Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals

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Abstract

This article examines the challenges and opportunities in measuring compliance with international human rights tribunals. Using the European Court of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights as examples, this article highlights the importance of strong measures of compliance, identifies the strengths and weaknesses of the current approaches to measuring compliance, and begins a dialogue about the future of measuring compliance by positing an alternative compliance indicator.

Keywords: compliance; execution of judgments; measurement; tribunals

Introduction

In June 2008, the European Court of Human Rights (ECtHR) and Council of Europe Member States held a high-level panel meeting in Stockholm, Sweden, to discuss the worrisome and ever-growing crisis of states' implementation of the ECtHR's rulings. In the words of Ms Deniz Akçay, the Chairperson of the Steering Committee for Human Rights and a presenter at the conference, '[Implementation] is linked not only to the obligation to comply with the Convention in the national setting, but also to its critical importance for ensuring the long-term effectiveness of the control mechanism' (Akçay, 2008). Lawyers, judges, and activists affiliated with the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACmHR) have echoed these same sentiments: compliance with the tribunals' judgments is the foundation upon which the institutions' legitimacy, moral authority, and effectiveness rest. Yet, despite the importance of compliance for the tribunals and for the protection of human rights, the means by which these human rights instruments measure compliance with their rulings suffers from ambiguity and inconsistency. This article seeks to begin a dialogue on how compliance is measured and to propose an alternative approach to measuring states' compliance with human rights tribunals.

Although the Inter-American and European human rights institutions face similar issues regarding measuring compliance, they also provide important and illustrative comparisons, both within and between institutions. Not only do the European and Inter-American human rights institutions occupy regions with very different political climates, experiences with democratic governance and above all, different approaches to protecting and promoting human rights, but each tribunal also deals with human rights concerns that

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touch upon a range of issue areas, from property rights to personal integrity rights. By leveraging the distinct experiences of both tribunals and the diversity of their Member States, this article aims to develop an approach to measuring compliance that is generalizable and can be used for comparative analyses of these and other human rights institutions.

This article proceeds in three main sections. Firstly, I provide a brief overview of the human rights systems, followed by an examination of the existing methods for measuring compliance with the European and Inter-American human rights systems, paying particular attention to the strengths and weaknesses of the current approaches. Then I outline the desired features of a new compliance indicator and build on that discussion to propose an alternative method for measuring compliance.

Overview of the Regional Human Rights Systems

The European and Inter-American human rights tribunals occupy a unique space in international adjudication. Organs of the Council of Europe (COE) and the Organization of American States (OAS), respectively, the ECtHR and its Inter-American counterparts are comprised of diverse Member States. The ECtHR's 47 Member States cover all of Europe, from Azerbaijan to Andorra. In the Americas, 21 states have accepted the jurisdiction of the IACtHR, and the Court's jurisdiction ranges from Mexico in the north to Uruguay in the south.

Like other international adjudicative bodies, the members of the tribunals are states, but unlike other international adjudicative bodies, the European and Inter-American human rights tribunals provide channels for individual standing. This means that individual constituents in the Member States, having exhausted domestic remedies, can take a petition of human rights abuse against their government to these regional human rights institutions. In the Inter-American system, individuals first petition the IACmHR, which can determine the admissibility of the petition, broker friendly settlements between the parties and issue reports with recommendations to the state if they find a human rights violation. If the state does not follow through with the recommendations in these reports, the IACmHR can then appeal to the IACtHR to hear the case, with the victim(s) and their next of kin gaining *locus standi* status at the IACtHR (Pasqualucci, 2003).[1] The process in the European system is somewhat different: since 1998, all Member States of the COE must accept the individual petitioning mechanism and individuals, having exhausted domestic remedies, can petition the ECtHR directly.

The individual petitioning mechanism is a defining feature of the tribunals and drives their use and development. As a result, compared with other

1 Inter-American Commission on Human Rights. 2007. *Annual Report of the Inter-American Commission on Human Rights 2007*. Organization of American States, OEA/Ser.L/V/II.130, Doc. 22, rev. 1.

international adjudicative bodies, the human rights tribunals are remarkably active. To date, the ECtHR has heard a total of 10,573 cases, and it processed over 32,000 individual petitions last year alone.[2] Although operating on a somewhat smaller scale, the IACmHR received 1,456 petitions in 2007, and the Inter-American Court has issued 174 rulings since its inception in 1979, most of which the Court issued over the last eight years.[3]

Although both the European and Inter-American Courts issue binding legal rulings, the mechanisms in place to oversee states' compliance with these rulings varies drastically. In Europe, the Committee of Ministers (CM) of the COE oversees compliance. The CM's involvement has been crucial in facilitating state cooperation and accountability, as it renders the Court's rulings and recommendations as matters of political, if not purely legal, import (Lambert-Abdelgawad, 2008). In 2007, the CM began compiling annual reports on states' execution of the ECtHR's judgments, representing both an important source of data as well as a critical step in holding states accountable for their compliance obligations.[4]

