment", *supra* note 21 at 1839.

lead to better human rights practice, adding further credence to her argument and providing a test for the idea that human rights treaties lead to improved human rights performance.[24]

Adding nuance to Hathaway's argument, James R. Vreeland compares the likelihood of multiparty and single party dictatorships to ratify or accede to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*CAT*). He argues that multiparty dictatorships are both more likely to torture *and* to ratify the *CAT*. This logic is based on two factors.[25] First, multiparty dictatorships are more likely to ratify because they are more likely to face internal pressure to do so by legally organized political parties. Even if they have no intention to abide by the agreement, the ratification may lead to small political gains at home. Single party dictatorships, on the other hand, face no such internal pressure to sign and have little incentive to do so. Ratification may actually lead to *more* pressure internally to liberalize.[26] In addition, multiparty dictatorships are more likely to torture because their political opponents are visible and operating within the purview of society. In a one party dictatorship, all dissent is likely to be punished. The fear of punishment means that individuals are less likely to engage in behaviour that will lead to punishment, meaning torture may occur, but is more likely to be infrequent. In contrast, in a more open dictatorship, not all dissent is punished, so more dissent occurs. Though punishment is selective, it is more frequent in such a regime.[27]

In summary, for Vreeland, internal dissent and pressure can lead states to ratify the *CAT*, but allowing internal dissent also leads to more punishment of dissent. While this is largely consistent with Hathaway's arguments (and those of Suzannah Linton) regarding the benefits gained by states that ratify human rights conventions, Vreeland's argument suggests that multiparty dictatorships also face some internal cost from doing so. That cost can lead to additional human rights violations. Nonetheless, the two arguments together suggest that state type affects the decision of whether or not to join a treaty. Though the creation of a new human rights institution is a different process than either the creation of a new treaty or the decision to accede to one once it enters into force, the research reviewed here does indicate that domestic political factors affect both the decision to support the creation of a new institution as well as preferences regarding the structure of that institution.

While the above scholars provide some guidance for developing an explanation for state preferences regarding the HRC, only Moravcsik deals explicitly with the creation of a new human rights institution, and his work focuses on the European, not global, context. Nonetheless, combining both

[24] Hathaway, "Difference", *supra* note 19. See also Neumayer, *supra* note 19.
[25] Multiparty dictatorships are states where the formal leader may not be selected democratically, but competing political parties are allowed to exist and competitive elections occur for some seats in government, whether they be municipal and regional governments or a national legislature. Egypt would be a good example of a multiparty dictatorship.
[26] Vreeland, *supra* note 19 at 70-71.
[27] *Ibid.* at 69-70.

the constructivist and domestic political approaches surveyed does provide some guidance. Constructivist scholarship can help to provide an explanation for why states almost uniformly supported the creation of a new human rights institution. As noted above, the UN Secretary General, the UN's High-level Panel, and a growing number of member states were frustrated by the existing institution, as will be further detailed below. Though not a perfect analogue, the "norm cascade" phase of the norm lifecycle can help explain the snowball of support for a new institution; Hathaway's work, including her treatment of a state's incentive to at least appear to care about human rights—"disingenuous ratification"—provides a further explanation for why near universal support existed for creating a new institution.[28] In this case, the CHR began to be viewed by many as a problematic institution that needed to be replaced. The perception of the institution was that many of those states which were members of the CHR were simply protecting other human rights abusing states and had little interest in human rights promotion. As the World Summit in 2005 approached, the idea of replacing the institution took hold among UN Member States, leading to steady pressure to replace the institution. States may have perceived a reputation cost of not supporting a new institution. Given the widespread criticism, including comments by the UN Secretary General, advocating for retention of the CHR could have led a state to be branded as opposing the promotion of human rights. [29]

Constructivist theories tell us less about the institutional features that states would (and ultimately did) support in a new HRC. Here, the separate work of Moravcsik, Hathaway and Vreeland suggests that domestic incentives play a strong role in determining preferences toward institutions. In particular, Hathaway's work suggests that perceived compliance and enforcement costs are a driving factor in whether or not a state will join an institution. Where domestic and/or international enforcement of a commitment is unlikely, states are willing to ratify a treaty.

Though Vreeland's and Hathaway's works are specific to a) the decision of whether or not to become a member of a human rights treaty and b) whether or not joining a treaty leads to better human rights practices, their work can also inform the analysis of the creation of a new human rights institution, particularly when combined with the work of Moravcsik. The primary difference between preferences regarding the decision to join a treaty, and preferences regarding the creation of an institution, is in the state's ability to shape enforcement costs. When joining a treaty, particularly one that has been in force for some time, states will have certain expectations regarding the actual costs associated with a treaty. In creating a new institution, however, states will have direct input on the capabilities the institution will have to carry out enforcement, which in turn will impact the eventual enforcement costs on states. In doing so, if states have an expectation that a new institution will be created regardless of their input,

[28] See Risse & Sikkink, *supra* note 18; Hathaway, "Commitment", *supra* note 21 at 1839.
[29] This point will be further discussed below, in Section III.

they have an incentive to attempt to shape the eventual outcome whether they want a strong institution or not. The logic of Moravcsik, Vreeland and Hathaway can be applied to institutional formation to help determine what type of institution states with differing domestic structures will desire.[30]

In designing an institution, two key considerations of states are 1) the capabilities that the institution will have; and 2) who will have the authority to determine when to use those capabilities. In the context of a human rights institution, these two factors lead states to consider the powers of the institution to investigate and report on human rights abuses in individual states, as well as the size and composition of the council. On one end of the spectrum—imposing high enforcement costs on states—would be an extremely strong institution that could authorize investigations and report on certain states' human rights practices, and would have a small membership composed of states with strong human rights protections. Such an institution would entail higher enforcement costs for member states for two reasons. First, it would be able to act more efficiently, since institutions with smaller membership tend to be more efficient as fewer members must be consulted to reach a decision. Second, and more importantly, an institution that excluded human rights abusing states would be less likely to shield those states that do violate human rights. On the other end of the spectrum—imposing low enforcement costs on states—would be an institution that could pass only general resolutions regarding rights standards, with a membership not restricted based on human rights performance.

This logic leads to certain expectations regarding state preferences toward the design of human rights institutions. One could expect states with stronger human rights records to both be more supportive of an institution that could carry out human rights investigations of particular countries, and to support some restrictions on membership based on rights performance. As states with good human rights practices, they would not expect to be targeted by the human rights institution. They would be unlikely to face increased domestic enforcement costs, as states with strong human rights records normally have strong legal systems that provide sufficient avenue for redressing rights grievances. This would make appeals to international forums unlikely. Given sufficient domestic protections, the states would also not expect to be targeted by the international institution. Further, if having good human rights performance were not a sufficient safeguard against being targeted by the rights institution, then control of the body's agenda would serve as an additional check. Finally, the reputational advantage—both international and domestic—of being a rights supporting state would also weigh against any potential enforcement cost.

On the other hand, states with poor human rights records could be expected to support the creation of an institution with relatively weak (or no) authority to investigate particular countries, and to support a broad based

[30] See also Linton, *supra* note 19.

membership that included states sympathetic to the view that the UN should not investigate particular violations of rights. The inability to investigate rights violations in individual states would serve the interest of those states with poor human rights records and, in the event that the body did have some ability to target individual states, the ability of any state to serve on the body would allow for additional influence on the decisions reached by the body, serving as a check on the exercise of power. Should such states be able to create an institution with at least a veneer of credibility, they would be able to benefit from improved reputation cost while simultaneously holding down enforcement cost.

This argument suggests a sliding scale whereby states with better human rights records should support a stronger human rights institution with limited membership while states with poor records should support an institution with weaker enforcement powers and a larger, more diverse membership. Applying this argument to negotiations surrounding the HRC does present some challenges in comparison to work done by Moravscik, Hathaway, or Vreeland, however. Moravscik's study benefited from a much smaller universe of cases: he studied 17 Western European Countries,[31]while Vreeland and Hathaway were able to use existing measures both of regime type and reports of rights violations, allowing for sophisticated quantitative methods. As will be discussed in the conclusion, the HRC will eventually lend itself to such methodology, but, unfortunately, it is not possible from the record of negotiations to reconstruct the exact positions of all member states of the UN regarding the HRC. Therefore, in applying the basic argument regarding preferences toward human rights institutions, this article focuses on groups of states that formed negotiating blocs in its analysis. Though not all negotiating blocs were uniform, groups of states can be considered to be more or less supportive of interventionist human rights institutions, and the positions that emerged tended to be held by many members of the blocks. Further, numerous speeches made by representatives of different groups will serve to test the validity of using this approach in examining the creation of the HRC.