The Inter-American system does not have an oversight body analogous to the Council of Europe's Committee of Ministers for overseeing compliance. Instead, the Inter-American tribunals rely on state reporting, site-visits and updates from activists and victims and monitor compliance with their own mandates. Their main tool to foster compliance is making as much compliance information public as possible. Although the reporting efforts by the IACmHR and the Inter-American Court of Human Rights are important steps in making governments' human rights obligations more transparent, the political organs of the OAS have been very reluctant to participate in overseeing or facilitating compliance with the human rights institutions, which has dampened the impact of the tribunals on the states' human rights practices (Farer, 1997; Krsticevic, 2007). The IACtHR currently is revisiting its rules of procedure and working on developing a stronger compliance mechanism.[5]

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2 Registry of the European Court of Human Rights (2009). *Annual Report 2008 of the European Court of Human Rights*. Strasbourg, France: Council of Europe. Available at: http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports/ (retrieved 7 July 2009).

3 Inter-American Commission on Human Rights. 2007. *Annual Report of the Inter-American Commission on Human Rights 2007*. OEA/Ser.L/V/II.130, Doc. 22, rev. 1. Organization of American States; Inter-American Court of Human Rights. 2007. *Annual Report of the Inter-American Court of Human Rights 2007*. Organization of American States.

4 Committee of Ministers. 2008. *Supervision of the Execution of Judgments of the European Court of Human Rights*. Strasbourg, France: Council of Europe; Committee of Ministers. 2009. *Supervision of the Execution of Judgments of the European Court of Human Rights: 1st Annual Report*. Strasbourg, France: Council of Europe.

5 Inter-American Court of Human Rights. *Statement of Reasons to Modify the Rules of Procedure*. Available on-line at http://www.corteidh.or.cr/reglamento.cfm (retrieved 29 July 2009).

The Inter-American and European approaches to human rights impose a number of obligations on the states after the tribunals have established a breach of human rights, and although the basic elements of these obligations are consistent across the two regions, there are some noteworthy and important differences.[6] The Inter-American tribunals generally offer a large and diverse set of recommendations and requirements in their rulings. These range from paying compensatory and moral damages to changing legislation and prosecuting human rights abusers; from publicizing the tribunals' rulings in national newspapers to issuing public apologies and erecting monuments. These obligations generally fall into four categories: payment of reparations to the victims and their families; states' recognition of their responsibility for the violation and honouring the victims through symbolic political measures; providing justice at the state level, including retrials and accountability for individual perpetrators; and measures of non-repetition that will prevent the same abuses from happening in the future.[7]

The European system, in contrast, identifies three particular obligations on the state: just satisfaction, which usually takes the form of financial reparations, and individual and general measures. Much like in the Inter-American system, individual measures can take a variety of forms, ranging from re-opening an investigation on the domestic level to striking a wrongly accused victim's name from court records. The general measures are measures of non-repetition and usually involve changes in administrative practice and/or legislation. Notably, the ECtHR is limited in its capacity to indicate the appropriate steps the state should make to rectify the abuse, and although the Court can set the sum of the payments necessary for just satisfaction, the principle of subsidiarity implies that it is up to the states, with assistance from the CM, to determine the appropriate individual and general measures (Wildhaber, 2006).[8]

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6 See Viljoen and Louw (2007) for a discussion of states' obligations originating from a report handed down by the African Commission on Human and Peoples' Rights.

7 Inter-American Commission on Human Rights. 2007. *Basic Documents Pertaining to Human Rights in the Inter-American System*. Washington, DC: Organization of American States.

8 Department for the Execution of Judgments of the European Court of Human Rights. 2006. *Information Documents: Working Methods for Supervision of the Execution of the European Court of Human Rights' Judgments*. DGII, CM/Inf/DH; Committee of Ministers. 2008. *Supervision of the Execution of Judgments of the European Court of Human Rights*. Strasbourg, France: Council of Europe; Steering Committee for Human Rights (CDDH). 2005. *Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR): Re-examination or Reopening of Certain Cases at Domestic Level Following Judgments of the European Court of Human Rights, Overview of Existing Legislation and Case-Law, Follow-up to the Implementation of Recommendation Rec(2000)2, Information Received by the Secretariat*. DH-PR(2005)002rev.

Existing Approaches to Measuring Compliance with Regional Tribunals

Before considering alternative approaches to measuring compliance, it is important to explore in more depth the current methods for measuring compliance with the European and Inter-American human rights tribunals. The IACmHR, for instance, uses three major categories to measure compliance: full compliance, partial compliance, and pending compliance.[9] Although this typology offers a quick sketch of states' implementation of the tribunals' rulings, these broad and ambiguous categories obscure many important details, details that for the victims and their families literally can be questions of life and death. For example, a state that pays some reparations six years after the ruling but fails to prosecute those accountable or to provide measures for non-repetition is classified as being in 'partial compliance'. The perpetrators remain at large, the state has given very little effort to prevent the abuse from happening again, and the resolution of the case remains in abeyance. Contrast this, however, to a state that has paid reparations within six months of the judgment, begun investigations of suspected perpetrators and enacted new legislation to prevent the repetition of the abuse. This state also would receive a 'partial compliance' rating, despite the drastically different efforts of the two states to address the tribunal's rulings and improve human rights conditions. By failing to differentiate among drastically different levels of compliance, the Commission structures states' incentives to comply with the lowest-hanging fruit rather than to implement more durable human rights safeguards. To better illustrate the potential problems with this, let us compare two cases from the IACmHR, both of which are categorized as having 'partial compliance'.

The first case is *Maria da Penha v. Brazil* (2000). Ms da Penha was a victim of domestic violence, and her husband's repeated attempts to kill her left her physically paralyzed and emotionally battered. Nevertheless, her abuse went unnoticed and unpunished by the Brazilian justice system. Ms da Penha, together with the non-governmental organization CEJIL, took her claim to the Inter-American Commission on the grounds that the government of Brazil violated her rights to fair trial and judicial protection and perpetuated a system of discrimination against domestic violence victims within the Brazilian legal system. The Commission made the following recommendations to the government of Brazil in 2000: (1) conduct investigations and trials to hold the perpetrators accountable; (2) provide Ms da Penha with appropriate financial reparations; (3) honour Ms da Penha with the appropriate symbolic reparations; and (4) continue legal reform, including police training and education, to stop domestic violence and stop the impunity

9 Inter-American Commission on Human Rights. 2001. *Annual Report of the Inter-American Commission on Human Rights 2000*. OEA/Ser./L/V/II.111 doc. 20 rev. Washington, DC: General Secretariat of the Organization of American States.

enjoyed by those who commit domestic violence.[10] As of 2007, the state has: (1) agreed to pay reparations but has not disbursed the funds; (2) honoured the victim with the Federal Senate's Bertha-Lutz Citizenship Prize and named a new anti-domestic violence legislation in her honour; (3) tried and found guilty the perpetrator; and (4) enacted new legislation to institute special courts and places of refuge for victims of domestic violence. Although the petitioner and her counsel have questioned (rightly) the capacity of the new law, doubted the fairness of the perpetrator's trial and expressed skepticism over the glacial pace of providing reparations, Brazil's compliance here is relatively complete.[11]

Contrast this to the experience of Colombia in the case of the Riofrío Massacre, which occurred in 1993. In April 2001, the IACmHR found Colombia to be responsible for the deaths and inhuman treatment of 20 individuals, as well as the obstruction of justice. Colombian military agents, working in conjunction with paramilitary groups, were responsible for the massacre. The Commission ordered that Colombia: (1) investigate and try those responsible; (2) compensate the families; and (3) enact measures of non-repetition and give full effect to the Inter-American Convention of Human Rights.[12] As of 2007, the state had complied with financial reparations and begun investigations, but had yet to effectively collect or analyze data related to the investigation or show progress on holding the perpetrators accountable. However, Colombia also receives a partial compliance rating for this case.[13]

For its part, the IACtHR does not expressly rate states' compliance. Instead, it produces compliance reports and identifies the specific elements of the rulings with which the state has complied, partially complied, or has yet to address. Indeed, the strength of the Inter-American institutions' attempts to oversee compliance lies in the data they have made available in recent years. The IACtHR publishes compliance reports on individual cases, which detail the progress that states have made with the rulings. The Court published its first compliance report in 2001 and has been successful in increasing the frequency and quality of compliance reports since. Also in 2001, the Inter-American Commission reformed its annual reports to include a

10 Inter-American Commission on Human Rights. 2001. *Report on Maria da Penha Maia Fernandes v. Brazil*, *Case 12.051*. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000), Washington, D.C.: Inter-American Commission on Human Rights.

11 Inter-American Commission on Human Rights. 2001. *Annual Report of the Inter-American Commission on Human Rights 2000*. OEA/Ser./L/V/II.111 doc. 20 rev. Washington, DC: General Secretariat of the Organization of American States.

12 Inter-American Commission on Human Rights. 2001. *Río Frío Massacre v. Colombia, Case 11.654, 62/01*. OEA/Ser.L/V/II.111 Doc. 20 rev at 758 (2000). Washington, DC: General Secretariat of the Organization of American States.

13 Inter-American Commission on Human Rights. 2001. *Annual Report of the Inter-American Commission on Human Rights 2000*. OEA/Ser./L/V/II.111 doc. 20 rev. Washington, DC: Inter-American Commission on Human Rights.

section on compliance.[14] Although the defining feature of this section is a table that categorizes states into the 'pending, partial and total compliance' categories, it also features a summary of each of the cases and relevant updates regarding their status.