III. The Creation of the HRC

This section will test the above argument by analysing the negotiating positions of four major groups of states during the process that led to the creation of the HRC. It focuses on the positions of the United States, the WEOG, the G-77, and Latin American states. Though states in these groups did not have perfectly uniform positions, the groups do provide a useful way to organize the major positions that emerged during negotiations and some general statements can also be made about the average level of democracy in the regions.[32] Whereas the United States and almost all WEOG states rate

[31] Moravcsik, *supra* note 20 at 233.
[32] Martin S. Edwards *et al*., "Sins of commission? Understanding membership patterns on the United Nations Human Rights Commission" (2008) 61 Pol. Res. Q. 390 at 397-398, find that states with more rights violations (as measured by physical integrity scores) were more likely to

highly on various democracy indices, Latin America and the G-77 contain more states with lower levels of democracy and more human rights abuses.[33]

As noted above, the creation of the HRC was ostensibly intended to redress several criticisms of the CHR. The CHR did do a great deal of work to establish human rights standards during its existence. Among its most notable achievements were the drafting of the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Political and Civil Rights*, in addition to several other core human rights treaties.[34] The body also implemented mechanisms to allow for the discussion of human rights violations in certain states. The 1235 procedure allowed for public discussion of a pattern of rights violations in a state, while the 1503 mechanism gave an avenue for individuals and NGOs to make confidential (though not anonymous) complaints about patterns of rights abuses in a particular country or region.[35] Finally, the CHR also employed the use of Special Procedures, which were *ad hoc* mandates given to individuals or working groups to study patterns of rights abuses or special human rights problems. Special Procedures had both thematic mandates looking at categories of rights as well as country-specific mandates.[36]

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be elected to the CHR than states with fewer violations. Further, this finding differed by region depending on the number of democracies in a region. As the number of democracies in a region increased, the human rights scores of states elected to the CHR increased as well. See p. 398 for a breakdown of levels of democracy in each region.

[33] Care should be taken in discussion of conceptions of democracy and human rights violations. However, many studies have concluded that states with more representative democracy frequently score better on human rights indices. On the relationship between rights and democracy, see especially Todd Landman, "Measuring Human Rights: Principle, Practice and Policy" (2004) 26 Hum. Rts. Q. 906 at 929-930. On the correlation of rights with democracy and the importance of democracy to the promotion of rights, see Christian Davenport, "Human Rights and the Democratic Proposition" (1999) 43 J. Confl. Resolution 92; Anthony J. Langlois, "Human Rights without Democracy? A Critique of the Separationist Thesis" (2003) 25 Hum. Rts. Q. 990; Vreeland, *supra* note 19; Hawkins, *supra* note 15. On criticism of the correlation between regime type and rights enforcement, see Zehra F. Arat, "Human Rights and Democracy: Expanding or Contracting?" (1999) 32 Polity 119; B. Todd Spinks, Emile Sahliye & Brian Calfano, "The Status of Democracy and Human Rights in the Middle East: Does Regime Type Make a Difference" (2008) 15 Democratization 321. For a discussion of the drawbacks of Freedom House's scoring system, see Landman at 928-929.

[34] See generally Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis" (2007) 29 Hum. Rts. Q. 547; Lauren, *supra* note 2.

[35] Christian Tomuschat, *Human Rights Between Idealism and Realism* (Oxford: Oxford University Press, 2004) at 117-124; Nigel S. Rodley & David Weissbrodt, "United Nations Non-Treaty Procedures for Dealing with Human Rights Violations", in Hurst Hannum, ed., *Guide to International Human Rights Practice*, 4th ed. (Ardsley, NY: Transnational Publishers, 2004) 65 at 65-77; Eric Cox, "United Nations Commission on Human Rights," in Neal Tate, ed., *Governments of the World: A Global Guide to Citizens' Rights and Responsibilities* (New York: Macmillan Reference, 2005) at 238.

[36] See generally Office of the High Commissioner for Human Rights, *United Nations Special Procedures: Facts and Figures 2008*, online: <http://www2.ohchr.org/english/bodies/chr/special/docs/Facts_Figures2008.pdf> (In reviewing the work of the CHR, the HRC decided to end the work of Special Procedures dealing with Liberia and the Democratic Republic of the Congo, two of the ten country-specific Special Procedures that had been established by the CHR. At the same time, the HRC maintained all of the thematic Special Procedures and added two additional ones (contemporary forms of slavery and safe drinking water), for a total of 30 thematic Special Procedures as of 2008.).

Despite these achievements, several factors brought about criticism of the CHR by UN member states, human rights NGOs, and members of the UN Secretariat. The first major criticism was directed at the membership of the CHR. In 2005, the CHR was composed of 53 regionally distributed member states, elected by the Economic and Social Council (ECOSOC) to three-year terms with no limit on re-election. In practice, ECOSOC (composed of 54 member states) basically served as a rubber stamp to decisions made by the various regional groups. According to critics, states with poor human rights records were able to lobby regional allies to nominate them to the body, leading to the election of several notorious human rights abusers to the CHR, including Libya (which served as chair in 2003), Sudan, Sierra Leone, Uganda, and Togo.[37]

A second criticism, related to the first, was that states would conspire to prevent meaningful action on serious human rights abuses. In essence, states engaged in a form of logrolling, coordinating to shield themselves and their allies from adverse resolutions. Powerful members like the United States and China worked to protect their allies. States such as Libya, Zimbabwe, Sudan, and Togo would also help to block resolutions aimed against human rights violations in their region, lest they also be singled out.[38] Paul G. Lauren notes that by 2003, the CHR had failed to pass resolutions against such abusers as China, Pakistan, Saudi Arabia, and Syria; the CHR had in essence become an "abusers club."[39] Several developing states shared a similar concern: that Western states, particularly the United States, selectively used human rights instruments in the UN to target smaller states in a manner that violated traditional notions of sovereignty.[40]

Third, the CHR was limited to meeting once a year for six weeks. In that time, it was expected to hear reports from treaty bodies concerning enforcement of their mandates, handle reports and recommendations from Special Procedures and create new ones, address human rights violations in specific countries, and receive input from member states and NGOs on all of the above. Critics argued that the six-week sessions proved insufficient to

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[37] Lauren, *supra* note 2 at 328-329; Alston, *supra* note 2 at 188, 192.

[38] But see James H. Lebovic & Erik Voeten, "The politics of shame: The condemnation of country human rights practices in the UNCHR" (2006) 50 Int'l S.Q. 861 (Arguing that contrary to this frequent criticism, the post-Cold War period up to 2001 actually saw a decrease in the politicization of country-specific targeting through the public mechanisms of the CHR).

[39] Lauren, *supra* note 2 at 329. Though this criticism may be legitimate, the CHR did pass resolutions against several states in 2003, including Israel, the Democratic Peoples' Republic of Korea, Myanmar, and Belarus. This will be discussed further below.

[40] See generally Alston, *supra* note 2 at 205-206; Paimaneh Hasteh, "Should the UN general assembly approve the draft plan for a new HRC?" Reprinted in (2006) 4(5) Int'l Debates 149 at 149, 151, 153 (Statement by Iranian envoy to U.N.); *Statements for the Third Round of GA's Consultations on the Human Rights Council*, "Statement by H.E. Mr. Hamidon Ali, Permanent Representative of Malaysia to the United Nations at the Informal Consultations of the Plenary (on the Status, Size, Composition and Membership of the Human Rights Council)." (24 October 2005), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2> ["Statement by H.E. Mr. Hamidon Ali"]. All speeches archived at <http://www.reforumtheun.org> should be available permanently. If the specific links are broken, the speeches can be requested by contacting the organization through the primary website or by contacting the author.

complete all of the business it had before it.[41]

All of these problems led many observers to call for either reform of the CHR or the creation of a new body. As noted above, the High-level Panel argued in 2004 that the body needed major reform, including the expansion of its membership to include all UN member states (with the goal of eliminating the problem of selectivity) and the addition of a small advisory council of experts.[42] Secretary-General Kofi Annan called for abolishing the CHR altogether, and replacing it with a Human Rights Council composed of fewer members. Such an organization could either be a principal organ of the UN, or subsidiary to the General Assembly rather than to ECOSOC, with members elected by two-thirds majority rather than the simple majority in ECOSOC.[43] Finally, the 2005 World Summit called for the General Assembly to conduct open and transparent negotiations for the establishment of a human rights council.[44]

The criticisms directed towards the CHR created the strategic context for the creation of the HRC. Any state that wanted to at least appear as if it cared about human rights could not continue its support of the status quo and thus support shifted towards the creation of the HRC. In line with the theoretical argument presented above, states believed they would suffer a cost to their reputation for not supporting the new institution. However, different groups of states took very different stances on the powers and size of the HRC, how members would be elected, and which states would be eligible for election. In line with the argument presented in the previous section, groups of states with more non-democratic or human rights violating members were most likely to support a weaker institution with little ability to launch country-specific investigations, and a larger membership with lower thresholds for election. Negotiating groups containing a high percentage of states with strong human rights records supported a stronger institution with more discretion to identify human rights abusers and higher standards for membership. In short, groups of states more concerned about UN intervention were more likely to support an HRC with fewer powers to single states out.