Although these updates and compliance reports are indeed useful to researchers and those tribunal and government officials most intimately familiar with the cases, they have a limited utility for policymakers, activists, and observers. The cases and compliance reports can be impenetrable, and few practitioners will have the time or inclination to drudge through each annual report. Furthermore, by failing to differentiate between compliance that involves trials or investigations and a comparatively straightforward one-time payment of reparations, the tribunals provide states with the incentive to do as little as possible. For most states in most cases, full compliance is out of reach, but partial compliance is quite feasible, particularly if they can attain that partial compliance rating through reparations or simple symbolic measures.[15] For those states most in need of an external impetus to consolidate human rights practices, the tribunals fail to provide them with that push in the right direction. In this way, the measurement of the tribunals' rulings works against the objectives of the institutions; rather than create an incentive for the state to comply with the rulings in full and to consolidate its human rights practices, the existing measurement system encourages states to shirk their responsibility to the tribunals and to human rights more generally.

As the foregoing discussion suggests, two needs emerge from the existing approach to measuring compliance with the Inter-American human rights tribunals. First, we need a new indicator that is user-friendly while still being informative. Second and relatedly, we need an indicator that is specific enough to hold states accountable for their human rights commitments and reward them for their human rights successes. Although the categories of pending/partial/full compliance are easy for users to grasp, they cloud over critical information, not least of which is the difference between providing remedy to individual victims and taking the structural measures necessary to ensure that the same types of violations do not happen again. An updated indicator should maintain a dedication to user-friendliness while also

14 General Assembly of the Organization of American States. 2006. *Observations and Recommendations on the Annual Report of the Inter-American Commission on Human Rights*. AG/RES. 2227 (XXXVI-O/06). Washington, DC: Organization of American States; General Assembly of the Organization of American States. 2006. *Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas*. AG/RES. 2220 (XXXVI-O/06). Washington, DC: Organization of American States; Inter-American Commission on Human Rights. 2008. *Annual Report of the Inter-American Commission on Human Rights 2007*. OEA/Ser.L/V/II.130, Doc. 22, rev. 1. Organization of American States.

15 For examples of full, partial and non-compliance, see Rubio-Marin (2009) and Sandoval (2008).

providing a better picture of *how* and with *which* components of the rulings the state has complied and provide states with the incentive to comply with as much of the ruling as possible.

The ECtHR, like its Inter-American counterpart, suffers from ambiguity when it comes to measuring states' compliance, and the sheer number of cases the ECtHR hears each year only exacerbates this problem. Neither the Court nor the CM compiles all of the information into a central database, and similarly, neither the ECtHR nor the CM provide a way to assess a state's overall compliance record short of tracing each individual case. Equally problematic is the data itself. Although the CM collects a great deal of relatively detailed information, the quantity of cases makes this data quickly overwhelming and nearly impenetrable. Yet, beneath these organizational and conceptual shortcomings is disaggregated data with a great deal of potential.

The CM keeps a massive amount of compliance data in three parallel databases. The first is a list of individual measures taken by the states to comply with the tribunal's rulings. The list categorizes states' actions regarding a ruling using a set of 11 individual measures, e.g. re-trials, striking a name off of an official court document, etc. The CM also publishes a list of general measures and uses these two lists in guiding its examination of states' compliance. Unfortunately, neither database has been updated since 2006. The CM also maintains a third database for those cases pending compliance, which is up to date, and provides dossiers on the current state of compliance with select cases for each state.[16] The Annotated Agenda of the Committee of Ministers' Human Rights meetings also tracks states' compliance with the ECtHR's rulings. Unfortunately, all of this data is never culled or systematically organized, nor does the CM or the ECtHR provide a rubric to measure states' compliance. The result: data that is inaccessible to most users and that provides little concrete or actionable information about a states' overall compliance with the tribunal or about specific elements of progress on a given

16 Council of Europe. *A Unique and Effective Mechanism*. Available on-line at http://www.coe.int/T/E/Human_rights/execution/01_Introduction/01_Introduction.asp (retrieved 1 February 2009); Council of Europe. *General Measures: Information from Cases Closed*. Available on-line at http://www.coe.int/t/dghl/monitoring/execution/Documents/MGindex_en.asp (retrieved 6 July 2009); Council of Europe. *Individual Measures: Information from Cases Closed*. Available on-line at http://www.coe.int/t/dghl/monitoring/execution/Documents/MIindex_en.asp (retrieved 6 July 2009); Council of Europe. *Cases Pending for Supervision of Execution*. Available on-line at http://www.coe.int/t/e/human_rights/execution/02_Documents/PPIndex.asp (retrieved 1 February 1, 2009); Council of Europe. *Current State of Execution: Pending Cases*. Available at: http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp (retrieved 6 July 2009). See also Department for the Execution of Judgments of the European Court of Human Rights. 2006. *Information Documents: Working methods for supervision of the execution of the European Court of Human Rights' Judgments*. DGII, CM/Inf/DH(2006). Strasbourg, France: Council of Europe.

case. In a move towards remedying this problem, the CM began publishing annual reports on the execution of judgments, which provide overviews of cases under the CM's supervision, catalogue the number and types of pending cases, and provide summaries of states' compliance with just satisfaction, individual and general measures for select cases. Reports from 2007 and 2008 currently are available.[17]

Although the Inter-American and European human rights tribunals have made great strides in recent years regarding the collection and interpretation of compliance data, three salient needs emerge from the current approach to measuring compliance. First, the current measurement approaches obscure important differences among the discrete obligations states face when the tribunals hand down an adverse judgment. By obscuring subtleties here, particularly with respect to the important differences between individual measures designed to provide remedy for the individual victim and measures of non-repetition designed to prevent similar abuses from happening in the future, the current measurement approaches fail to recognize the dual role of the tribunals: providing recourse for individuals and strengthening human rights more generally. Second, the extant approaches to measuring compliance with the tribunals' rulings do not provide a way to compare compliance across cases, states or tribunals without first doing a massive amount of background work. By leveraging the comparative element both within and between cases and tribunals, policymakers, activists and academics alike can better understand the compliance process, learn from previous successes, and identify systemic shortcomings. Third, the current approaches to measuring compliance do not allow for the easy aggregation of cases, thus thwarting any attempt at creating a 'bigger picture' about compliance with human rights tribunals.

Rethinking Measuring Compliance: A Multi-Level Approach

On the basis of the shortcomings of the indicators identified in the foregoing section, a measure of compliance with human rights tribunals' rulings should be able to account for the distinct obligations a judgment confers on the state, particularly the difference between individual and general measures; provide a mechanism to derive a state's aggregate compliance record; and allow for comparisons across cases, states and tribunals. In order to meet these demands, the compliance indicator described below has two defining features: (1) a multi-level approach that takes into account compliance obligations on the individual case level, the structural level, and in the aggregate; and (2) constituent elements measured as percentages of the obligations

17 Council of Europe Committee of Ministers. 2009. *Supervision of the Execution of Judgments of the European Court of Human Rights*. Strasbourg, France: Council of Europe; Council of Europe, Committee of Ministers. 2008. *Supervision of the Execution of Judgments of the European Court of Human Rights: 1st Annual Report*. Council of Europe.

discharged so as to be comparable across constituent elements, cases, states and tribunals. Figure 1, below, depicts such an indicator.

Starting from the micro-level, this multi-level system takes into account: (1) one state's compliance with reparations and just-satisfaction and individual measures; (2) the aggregate of compliance with reparations and just-satisfaction for each case; (3) the state's implementation of non-repetition measures; and (4) the state's overall compliance record for all cases or a specific sample of cases. By examining a state's compliance in the aggregate while still incorporating the individual mandates within each case, this approach allows the tribunals, governments, activists and academics to examine the level of analysis most appropriate for the task at hand. At the same time, it also provides a comprehensive framework that is easily adapted for different tribunals, states or issue areas.

Measuring compliance with each of the constituent elements represents its own challenges, and the approach outlined below attempts to balance the user-friendliness of the existing methods of measuring compliance with the need for more nuance. Because comparisons between state performance on the discrete mandates imposed by the rulings, across cases, over time and even across tribunals is critical for developing a set of best practices and identifying weaknesses in compliance, the approach outlined below is based entirely on calculating percentages rather than absolute values, and it starts with the fundamental question: Given the universe of demands placed on the states following a ruling from the tribunals, with what percentage of those obligations do states comply? Throughout the discussion, I use a select set of cases from Portugal at the ECtHR to illustrate how to derive the constituent

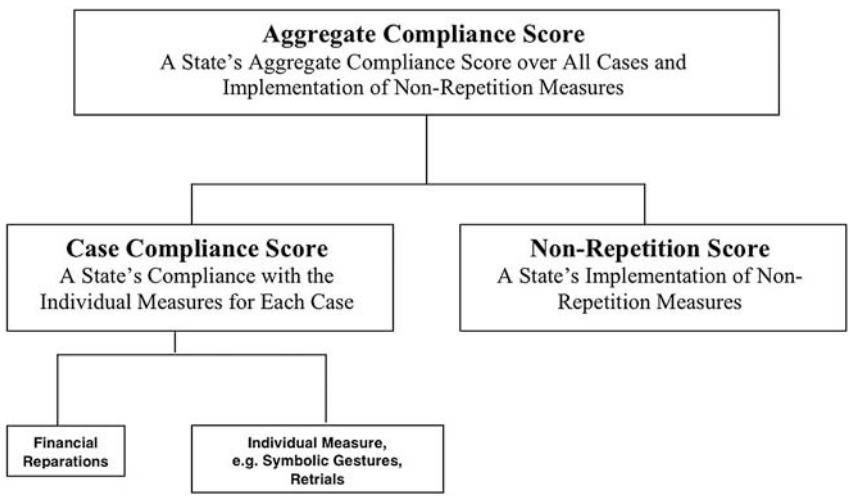

Figure 1. Three levels of compliance.