As negotiations began, debate centred on how many members the new institution would have, how members would be elected, whether or not states with poor human rights records could stand for election, and the ability of the organization to pass country-specific resolutions. Early in the negotiation process, a new idea also emerged that would lessen states' fears of being singled out: a Universal Periodic Review (UPR) mechanism that would subject all states to the same general review process.

As noted above, four basic positions emerged during these negotiations: the United States; the WEOG; the G-77; and the larger Latin American

[41] Rahmani-Ocora, *supra* note 2 at 16.
[42] High-level Panel, *supra* note 1 at paras. 285, 287.
[43] Annan, *supra* note 2 at 45.
[44] *Ibid.* at 39-41.

countries.[45] The United States was basically alone in its position. It wanted the HRC to be composed of no more than 20-25 members, elected by a two thirds majority of the General Assembly. It also called for a restriction that would prevent any country that currently had a human rights abuse resolution pending against it either in the GA or Security Council from serving on the HRC. Finally, the U.S. advocated for the HRC to be able to pass country-specific resolutions. At one point in the negotiations, the United States also demanded representation of the permanent five members of the Security Council.[46] In short, the U.S. conformed well to the predictions made above. Though the U.S. has been criticized for the abuse of prisoners captured during wars in Afghanistan and Iraq, overall it still has a strong human rights record, according to many different organizations.[47] As such, its advocacy of a strong organization with a limited membership, restricted to states who met some human rights criteria, was to be expected.

The European states were by and large concerned with having a body that would be more effective than the old CHR, but they did not believe that this could be brought about by insisting on fewer member states. The WEOG, led primarily by the EU, was also interested in an institution that would be effective in monitoring and improving human rights performance around the world. According to statements issued by EU member states and under EU auspices, EU countries did believe that a reduction in size would facilitate the promotion of human rights, but they also recognized that other institutional reforms were more likely to generate sufficient support to achieve passage. As such, EU countries largely supported an HRC of a similar size to the CHR, but one that would have several sessions each year (or meet in continuous session). They also wanted the new HRC to be able to consider country-specific resolutions, although to insulate the institution

[45] Interviews conducted by the author, 2006 [Interviews]. I interviewed four diplomats involved in the creation of the HRC, each from a different region; three outside observers with strong connections to the U.N.; two U.N. officials; and two individuals from the U.S. government, one from Congress and one from the executive branch (neither of these were elected officials). This section relies in part on information drawn from these discussions, which served primarily to provide directions for research. Each interview lasted 30 minutes or more. All interviewees spoke with me in a personal capacity, not as representatives of the government, and their comments were not specifically authorized. They all spoke on the condition that I could disclose no identifying information. All information in this article was either confirmed by at least two independent sources or written sources; citations will indicate each point where information from an interview is used that was not available in published sources.

[46] See e.g. USUN, Press Release, 2(06), U.S. Ambassador John Bolton,"Statement on Creation of the Human Rights Council" (1 November 2006), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2>.

[47] For critical examinations of the United States' human rights record, see Human Rights Watch, *United States of America*, online: <http://www.hrw.org/united-states>; Amnesty International, *2009 Annual Report for USA*, online: <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2009&c=USA>. Two databases rating levels of democracy, Freedom House's Freedom in the World index and the Polity IV database, both give the U.S. the highest possible rankings. Their rankings are based in large part on observance of human rights. See Freedom House, "Freedom in the World – United States of America (2010)", online: <www.freedomhouse.org/inc/content/pubs/fiw/inc_country_detail.cfm?year=2010&country=7944&pf>; Polity IV Project, "Polity IV Country Report 2008: United States of America", online: <http://systemicpeace.org/ polity/UnitedStates2008.pdf>.

against charges of politicization in selectively applying human rights standards, the EU also supported the creation of a UPR that would periodically review human rights performance in every member state on a rotating basis. Finally, in regards to membership requirements, the EU supported subjecting members of the HRC to the UPR before other UN members.[48] As a working group comprising states that generally uphold strong human rights standards, EU support for an institution with strong mechanisms to consider country-specific reports and resolutions was expected, as was its advocacy of the UPR. The EU's stance on membership selection and size of the HRC, however, appear to have been driven by recognition of the need to compromise, as will be discussed below. Though the membership stance is a minor exception, the EU's view on the capabilities of the institution is consistent with the view that more democratic states would support a stronger institution.

The G-77 was led by a coalition that included Egypt and Pakistan, and included states such as China and Malaysia.[49] In general, these states stressed a "cooperative" approach, whereby human rights bodies would defer to the expertise of member states. This can be contrasted with a "confrontational" approach, which would target violations committed by any one state.[50] Many of them saw the creation of the HRC as inherently an imposition on state sovereignty, so the goal for the G-77 was to minimize the HRC's ability to single out particular countries. These states argued that the primary problem of the CHR was not its membership, but rather the politicization of human rights and the use of double standards.[51] They were therefore primarily concerned with creating a council with no restrictions on membership,

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[48] Interviews, *supra* note 45; United Kingdom of Great Britain and Northern Ireland: *Statements for the Fourth Round of the GA's Consultations on the Human Rights Council*, "Working Methods, Rules of Procedure, Transition: Statement by Sir Emyr Jones-Parry of the United Kingdom Mission to UN, on behalf of the European Union" (1 November 2005), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2>; European Union: *Statement from first round of GA Consultations on Human Rights Council*, "EU Statement: Follow-up to the World Summit: Statement by the United Kingdom of Great Britain and Northern Ireland on behalf of the European Union" (11 October 2005), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2>.

[49] As above, the G-77 here is used as a shorthand for a large and diverse negotiating bloc. Some members of the G-77 did push for a stronger rights body, but, in the main, G-77 states coalesced around the positions described here.

[50] Felice D. Gaer, "A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System" (2007) 7(1) Hum. Rts. L. Rev. 109 at 132-133.

[51] See, e.g. statements by the Thai Ambassador at the Informal Plenary Meetings on the HRC on the same topic. Thailand: *Statements for the Third Round of GA's Consultations on the Human Rights Council*, "Statement by H.E. Khunying Laxanachantorn Laohaphan, Ambassador and Permanent Representative of Thailand to the United Nations at the informal Plenary Meeting of the General Assembly on the Human Rights Council" (24 October 2005), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2> ["Statement by H.E. Laohaphan", 24 October]; Thailand: *Statements for the Fourth Round of the GA's Consultations on the Human Rights Council*, "Statement by H.E. Khunying Laxanachantorn Laohaphan, Ambassador and Permanent Representative of Thailand to the United Nations at the Informal Plenary Meeting of the General Assembly on the Human Rights Council" (1 November 2005), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2>. See also Statement by H.E. Mr. Hamidon Ali, *supra* note 40.

comparable in size to the CHR.[52] Some even called for it to be universal. By and large, these states also opposed anything more than a majority vote to elect members, and adamantly rejected any limitation based on Security Council sanctions or General Assembly Resolutions. They also wanted to ensure that seats continued to be allocated according to regional distributions, but that distribution would be more representative of Asia and Africa.[53] The G-77 states did eventually support the creation of the UPR, but opposed allowing the participation of NGOs or the High Commissioner for Human Rights, since both were perceived as representatives of the Western world. The UPR, with the opportunity to shape the process through the HRC, was seen as an alternative to country-specific resolutions. These stances regarding institutional capabilities and membership selection reflected the fact that member states of the G-77 are, on average, less democratic than the other major negotiating groups. Of the groups, the G-77 supported the weakest institutional features and the most open membership rules, all in keeping with the expectation that less democratic states prefer institutions with less capability to intervene in domestic affairs.