elements of the compliance indicator depicted in Fig. 1. Portugal is an appropriate example for this purpose as it represents an 'average' complier within the European context, does not have any one particular human rights issue that is driving its performance, and finally, has had a varied response to the ECtHR's rulings, allowing us to gain leverage on the strengths and weaknesses of the measurement process outlined below. Also, because the juridical mandate of the ECtHR does not allow the tribunal to specify particular individual or non-repetition measures like the IACtHR does, developing the model on the more difficult test case provides some reassurance that the indicator will be generalizable to the different tribunals.

Financial Reparations

Calculating states' performances on financial reparations is the most straightforward of the constituent elements to calculate. Reparations for each case are measured as the percentage of the reparations awarded to the victims that the state has disbursed. Let us consider the case of *Campos Dâmaso v. Portugal*.[18] In this case the ECtHR awarded the victim 1750 Euros, and Portugal disbursed all of the funds. Thus, the state complied with 100% of its obligations and receives a score of 1 for this constituent element. If, however, Portugal were to have only disbursed 1312.50 Euros, it would have received a score of 0.75 (1312.50/1750 = 0.75).

Individual Measures

The same basic principle holds for measuring compliance with the individual measures in each case, although the task here is much more difficult, as the goal is to move from an inherently qualitative and subjective legal obligation into a quantifiable ratio of individual measures implemented to those pending. The first step is to identify the universe of the individual measures demanded by the state. In the Inter-American system, the tribunals very clearly outline the states' obligations in this respect. The ECtHR, however, does not specify the individual measures that the state should take. Although this complicates the process, the CM has recently begun to identify the individual measures taken and those still pending in its annual reports and 'State of Execution' database.[19] Although the principle of subsidiarity places the burden of identifying the necessary measures on the state, cases remain pending until the CM is satisfied that all of the necessary measures have been taken, making these sources of data very useful for identifying both the universe of necessary measures as well as the steps states already have taken. From these data sources, we can begin to identify the universe of individual measures, and subsequently, the ratio of completed to pending measures.

18 European Court of Human Rights. 2008. *Campos Dâmaso v. Portugal*, No. 17107/05.

19 Council of Europe. *Current State of Execution: Pending Cases*. Available at: http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp (retrieved 6 July 2009).

For instance, in the case of Campos Dâmaso v. Portugal, the CM found it appropriate that the state erase the victim's criminal record, reopen the case domestically and publish and disseminate the ruling. As of June 2009, however, the state had not taken any of these measures, thus yielding a ratio of completed to uncompleted individual measures of 0:3, or 0% compliance.[20]

There are clear challenges to transforming inherently qualitative and subjective political and legal phenomenon into quantitative evaluations. These problems are exacerbated by the legal structure of the ECtHR and the CM, but as the CM continues to debate the importance of the execution of individual measures, the available data will improve over time. Further, individual measures vary drastically in and of themselves, and grouping them together dilutes some of these important differences. Subsequent iterations of the model could distinguish among individual measures that involved apologies, re-trials and the publication of the rulings, for example.

Aggregating: The Case Compliance Score

Having determined the separate scores for financial reparations and individual measures, we can aggregate these two scores to get a state's score for each case regarding redress for the victim(s). The most straightforward way of doing this is to take the average of the score for financial reparations and individual measures. For instances, if we look again at the case of *Campos Dâmaso v. Portugal*, the victim was awarded 1750 Euros, all of which the state disbursed. Thus, its financial reparation score was 1. The state did not fare as well with the individual measures and had an individual measures score of 0. If we use a simple average, the individual case score for *Campos Dâmaso v. Portugal* would be 0.5, or 50% compliance.

It is important to note that by averaging the financial reparations and individual measure scores in this way, the model assumes that financial reparations and the sum of the other individual measures are of equal weight and importance to the victim, the state and the tribunal. Indeed, this might not be the case. Creating weights for each constituent element of the indicator can adjust this assumption and is explained in more depth below.

Measures of Non-Repetition

Compliance with measures of non-repetition is critical for remedying systematic and structural problems within Member States, but they often receive less attention regarding measurement than individual measures and just satisfaction. Yet, improving compliance with measures of non-repetition is not only the key to protecting human rights in the tribunals' Member States, but it also is the linchpin for reducing the burden placed on the tribunals as a

20 Council of Europe. *Current State of Execution: Pending Cases*. Available at http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp (retrieved 6 July 2009).

result of their rapidly expanding caseloads. In 2008, for example, nearly 90% of the cases pending compliance with the CM at the COE involved clone or repetitive cases. In Italy, 98% of the cases pending compliance (2,428 in total) were repetitive cases.[21] This presents a challenge to measuring compliance, as compliance with one or two general measures would satisfy the general measure obligations for multiple cases. The implications are two-fold: on the one hand, if one change in legislation were used to satisfy 10 cases and measured the same way as individual measures, the country's compliance rate would be artificially inflated. Conversely, if one change in legislation was all that stood in the way between a state's complete compliance in 10 cases, the state's compliance rate would be artificially deflated.

As with the individual measures, non-repetition measures are difficult to quantify, and the universe of required non-repetition measures is even more challenging to identify. Just as with the individual measures, the Inter-American tribunals are more direct about the necessary measures of non-repetition, whereas the ECtHR refrains from making anything that could be construed as policy recommendations. Similarly, as with deriving the universe of obligations with the individual measures, an iterative process that relies on the CM Annual Reports and the State of Execution Database is perhaps the most practical avenue to pursue, at least for the time being.

Calculating the ratio of completed to pending general measures is a two-step process. First, we must identify the universe of general measures required. For some states, each case will require a discrete measure of non-repetition. For instance, each of Albania's nine cases pending compliance in 2008 are leading cases, which means that they raise new problems and thus, require discrete general measures.[22] Contrast this with the Italian case discussed above, where 98% of the 2,428 cases pending compliance in 2008 are clone or repeat cases and will require just a few general measures, albeit difficult ones to achieve.

Once we have established all of the general measures required, the second step is to eliminate repetitive general measures. Consider, for example, a set of three cases against Portugal regarding freedom of speech (*Camposo Dâmaso v. Portugal*, *Colaço Mestre and Sic v. Portugal*, and *Azevedo v. Portugal*).[23] Following the Colaço Mestre ruling, Portugal established a training module to promote freedom of expression. According to the CM

21 Council of Europe Committee of Ministers. 2009. *Supervision of the Execution of Judgments of the European Court of Human Rights*. Strasbourg, France: Council of Europe.

22 Council of Europe Committee of Ministers. 2009. *Supervision of the Execution of Judgments of the European Court of Human Rights*. Strasbourg, France: Council of Europe.

23 European Court of Human Rights. 2008. *Campos Dâmaso v. Portugal*. No. 17107/05; European Court of Human Rights. 2008. *Azevedo v. Portugal*. No. 20620/04; European Court of Human Rights. 2007. *Colaço Mestre v. Portugal*. No. 11182/03.

notes on the Camposo Dâmaso and Azevdeo cases, this training module generally satisfied the non-repetition requirements for the latter two cases. Thus, one measure of non-repetition was sufficient for compliance with three cases.[24]

Global Compliance Score

The final step in putting together an indicator to measure compliance is to create an aggregate compliance score. This aggregate score could indicate compliance for one issue area, for cases handed down in a given year, or for all cases against a state, or any such pre-established sample of cases. Such aggregated information is critical for states and the tribunals, as well as civil society and academics, as it allows these stakeholders to identify structural or systematic problems, develop and employ best practices, and, perhaps, even allow states to use empirical evidence to show that on average, they are doing well, or improving, their compliance records. The CM of the Council of Europe have begun to develop aggregate-level statistics, particularly for states' payment of just satisfaction, and the next logical step would be to expand this work to include the other obligations states face, as well as to other tribunals.

Keeping with the simple approach used to calculate the scores for the constituent elements, we can derive a compliance score in the aggregate by looking at the percentage of all of the state's obligations following adverse judgments with which the state has complied. This is done in two steps: (1) calculating the average individual case score for all of the cases in the selected sample; (2) taking the average of that score with the relevant general measure scores. Let us consider a sample of cases consisting of just the three freedom of expression cases identified above. Their individual case scores are as follows: Campos Dâmaso (0.5); Colaço Mestre (0.75) and Azevedo (0.5). Thus, the average individual case score is (0.58) or 58% compliance. The general measures score is 1, or 100%. Thus, the aggregate compliance score for this set of cases is 0.79 or 79%. This result implies that Portugal has done a passable job of complying with the ECtHR's freedom of expression rulings, a finding that is consistent with qualitative evidence on the same topic.