Bridging the gap between Europe and the G-77 were several Latin American states that strongly supported the creation of the HRC but were generally sympathetic to both sides. The range of views from Latin America was not surprising given the mix of stable democracies, democracies with mixed human rights records, and non-democratic states. Though there was not a single Latin American negotiating stance, the states did have fairly common positions on the new institution. Stressing a cooperative approach to human rights, these states wanted members of the HRC to pledge to support human rights, but did not want to create any human rights performance criteria for states seeking membership to the HRC. While some states in this group wanted only majority voting, others, particularly Argentina, initially supported a two thirds requirement to elect members.[54] They also supported the UPR as a means to avoid having country-specific resolutions, while also allowing for some form of review of human rights practices. In addition, many Latin American countries strongly supported

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[52] As noted above, for the purpose of this article, states are grouped together by negotiating bloc. Within each bloc, individual states did, at times, take positions contrary to the majority of similar state-types. Similarly, states within each bloc vary on their human rights performance and level of democracy.

[53] Interviews, *supra* note 45; Statement by H.E. Mr. Hamidon Ali, *supra* note 40; "Statement by H.E. Laohaphan, 24 October, *supra* note 51; Assembly of the African Union, *Sirte Declaration on the Reform of the United Nations*, Assembly/AU/Decl. 2 (V) (5 July 2005); Nigeria: *Statement from Third Round of GA Consultations on Human Rights Council* (October 24 2005), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2>. The Nigeria statement is interesting for two reasons. First, it does highlight that Nigeria supported both the African and G-77 positions regarding the HRC, but also noted that it would be willing to consider a smaller size for the HRC. This statement reveals that while groups of states did negotiate as groups of states, some states were willing to move beyond other group members.

[54] Argentina: *Statement from the Third Round of the GA's Consultation on Human Rights Council*, "Statement by the Argentine Delegation to the United Nations, Informal Consultations of the Plenary on the Human Rights Council 'Status; Size; Composition; Membership'" (24 October 2005), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2>.

the issuance of an annual report that would analyze the global state of human rights. These states also generally supported lengthier and more frequent sessions to complete the work of the body.[55]

In achieving a final outcome, the G-77 wielded tremendous influence given the number of states that supported its position.[56] The United States was basically a non-actor as negotiations drew to a close. For the United States, automatic membership for members of the Security Council was an issue that was not open to compromise.[57] In fact, the United States came under a great deal of criticism for not making its bargaining positions clear. It was accused of not negotiating in good faith, and it frequently failed to attend negotiating sessions.[58] Though the United States did participate in negotiations, in the end its intransigence meant that, for the most part, its views were not reflected in the new institution. Unlike the United States, European states were more interested in compromising in order to ensure that something new was created. While the theoretical argument advanced in the previous section cannot account for the difference in willingness to compromise between the United States and Europe, it does explain why both wanted an institution that would be able to pass country-specific resolutions and have a slightly higher bar for membership than did the CHR. The G-77, on the other hand, appeared willing to relax some of its demands regarding institutional capabilities, particularly by agreeing to allow the HRC to pass country-specific resolutions and the UPR, in exchange for less stringent membership requirements than had been advocated by the United States and Europe. Finally, Latin American states helped serve as the bridge between these positions while then General Assembly President Jan Eliasson helped forge the final compromise agreement by drafting the final text.[59]

Ultimately, the G-77 position is most reflected in the membership of the body, including the size of the body, the manner of elections, and the regional distribution of seats without formal requirements regarding membership. The HRC is slightly smaller than the CHR—47 members as opposed to 53. Members are elected to three-year terms, and have to receive the votes of a majority of member states (not just a majority of those present and voting); further, the seats on the HRC are apportioned based on a

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[55] Interviews, *supra* note 45; Brazil: *Statement from first round of GA Consultations on Human Rights Council*, "'The informal consultations [*sic*] the Human Rights Council' Statement by Ambassador Ronaldo Mota Sardenberg 'Human Rights and the Rule of Law' Permanent Representative of Brazil to the UN" (11 October 2005), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2>; Ronaldo Mota Sardenberg, "Should the UN general assembly approve the draft plan for a new HRC?" (2006) 4(5) Int'l Debates 140 at 140, 142 [Sardenberg, "Should the UN"].

[56] The G-77 has 130 members, though it should be noted that its membership includes several Latin American states and other states who did not support its position. Nonetheless, the size of its membership means it wields considerable influence in votes in the General Assembly.

[57] This is similar to how it had been with the negotiations for the ICC. Lauren, *supra* note 2 at 334.

[58] Interviews, *supra* note 45. See also Warren Hoge, "As Praise Grows at Home, Envoy Faces U.N. Scorn" *The New York Times* (23 July 2006) A1; Mark Leon Goldberg, "The Arsonist" The American Prospect 17:1 (January 2006) 22.

[59] Warren Hoge, "U.S. Isolated in Opposing Plan for a New U.N. Rights Council" *The New York Times* (4 March 2006) A4.

regional distribution: Asia–13 seats; Africa–13 seats; Eastern Europe–6 seats; Latin American and Caribbean–8 seats; and Western Europe and other States (e.g., Canada and the United States)–7 seats. States can be elected to two consecutive terms and then are ineligible for immediate re-election. Finally, while members of the HRC are required to take an oath to uphold human rights, no specific requirements for members were adopted.

The WEOG position is more reflected in the institutional structure of the body. The HRC is able to call special sessions, in addition to meetings held in several regular sessions throughout the year. Moreover, it is empowered to issue country-specific resolutions, but it also implemented the UPR that engages in periodic human rights reviews of every UN member state, starting with members of the HRC.[60] Although these institutional powers do grant the HRC the ability to impose stronger enforcement costs than the CHR, it appears as though states that were concerned about an overly strong institution had their fears somewhat allayed by membership rules that would grant them significant influence over how the HRC exercises its powers.

Reflecting that the final composition of the HRC was a compromise, many of the 170 states that voted in favour of it had major reservations. The EU's statement in support of the final draft resolution was hardly a ringing endorsement. It simply noted that "The EU considers that the President of the General Assembly's draft resolution meets the basic requirements for the establishment of the Human Rights Council. The EU could therefore accept this text as a compromise."[61] After voting in favour of the resolution, several Latin American states expressed reservations, particularly about the diminished number of seats available to Latin American states on the HRC as compared to the CHR (17% of seats as opposed to 21%) and the fear that the failure to include a global human rights report could lead to further politicization of the HRC.[62] China voted in favour of the resolution, but expressed several concerns:

> The Chinese Delegation also wishes to indicate that [the final resolution] has failed to fully reflect the concerns of many developing countries, including China, over some issues. First, it does not provide [an] effective guarantee to prevent the political confrontation caused by the country-specific resolution, which has become a chronic disease of the Commission on Human Rights. Second, the universal periodic review to be developed by the Council may overlap with the work of human rights treaty bodies and special mechanisms, thus increasing report burdens for developing countries.[63]

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[60] *Human Rights Council,* GA Res. 60/251, UN GAOR, 60th Sess., UN Doc.A/60/ 251 (2006) at para 7.

[61] European Union: *EU Position on Human Rights Council*, "Austrian Presidency of the European Union 2006: EU Position on the Human Rights Council" (1 March 2006), online: <http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2>. Due to an error on the webpage, the link to the statement appears next to the date "1 March 2005".

[62] Sardenberg, "Should the UN", *supra* note 55.

[63] China: *Statement on Adoption of Human Rights Council Resolution*, "Statement by Ambassador Zhang Yishan, Permanent Representative of China to the UN, after adoption of the draft resolution on Human Rights Council" (15 March 2006), online: <www.reformtheun.org/

Finally, the United States famously voted 'no' on the resolution, citing as its primary opposition the failure to adopt any membership criteria. Nevertheless, the United States did pledge to work closely with the HRC to help it develop over time.[64]

The HRC itself was a compromise between negotiation groups with different views of the role that a human rights institution should play. The G-77, dominated by states with comparatively poor human rights records, wanted a larger institution with fewer capabilities. European states, which have strong human rights records, initially preferred a smaller institution, but were willing to accept one similar in size to the CHR as long as it would have the power to issue country-specific resolutions and to implement the UPR. Latin American states, reflecting their mixed human rights natures, represented a compromise between the two groups. Finally, the United States desired a much smaller and more powerful institution than was ultimately created. The HRC as constructed does appear to have greater institutional powers. It meets more frequently than did the CHR, and the UPR is a potentially powerful mechanism. Nonetheless, as major decisions must still be made by its member states, and membership rules largely reflect the views of the G-77, the HRC should not be expected to take positions significantly different than those of the CHR, with the possible exception of the UPR.