Building from the Basics: Time and Stakeholder Priority

The approach to measuring compliance outlined here is a starting point, and I currently am working on developing two ways to add nuance to the model. The first development is to incorporate time. One of the shortcomings of the existing approaches to measuring compliance is that they fail to take time to

24 The Committee of Ministers categorizes the publication and dissemination of the rulings as 'general measures' but they are included as individual measures in this measurement approach.

achieve compliance into account. In some of the cases heard by the Inter-American and European human rights tribunals, the expediency with which states comply with the rulings can be matters of life and death for the victims. The CM of the COE has begun to address this issue by recording the percentage of just satisfaction payments states have made within the time limit set by the Court. This is a very important step, but more nuances would be very helpful. An alternative approach, and one that I advocate developing, would be to create a 'completion per day/month/year' score. By standardizing the percentage of reparations paid or individual and general measures completed over a chosen time-frame, it is relatively straightforward to compare the efficiency with which states discharge their obligations. Furthermore, this will allow the tribunals, the states and the victims to address long delays in compliance by having clearer and more transparent data on the compliance process.

A second addition to the baseline model advocated here is to weight the constituent elements of the indicator according the frequency with which particular demands appear in the data, the policy distance between the status quo and the required changes, or even the value with which stakeholders view compliance with the different obligations. Subsequent iterations of the indicator also could use weighted coefficients as a way to penalize late payments of reparations or the delayed completion of other obligations.

The compliance indicator described above is a starting point, not a finished product. As interest in facilitating and measuring compliance continues to grow, it is crucial for researchers and policymakers alike to remember a couple of key caveats about this measurement process. First, it is imperative to have a clear coding schema developed prior to identifying the universe of obligations and determining states' compliance with those obligations. Using multiple coders and frequently performing inter-coder reliability checks is a true imperative. Second, coders will need to address missing or incomplete data, which is a common problem in this line of inquiry. Third, and finally, the tribunals will need to prioritize keeping their data updated, as the flood of cases they experience each year only will become more difficult and challenging to track as time goes on.

Despite these caveats, however, by integrating three levels of analysis the multi-tiered system proposed here represents a step forward in how we measure compliance. It provides comparative statistics on compliance among the different demands of individual cases, across cases, and even across states, and yet it is user-friendly and easily calculated. By focusing on the specific steps states have taken, this method provides insight into best practices as well as motivation for states to comply with the rulings to the highest degree possible. This method builds on the strengths of the existing compliance measures, while providing a more organized, nuanced and holistic approach to measuring compliance with the tribunals' rulings.

Implementing the Measurement System: Problems and Possibilities

The objective of this article has been to examine critically the important question of measuring compliance with international human rights tribunals' rulings. Although the discussion has focused on the European and Inter-American human rights institutions, the need to reconsider compliance measures, as well as the basic principles outlined here, are relevant for any number of human rights institutions, both international and domestic.

The three-tiered system advanced in this article opens a dialogue not only about how to measure compliance, but also about what constitutes compliance. One of the underlying questions that we must ask when defining and measuring compliance with the tribunals is whether or not each of the discrete elements of the rulings is of equal importance, as they are here, or whether or not the distinct mandates should be weighted differently.

Furthermore, it is important to recognize that measuring compliance with human rights tribunals is not only a complicated task from a methodological perspective but also from a political one. Measurement and judgment often go hand-in-hand, and improved and more transparent measures of the tribunals' rulings could expose the failures, on the part of the states and the tribunals themselves, to live up to their responsibilities for safeguarding human rights. Furthermore, numbers can be manipulated just as easily as words, and measures of compliance could be used as geopolitical tools. Despite these concerns, however, if the rubric for measuring compliance is clear, the data is easily accessible, and the conclusions drawn are made from empirically rigorous research, then states, the tribunals, and individuals all stand to benefit from improved measures of compliance. States will be better able to demonstrate the successes they have achieved, learn from the best practices of their neighbours, and demonstrate a commitment to upholding their international obligations regarding human rights. Better measures will help the tribunals to manage their caseload more effectively and redistribute their human and financial capacity to the areas most in need of attention. And, finally, individual citizens will have clearer information regarding the protection of human rights at home and abroad.

Of course, drafting a new measurement system and implementing it are two different tasks, and implementation will require technical and political collaboration on many fronts. For the Inter-American institutions, implementation of the new system will require diverting limited resources and staff from other tasks to the arduous job of recoding and classifying each of the cases. For the ECtHR, the tremendous docket of cases makes implementing this new system particularly challenging and yet, immensely important. One potential solution to these problems is to develop partnerships with other organizations that can provide the expertise, skills and human capital to facilitate the implementation of these indicators. Such partnerships could pave the way to better measurements of compliance as well as longer-lasting

collaboration among the human rights tribunals and other international organizations.

Despite the challenges ahead, rethinking measures of compliance with human rights tribunals' ruling can have three important effects on the protection of human rights. First, reconceptualized measures of compliance can better hold states to account for their human rights obligations. Second, new measures can provide critical information to states, the tribunals, activists and academics on both the successes and failures of compliance. Third, compliance measures that are applicable to multiple tribunals can help stakeholders leverage the important differences among tribunals and develop shared standards and best practices. The approach proposed here represents a crucial first step towards a new, empirical approach to measuring compliance with human rights tribunals, and in turn, safeguarding human rights.

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