The next section will evaluate the initial outcomes of the HRC to determine if a) they represent a break with the CHR and b) which state preferences they most closely mirror.

IV. Human Rights Council Outcomes

The HRC and CHR are similar in some respects and different in others. The basic size and regional distribution of member states changed only slightly from the CHR to the HRC. Election of member states was moved from the ECOSOC to the GA, but, as will be discussed below, regional groups still are the primary locus for determining who will sit on the body. Both bodies have a similar power to issue country-specific resolutions. The major institutional difference between the two bodies is the UPR. Given the similarity in membership and, presumably, preferences of the states on the HRC and CHR, one should not expect dramatically different outcomes between the two bodies. Just as decisions in the CHR were largely dominated by developing states of the G-77, so too should one expect HRC decisions largely to conform to the preferences of that group of states, as they hold more seats than the Western Europe and Other States regional group.[65]

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index.php/government_statements/c464?theme=alt2>.

[64] USUN, Press Release, 51(06), U.S. Ambassador John Bolton, "Explanation of vote on the Human Rights Council Draft Resolution" (15 March 2006), online: <www.reformtheun.org/index.php/government_statements/c464?theme=alt2>. The Obama administration subsequently decided to run for a position on the HRC, and the United States was elected to a three-year term in 2009.

[65] In bodies elected according to regional representation to which membership is not

This section uses both summative data from regular and special sessions of the HRC, held through August 2009, and qualitative analysis from primary and secondary sources, to compare the actions of the two bodies in order to determine if, as expected, the institutional outcomes reflect the interest of member states. This would suggest that state preferences become a better determinant of outcomes than the institutional changes made in the HRC. The evaluation of outcomes primarily focuses on the degree to which the HRC has reflected the preferences of member states, rather than a normative focus on the degree to which it has improved human rights practices. The section focuses on the election of members to the HRC, the nature of resolutions that have been passed, including certain unforeseen impacts of those resolutions on other UN bodies. It concludes with a discussion of the UPR, the one major break with the design of the CHR that could be less influenced by member state preferences, given the universal nature of the review process.

1. Membership

Kofi Annan, along with several member states, had been concerned with the membership of the CHR, in particular the inclusion of states with poor human rights records. However, the possibility of any meaningful restrictions on member states fell by the wayside during the negotiation process. The regional distribution of seats on the HRC even led to the possibility of a repeat of what had occurred under the CHR: regional groupings could come together to nominate states without regard for their human rights records and present just enough candidates to fill their regional quotas. This concern appears to have been validated. In the 2009 elections, only 20 states competed for 18 open seats. Most regions nominated exactly the number of states that were eligible under distribution rules, with the Asia and Africa groups being the exceptions. Latin American countries have largely agreed to rotate the seat among members. In the Western Europe and Other States group, Iceland withdrew from elections after the United States announced its candidacy to ensure that the U.S. would be elected.[66] Nonetheless, the elections have led to the defeat of some states considered by rights groups to be human rights abusers, including Azerbaijan, in 2009.[67]

Figures 1 and 2 present a clearer view of the membership of the HRC by comparing the numbers and percentages of free, partially free, and not free members of each year of the HRC, in comparison to the last three years of the

automatically granted based on some other factor (such as permanent Security Council membership), the United States is grouped with Western Europe and Other States. This should not be confused with the US negotiating stance which has often been at odds with WEOG, an informal negotiation group.

[66] Human Rights Watch, *UN: Lack of Competition Mars Vote on Human Rights Council* (12 May 2009), online: <www.hrw.org/en/news/2009/05/12/un-lack-competition-mars-vote-human-rights-council>.

[67] *Ibid*. For information on Azerbaijan's rights record, see Amnesty International, "Human Rights in Republic of Azerbaijan", online: <http://www.amnesty.org/en/region/azerbaijan>.

CHR. The ratings are from Freedom House's combined score for Political Rights and Civil Liberties.[68] Freedom House's scores have been subject to some criticisms for focusing too much on civil and political rights, for not being entirely transparent in their coding, and for exhibiting some bias toward countries with economic freedom. Further, the scores conflate democracy with rights practice, and vice versa. [69] However, for the purposes of this article, they still represent a reasonable method of comparing members of the HRC and CHR. First, they are comprehensive in their coverage of states and are updated on an annual basis. Second, their findings correlate well with other measures of human rights and, rather than focusing only on procedural democracy, examine civil and political rights to arrive at their conclusions.[70] Finally, though imperfect, the public accessibility of the data, the level of coverage and the production of disaggregated scores offer a common point from which to begin a discussion on rights.

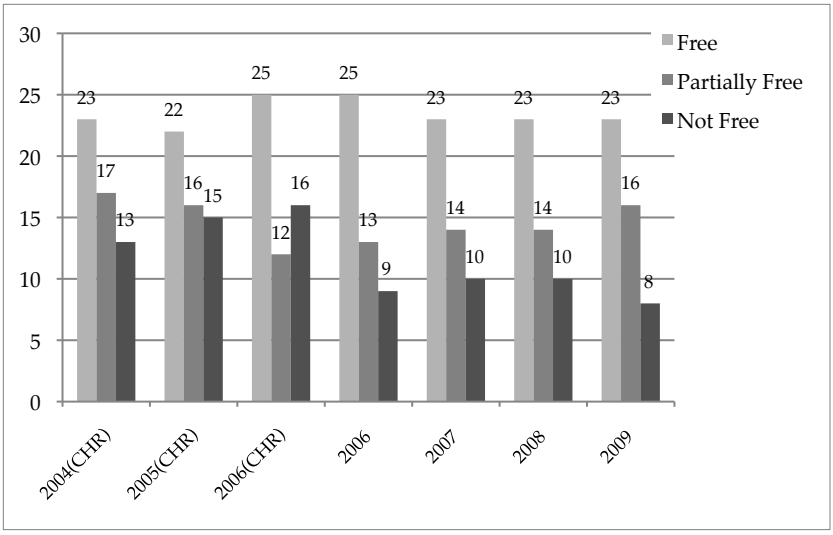

Figure 1: Number of Free, Partially Free, and Not Free States on the CHR and HRC.

For each year's membership, the article uses that year's Freedom in the World scores, which represent the status of the country in the previous year (e.g., 2006's scores are based on 2005 conditions). By using that year's report, the scores used here are based on information that would have been

[68] The reports can be found at Freedom House, "Freedom in the World", online: <www.freedomhouse.org/template.cfm?page=15>. As a check on the Freedom House scores, I also compared two years of information to the combined score that countries received in the Polity IV dataset. That scale produced similar numbers, with slightly more states being rated "democratic" than using the Freedom House Scale. The change in average score and change in numbers of states in different categories was similar, however.

[69] See note 33 for a discussion of the relationship between democracy and rights. For a discussion of the drawbacks of Freedom House's scoring system, see Landman, supra, note 33 at 928-929.

[70] *Ibid*. at 920-921.

available to member states voting on members of the CHR or HRC.[71]

Looking at the data reveals that the high water mark to date for the number of free states on the HRC occurred in its first year, with a slight decrease after that. Similar numbers of states rated as "free" served on the CHR in its final three years (average of 23.3), as in the HRC in its first four (average of 23.5). The percentage of free states increased from 47.17% in the last year of the CHR, to 53.19% in the first round of HRC elections. The percentage then fell back to 48.94%. While this number is scarcely higher than the last year of the CHR, it is seven percentage points higher than the percentage of free member states on the CHR in 2005, and five percentage points higher than 2004. Similarly, the number of "partially free" states (15, on average, for the CHR and 14.3 for the HRC) has not significantly changed. The most important difference is in the number of states rated as "not free". The CHR averaged 14.7 not free states, while the HRC has averaged 9.3. The drop in membership of six member states between the CHR and HRC, then, has come almost entirely at the expense of not free states. This is better reflected in the percentages of not free states. While the HRC has had between 17.02 and 21.28% of its member states categorized as not free, in its last three years of existence, the lowest percentage of "not free" states that comprised the CHR was 24.53%, ranging to a high of 30.19% in 2006.

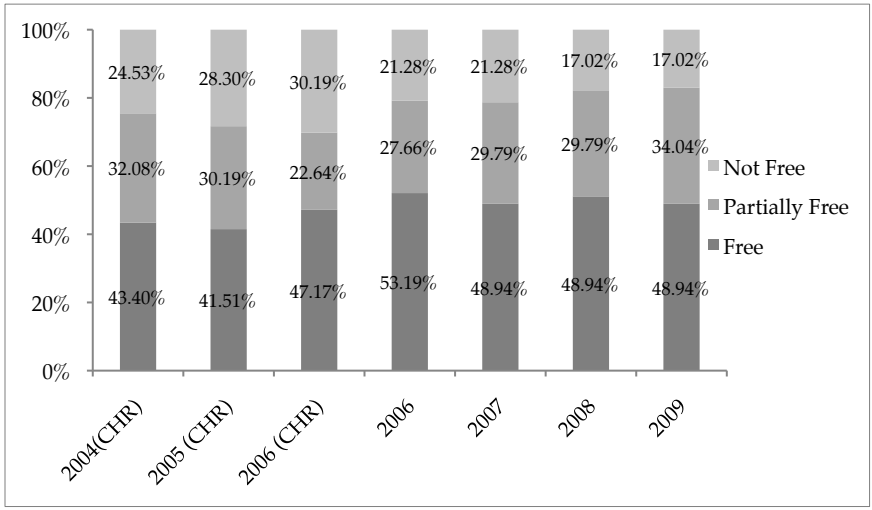

Figure 2: Percentage of Free, Partially Free and Not Free states on the CHR and HRC.

The result of this change has been that states rated as free and partially

[71] Freedom House has produced its own report card on the HRC: *The UN Human Rights Council Report Card: 2007-2009* (10 September 2009), online: <www.freedomhouse.org/uploads/UNHRC_Report_Card.pdf>. This report presents data and analysis similar to that presented here, though all the tables and figures in this article were created by the author. Freedom House's report presenting similar data was released in September 2009, shortly after the initial presentation of this article at the American Political Science Association's annual meeting in Toronto, Canada.

free now constitute a higher percentage of member states than they did under the CHR. Perhaps this suggests a modest improvement in the human rights performances of elected states, although the percentage of states rated as "free" peaked in the first year of the HRC. Further, many of the states that were on the CHR have continued as members of the HRC. In the first round of elections, 29 of 47 elected states had served on the CHR in its last year of existence. In the 2007 round of elections, three additional states that had been members of the CHR in 2006 were elected to the HRC. In examining which states continued as members, no discernible pattern emerges as to why some states were elected and others were not. Some states with very poor records were members of both bodies. For example, states rated as not free, including Cuba, Pakistan, and Saudi Arabia, continued as members, as did states rated free, such as Canada, Finland and Mexico. Neither did the human rights performance of states that were members of both bodies change dramatically.[72]

This result does reflect the ultimate compromise on the HRC: the lack of membership conditions has not prevented some states with poor human rights records from being elected, but it has led to an overall improvement of the rights records of states on the HRC as compared to the CHR.

2. Work Product

The HRC has spent more time in session as compared to the CHR. As of August 2009, it had held eleven regular sessions and eleven special sessions to consider a variety of issues. Consistent with its mandate, the HRC has considered both country-specific resolutions, as well as a more general attempt to engage in new standard setting for human rights. Another portion of its mandate has been to review Special Procedures inherited from the CHR—including country-specific mandates.[73] Finally, it also created the UPR, which will be discussed in more detail in the next sub-section.

Early reviews of its work were somewhat critical, noting that the HRC had failed to take action against several states that had been highlighted as rights abusers by the CHR.[74] More concrete evidence also suggests that the HRC is avoiding the discussion of specific instances of human rights abuses, except in very limited circumstances. Through August 2009 (11 regular and 11 special sessions), the HRC had passed 234 documents that were not directly related to specific country reviews under the UPR. Of those, 46 can be categorized as administrative resolutions, including the specific rules regarding the UPR. An additional 135 deal with general human rights topics, including promoting new human rights standards and encouraging

[72] Of these six states, only Saudi Arabia and Mexico experienced any change in Freedom House scores over the course of time. Saudi Arabia's Freedom House score improved from 7 (the lowest possible score) to 6.5 between 2005 and 2006, a rating it maintained at least through 2009. Mexico's score worsened from 2 to 2.5 between 2006 and 2007, though this score remains in the free range.

[73] See *supra* note 37 (A discussion of the disposition of Special Procedures as of 2008).

[74] Felice Gaer, "Human Rights at Risk? The Arbour years and beyond" (2008) 6 The Interdependent 22 at 22-23.

widespread adoption of other human rights standards. The remaining 53 resolutions were country-specific, nine of which were advisory in nature. These advisory resolutions can be thought of as more cooperative in that they are usually resolutions to establish some form of assistance to a country. Nonetheless, the 53 country-specific resolutions seem like a fairly impressive number, until the breakdown of countries covered is examined. Table 1 shows the number of documents mentioning a specific country since the creation of the HRC.[75]

State	*Number of Documents*
Israel	23
Sudan	9
Myanmar	6
Democratic Republic of Congo	3
Burundi	2
Liberia	2
North Korea	2
Somalia	2
Cambodia	1
Haiti	1
Kyrgyzstan	1
Sri Lanka	1

Table 1: Country-Specific Documents in the HRC (June 2006-August 2009)

Just under half of the country-specific resolutions have concerned Israel. While Israel has committed human rights violations, many other states almost certainly have as well. Egregious rights abusers do appear on this list, but the flaw is in its imbalance: just three states—Israel, Sudan and Myanmar—have accounted for 72% of all country-specific resolutions. This pattern has been fairly consistent over time. In the tenth session, nine country-specific resolutions passed, five of which were directed at Israel, including resolutions concerning the hostilities in Gaza in January 2009.

By way of comparison, in the last three sessions of the CHR, from 2003–2005, the body passed 258 total resolutions, 53 of which were country-specific. Of those, 24 were advisory or cooperative in nature (a higher percentage than under the HRC). Excluding Israel, 62% of the CHR's

[75] Data for the table were tabulated based on the Annual Reports prepared by the HRC: *Report of the Human Rights Council*, UN GAOR, 61st Sess., Supp. No. 53, UN Doc. A/61/53 (2006); *Report of the Human Rights Council*, UN GAOR, 62nd Sess., Supp. No. 53, UN Doc. A/62/53 (2007); *Report of the Human Rights Council*, UN GAOR, 63rd Sess., Supp. No. 53, UN Doc. A/63/53 (2008); *Report of the Human Rights Council*, UN GOAOR, 64th Sess., Supp. No. 53, UN Doc. A/64/53 (2009). These are available online: Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/hrcouncil/>.

resolutions reflected a cooperative approach versus only 30% under the HRC. A lower percentage of resolutions targeted Israel: 14 of the 53 resolutions were specific to Israel or areas Israel occupies. No other state had more than three resolutions against it in that time period. One possible explanation for the greater focus on Israel under the HRC is use of military force in the 2006 war in Lebanon and the 2009 Gaza action, although this conjecture is not fully explored here.[76] Further, those states (other than Israel) with three resolutions against them under the CHR had one resolution passed in each session (or one per year). Table 2 presents information on the countries targeted by the CHR in its last three sessions.[77]

State	***Number of Resolutions***
Israel	14
Belarus	3
Burundi	3
Cambodia	3
Cuba	3
Democratic Republic of the Congo	3
Myanmar	3
North Korea	3
Sierra Leone	3
Somalia	3
Chad	2
Liberia	2
Turkmenistan	2
Western Sahara (disputed territory)	2
Afghanistan	1
Iraq	1

Table 2: Country-Specific Resolutions in the CHR (2003–2005).

Drawing specific conclusions about the differences in resolutions passed in the two bodies should be undertaken with care, as should discussion of the difference in approach between the two bodies. The trend in both bodies is that they largely reflect the preferences of those states that prefer to avoid country-specific resolutions. However, it is possible that the institutional changes in the HRC have had some effect, since it has passed more non-

[76] For the purposes of brevity, this article will not discuss the *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (25 September 2009) ("the Goldstone Report").
[77] Information on resolutions passed by the CHR is available online: Office of the High Commissioner for Human Rights <http://www2.ohchr.org/english/>.

cooperative resolutions both in absolute and percentage terms—even excluding Israel—than did the CHR. Despite this change, the HRC also reflects consistency in the states targeted, as well as in states that escape particular scrutiny. Of the twelve states the HRC has targeted with a country-specific resolution, eight were also subjects of resolutions under the CHR.

Also reflecting consistency in the states targeted is the fact that neither body has addressed human rights abuses in states such as China, Saudi Arabia or Zimbabwe. Both, however, have given Israel—a frequent target of developing nations—a disproportionate share of attention. Nonetheless, one can tentatively conclude that though states wishing to avoid confrontational language—reflected in the negotiating position of the G-77—have largely succeeded in the HRC, the HRC has appeared to be slightly more willing to be critical of rights practices in states it addresses. Why this shift may have occurred however, is not entirely clear.

Country-specific resolutions in the HRC have had an additional effect as well. Several states have adopted the position that the HRC, as a body that reports to the GA, is the appropriate venue for the discussion of specific human rights violations. Several countries, including Barbados, Uzbekistan, and Angola, argued against a 2007 GA resolution regarding the human rights situation in Myanmar. They specifically referenced the Human Rights Council as the appropriate venue to address particular rights concerns—either through the UPR or through country-specific resolutions. The representative from Barbados lamented "that the Council had not been afforded any real opportunity to establish itself and that a confrontational approach had persisted."[78] Although the percentage of states voting in favour of country-specific resolutions in the GA did not change significantly from 2004–2007 (an average of 82 states voted for five country-specific resolutions in 2005; 81.25 for four in 2006; and 82.25 for four in 2007, and all 2006 and later votes occurred after the creation of the HRC), the creation of the HRC has given states an additional rhetorical justification to vote against such resolutions in the GA.[79] Moreover, Russia and Indonesia opposed a 2007 resolution in the Security Council regarding the situation in Myanmar on the grounds that the Human Rights Council was the appropriate venue for addressing country-specific rights concerns. Russia ultimately vetoed the

[78] *Summary Record of the 50th Meeting*, UN GAOR, 62nd Sess., UN Doc A/C.3/62/SR.50 (published 14 December 2007) at paras. 25, 11-31, online: <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/605/36/pdf/N0760536.pdf?OpenElement>. The record of the debate regarding this resolution contains statements of the referenced states as well as those of several others.

[79] These data are from a database the author has compiled using data from the UN Bibliographic Information System on all U.N. General Assembly resolutions passed from 1990-2007. I ran a simple regression analysis on country-specific resolutions from 2000 to 2007. The independent variable is a dummy variable coded as "1" if the vote occurred during the existence of the CHR, or "2" if it occurred during the HRC. The dependent variable was percentage of states voting yes. The independent variable was not statistically significant. There was not a significant change in either the number of states voting in favour, nor the percentage of member states—either overall or calculated as a percentage of those actually voting—changed significantly.

resolution.[80]

A core objective of many G-77 states in creating the HRC was to ensure that the HRC did not become a body with sufficient strength to condemn individual rights violations. These states appear to have been successful. They appear to have achieved this primarily by establishing an HRC that was not significantly smaller than the CHR, and sustaining the regional distribution of seats, with no limitations on which states could be elected. Though the HRC has passed a limited number of resolutions aimed at specific countries—a higher percentage of which are critical in comparison to the CHR—a significant percentage of those have been aimed at one state, while several states with poor human rights records have escaped attention entirely.

Based on these initial outcomes, then, it would seem that members of the G-77 largely succeeded in their efforts to create an institution that would not represent a major change in practice from the CHR. In return for concessions on membership, however, European states and other members of WEOG pursued the creation of the UPR in an effort to hold all UN member states accountable for human rights practices. This article now turns to a discussion of that mechanism.

3. *Universal Periodic Review*

One of the first tasks of the Human Rights Council was to establish the procedure for the UPR.[81] The mechanism ultimately created by the HRC calls for all UN member states to be subject to review every four years. Countries under review provide an individual country report, while other stakeholders, including NGOs and other member states, provide information considered relevant to the review. Information submitted by stakeholders is summarized by the Office of the High Commissioner for Human Rights. The UPR working group, consisting of the member states of the HRC, then meets with representatives of the country under review.

The resulting dialogue can include other UN member states that choose to attend the review session. Interested stakeholders may attend, but may not participate in the dialogue. A troika of states randomly selected from the HRC serve as rapporteurs who manage the review session. The session is limited to three hours, the first portion of which is reserved for the state under review to make its presentation. The rapporteurs are responsible for preparing the final outcome document, which includes a series of recommendations to the state under review. That state has the opportunity to respond, formally accepting or rejecting the recommendations; both the recommendations and the responses are included in the final report.[82]

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[80] Yvonne Terlingen, "The Human Rights Council: A New Era in UN Human Rights Work?" (2007) 21 Ethics & Int'l Affairs 167.

[81] *Human Rights Council*, *supra* note 4 at para. 5(e) (Outlining the nature of the UPR, and providing that "the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session").

[82] Human Rights Council, *Institution-building of the United Nations Human Rights Council*, UN HRCOR, 5th Sess., Annex, UN Doc. A/HRC/RES/5/1 (2007); Allehone Mulugeta Abebe, "Of

Compiling final reports has proved somewhat contentious, with many African states in particular arguing that rejected recommendations should not be in the report, while European states have generally insisted that they be included. Ambassador Allehone Mulugeta Abebe of Ethiopia illustrates this point by reference to the review of Tunisia, in which Belgium objected to the exclusion of some of its recommendations from the final draft of the report. A working compromise to include specific recommendations, but to note which country made them, has settled the issue to an extent.[83]

To date, this process has had mixed success. Some countries have taken the process quite seriously, while others have been less engaged. In 2009, China, for example, rejected out of hand almost all recommendations to improve its rights record, and admitted almost no areas of concern in the country report it prepared for the committee.[84] As the final UPR report on China summarized:

> The delegation thanked all countries who spoke positively of its efforts in human rights promotion and protection and for many important and interesting questions and recommendations. It noted with regret, and reject[ed] categorically, however, the politicised statement[s] by certain countries.[85]

Other states have been able to manipulate the speakers' list for the three-hour review session to limit the ability of those critical of their regime to speak, while highlighting those speakers who will praise them.[86] Still others have not submitted documents in a timely fashion: Jordan, for one, submitted its country report late.[87] Cuba and Malaysia also came under particular criticism after the 2009 process, for failing to take the review seriously, or politicizing it in a manner that shielded discussion of human rights abuses.[88] On the other hand, Amnesty International has praised

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Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council" (2009) 9 Hum. Rts. L. Rev. 1 at 8-15 (a more detailed description of the process, as well as the process by which it was negotiated); Office of the High Commissioner for Human Rights, *Basic Facts about the UPR*, online: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>.

[83] Abebe, *ibid.* at 15.

[84] Human Rights Watch, *UN: Nations Show True Colors at Rights Review* (13 February 2009), online: Human Rights Watch <http://www.hrw.org/en/news/2009/02/13/un-nations-show-true-colors-rights-review> [HRW, *True Colors*]; Amnesty International, *United Nations Human Rights Council: Universal Periodic Review: The Fourth Round of Reviews Yields Mixed Results* (9 March 2009) at 3, online: <http://www.amnesty.org/en/library/asset/IOR42/001/2009/en/a41cc0d0-0cec-4f46-839b-b721e4b7fc53/ior420012009en.pdf> [Amnesty International, *Universal Periodic Review*].

[85] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: China*, UN GAOR, 11th Sess., UN Doc. A/HRC/11/25 (2009) at para 60. According to the summary of the report, China proceeded to address specific criticisms by explaining them away, denying the problem, stating that the problem had been solved, or arguing that the criticism was the result of political disagreement between states.

[86] Gareth Sweeney & Yuri Saito, "An NGO Assessment of the New Mechanisms of the UN Human Rights Council" (2009) 9 Human Rts. L. Rev. 210.

[87] HRW, *True Colors*, *supra* note 84. Joe Stork & Christoph Wilcke, *A Missed Opportunity*? (10 July 2009), online: Human Rights Watch, <http://www.hrw.org/en/news/2009/07/10/missed-opportunity>; Amnesty International, *Universal Periodic Review*, *supra* note 84 at 2.

[88] Amnesty International, *Universal Periodic Review*, *ibid*.

several states, including Mexico, Russia, and Nigeria, for what it considered to be the care taken in the preparation of their country reports, their willingness to engage critics, and their willingness to at least formally accept their respective final reports' recommendations.

There has also been a widespread practice during review of regional blocs looking out for one another by rarely criticizing fellow members. Ambassador Abebe has noted that, "out of 65 statements during the review of Tunisia, 50 'favourable' statements were made, mainly by African and Muslim countries. …Non-Western countries presented rather critical observations of the human rights situations in the UK…. But similar reaction towards reports by developing countries were absent."[89] Shortly before the U.S. election to the HRC in 2009, U.S. Ambassador Mark Cassayre specifically addressed this concern, stating that:

> …we must be vigilant against the abuse of the UPR process to deny the existence of human rights violations. …Practices such as lining up friendly speakers, facilitating the early sign-up of government-operated NGOs, and encouraging government-operated NGOs to submit reports in order to block dissenting opinions, have a particularly chilling effect on the purpose and spirit of the UPR. In doing so, states undermine the international community's aspirations for the UPR process.[90]

Evaluating the UPR at this early stage is somewhat difficult. At best, the results are mixed. The review is easily open to abuse by states that wish to do so. The state under review has much influence in crafting its own review process, including preparing an initial report, helping to shape the three-hour review session, and choosing which recommendations to accept or reject. This means that the mechanism will only be useful for those states that wish it to be useful.

Such a mechanism benefits those states most concerned with preventing UN intervention in their domestic affairs, at the expense of those that wish to more intensely promote human rights standards around the world. Though the WEOG held out hope that the UPR would be a powerful tool to hold states accountable for human rights practices, many, including G-77 countries, have already manipulated the process in order to avoid making major concessions regarding human rights. In this regard, it would again appear that G-77 states, while conceding to institutional design, maintained the status quo. The UPR is non-discriminatory in the sense that all nations fall under review, but early results suggest that not all reviews are created equal. Notorious human rights abusers, though subject to some criticism during the review process, have a substantial level of influence on what the HRC is able to produce. Though the UPR may develop into a mechanism that does affect state practice, as yet states with poor practice appear to be engaging the process only to the extent necessary to fulfill their official

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[89] Abebe, *supra* note 82 at 19-20.

[90] Mark Cassayre, *Statement by the delegation of the United States of America before the Human Rights Council*, HRC, 11th Sess., General Debate, Item 6 (12 June 2009), online: United States Mission <http://geneva.usmission.gov/news/2009/06/12/item6unhrc/>.

obligations. As will be discussed in the conclusion, however, the UPR itself should provide an interesting avenue for further research regarding domestic and international incentives and human rights institutions.

V. Conclusion

The process of creating the HRC was one of negotiated compromise. It fits well with recent arguments that the decisions of states to participate in human rights regimes involves complex cost-benefit calculations, in addition to (and possibly informed by) normative commitments to human rights. The impetus behind the creation of the HRC was the shortcomings of the CHR: its failure to engage human rights abuses around the world to a sufficient degree; its inclusion of human rights abusers among its members; and its production of politicized decisions.

Nevertheless, the HRC does not really address these issues. Outcomes of the CHR have so far been largely reflective of the interests of its member states, and of the interests of their regions more broadly. Those same states participated in the negotiation of the HRC, designing an institution that reflected the overwhelming desire of many states not to have an overly strong human rights enforcement body. In the final design, a state's human rights record was not a major impediment to membership on the HRC so long as it could gain enough votes, and the regional distribution of seats virtually ensured that some states with poor human rights records would be on the HRC. The size of the HRC also suggested that little would change in the voting dynamics between the two bodies.

As I have shown, little did change. While fewer states at the lowest level on Freedom House's scale have made it onto the HRC, there has not been an increase in the election of states rated as free. Finally, the HRC has addressed fewer states in country-specific resolutions than the CHR did in its last three years, and the percentage of those resolutions specific to Israel has increased.

The question thus arises: is the HRC a failure, and the UN fatally limited in its pursuit of human rights? Not necessarily. At this point, the HRC can do no more than mirror the preferences of its member states. If institutions are the results of bargains struck to reflect the preferences of their members, then the HRC has been particularly successful for the largest voting bloc in the UN: namely, developing states concerned with intervention in their domestic affairs.

This situation was not unforeseen in the creation of the HRC. One diplomat whom I interviewed summarized the creation of the HRC as "pouring the same wine in different bottles." This view is held by many observers of the UN as well. As Ladan Rahmani-Ocora noted prior to the finalization of the HRC's design: "an outstanding design for the structure of the new Human Rights Council will be meaningless without a firm foundation of state commitment."[91] It would appear that the outcome of the HRC was, in many ways, predetermined. Given the structure of preferences

[91] Rahmani-Ocora, *supra* note 2 at 20.

at the UN, the new institution might not be expected to be dramatically different, yet member states engaged in a lengthy reform process. This apparent paradox raises the question: why create a new institution at all?

One explanation fits well with the argument presented here: reputation. The CHR was perceived as being ineffective at promoting human rights. To be perceived as caring about human rights, bolstering both international and domestic prestige required supporting a new institution. States satisfied with the status quo could support the creation of a new institution without any real fear that it would be effective, since they were able to shape institutional design and membership in a manner that would keep prospective enforcement cost low, while gaining a reputational benefit. Outcomes at the HRC as compared to the CHR support this hypothesis.

It is more difficult to explain the preferences of those states that desired a stronger institution. Given the distribution of preferences, the likelihood of creating a substantially more effective institution was not high. Why expend the cost in trying? The answer to this question may not fit well in the confines of this article's argument: hope. Though the structure of preferences at present may not be conducive to greater rights promotion, the states that advocated for a stronger institution – particularly the members of the WEOG – may have hoped that a redesigned human rights body could have a stronger constitutive effect on states. They may have hoped that a new institution could facilitate global processes of change.

This argument may not be entirely farfetched. While those who had hoped the HRC would be a dramatic departure from the CHR may be disappointed at present, there is research suggesting that the HRC *could* lead to improved human rights performance. Goodman and Jinks, for example, have argued that coercive institutions are ultimately less effective at improving human rights practices than institutions that use a cooperative approach, one that attempts to acculturate states into an acceptance of rights norms.[92] If this insight is true, the HRC may become more effective at facilitating change than a more coercive institution. Such views about the diffusive effect of the HRC's largely non-confrontational work are common within the transnational human rights community: former vice president of the HRC Ambassador Blaise Godet, for example, believes the transmission of testimony about human rights conditions during the UPR process could lead to changes in state practice over time.[93]

Along that vein, the HRC will continue to be an interesting subject for research, particularly in terms of how states use the UPR. Based on work by Hathaway and Vreeland,[94] we should be able to make predictions about the manner in which states will engage the UPR. States have little choice but to participate, but will have several choices to make in regard to how they

[92] Goodman & Jinks, s*upra* note 17.
[93] Owen Barron, "Reforming Human Rights" (2008) 29:4 Harv. Int'l Rev. 74 (An interview with Ambassador Godet).
[94] Hathaway, "Difference", *supra* note 19; Hathaway, "Commitment", *supra* note 21; Oona A. Hathaway, "Why Do Countries Commit to Human Rights Treaties?" (2007) 51 J. Confl. Resolution 588; Vreeland, *supra* note 19.

participate. The process can be broken into three stages: the production of the country report; interaction with the HRC and other stakeholders, including accepting or rejecting recommendations; and follow through on recommendations. At each stage of the process, states can choose to engage in good faith, or can attempt to block the work of the HRC.

The approach adopted in this article and in others gives some hints on what to expect. Broadly, democratic states, whether they have a history of rights abuses or not, can be expected to be forthcoming in their country reports by providing a tangible list of areas of improvement and be willing to engage critics and accept recommendations from stakeholders. Such states can also be expected to carry through (or at least actively engage) the recommendations prior to the next country appraisal. Both democracies with a history of rights abuses, and authoritarian states with some party competition and strong civil societies, would also be expected to be more forthcoming in the first two stages. Since failure to do so could lead to trouble at home with civil society and competing parties, participation can help to thwart domestic criticism. In terms of implementation, however, these states are less likely than democracies to undertake meaningful actions to improve their rights conditions, with the following caveat: the more democratic the state, the more likely it is to make changes. Finally, authoritarian regimes without meaningful internal mechanisms of dissent will probably be the least likely to be forthcoming in their country reports, the least likely to engage regime critics, and the least likely to make meaningful changes after undergoing the UPR process.

While this line of research into how states engage the process cannot be completely addressed until the first full UPR cycle is complete in 2011, Amnesty International's initial review of the 2009 process lends some credence to these arguments. As noted, Mexico and Russia, both states with a pattern of human rights abuses combined with meaningful electoral competition, engaged the process in a serious manner, while two states with far less electoral competition, Cuba and China, cooperated far less.[95] Only time will tell if other states follow this pattern, or if states like Russia will act on the recommendations contained in their final reports.

Ultimately, however, this article suggests that in terms of promoting human rights, the institutions of the UN will continue to be a reflection of the preferences of member states. The UN will not be able to have a truly powerful human rights body until a sufficient number of its member states desire it – an outcome which is unlikely to happen until enough states have improved their human rights records to the point where they are no longer threatened by a powerful HRC. Just as the process of standard-setting in the CHR took many decades, so too can we expect that it will take time for change to occur both within the HRC and as a result of its work.

[95] Amnesty International, *Universal Periodic Review*, *supra* note 84.