

Enforcing Civil and Political Rights: Lessons from Europe

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Introduction

Due to its impressive compliance rates, the European Human Rights system is widely held to be the most effective regional human rights system in place.¹ While human rights courts in the Southern hemisphere (i.e. the Inter-American Court for Human Rights and the African Court on Human and Peoples' Rights) have a stronger focus on social and economic rights, the majority of cases adjudicated before the European Court of Human Rights (ECtHR) relates to the alleged violation of civil and political rights.² It is often assumed that rights falling under the latter category are more easily implemented than those belonging to the former. However, despite the common perception of regular compliance in the European context, human rights judgments in Europe are often implemented with significant delays. Moreover, the compliance requirements spelled out in the judgments often face contestation by state parties, be they established democracies and states moving towards democracy.³ This indicates that civil and political rights judgments are not more conducive to implementation by virtue of their substance, and suggests that even in democratic contexts, compliance with human rights judgments is not to be taken for granted.

The aim of this paper is to discuss what kinds of lessons can be learned from the European Human Rights system with regard to the enforcement of civil and political rights, and to what extent these lessons may be relevant for the enforcement of human rights generally – including social and economic rights – in other regional contexts. The paper argues that the challenges of enforcing civil and political rights and economic and social rights are not as dissimilar as one may think. Both the institutional design and robustness of the enforcement systems and the perceived costs of compliance by decision-makers are likely to play an important role in when and to what extent states comply with international court judgments pertaining to human rights violations. In order to develop this argument, the paper describes the process by which compliance requirements are delineated for each individual case before the ECtHR, analyzes the role of institutional design in this process, and discusses factors that increase or decrease the likelihood of implementation of ECtHR judgments in various domestic settings in Europe.

The paper has three parts. In the first part, we introduce the various juridical and political processes used by the Council of Europe to monitor the implementation of ECtHR judgments. We discuss how their distinct combination affects the stipulation of compliance requirements in human rights cases, and how this amounts to a pattern of compliance that can be described as a 'deliberative compliance model'. We argue that this model has both disadvantages and advantages. While in the European context, compliance with human rights

¹ Slaughter and Helfer, 1997.

² Throughout its history, the ECtHR has also adjudicated a lot of cross-cutting cases that have a civil-political as well as a social-economic dimension – e.g. cases that required decisions regarding housing rights, economic development programmes, concessions to multinational corporations, and pensioners' rights. However, in this paper we will concentrate on cases before the ECtHR that pertain to the violation of civil and political rights.

³ *Supervision of the Execution of the Judgments of the European Court of Human Rights: Annual Report 2008* (Council of Europe, April 2009) and *List of Strasbourg Court judgements not fully implemented more than five years: The Report of Mr Christos Pourgourides, The Rapporteur of the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe* (2009)

http://assembly.coe.int/CommitteeDocs/2009/ejdoc36ADD_2009.pdf Accessed on 30.01.2010.

judgments is often delayed and domestic decision-makers regularly contest the terms of compliance, outright public refusal to comply is extremely rare. Instead, and partially due to the possibilities of public exposure of non-compliance, an overwhelming majority of cases features eventual compliance. In the second part, we turn our attention to domestic mechanisms of compliance with human rights judgments. We identify three types of pro- and anti-compliance incentives that domestic decision-makers take into consideration in the implementation of ECtHR judgments: a) political b) institutional and c) normative incentives. Anti-compliance incentives therefore incur political, institutional, or normative costs. We argue that both the timing and the quality of implementation depend on the distinct distribution of these different incentives in each individual case. We will show that some domestic settings make specific distributions of these incentives more likely than others. In Europe, for instance, the perceived high degree of legitimacy of the ECtHR and the accordant normative commitment to a Europe-wide judicial human rights monitoring system in the area of civil and political rights has created a pattern of ‘eventual compliance’ with human rights judgments. There are also important differences between old and established democracies and newer or fragile democracies in terms of how the costs of compliance are perceived by domestic decision-makers. Where appropriate, these different findings will be illustrated with reference to interview data gathered in a number of ECtHR member states.⁴ In the final part the paper we outline various mechanisms and strategies that can offset the costs associated with the implementation of human rights judgments. In doing so, we emphasise that there is no ‘one-size-fits-all’ approach to designing effective strategies. Successful prioritization of strategies that leads to an effective enforcement of human rights judgments, whether pertaining to the realm of civil, political, or socio-economic rights, requires an in-depth understanding of the domestic setting, and of the specific type of the pro- and anti-compliance incentives encountered by state actors.

Compliance with the European Human Rights System: A Juri-political Compliance Model

The European Human Rights system has a number of unique design features that need to be taken into account when trying to distil lessons from the European experience. First, the system entails a court - the ECtHR - and a political body, the Committee of Ministers, that is made up of government representatives from each of the 47 Council of Europe member states. While it is the role of the ECtHR to adjudicate human rights violations and to deliver final judgments, the Committee of Ministers is charged with monitoring the execution of judgments and has the power to officially declare a case closed when a judgment has been complied with.⁵ This juri-political compliance model therefore differs from the Inter-American and African regional systems as well as United Nations quasi-judicial human rights bodies model in that it relies on good faith co-operation between a judicial body and an inter-governmental peer review mechanism. The relationship between the two bodies is non-hierarchical and the Committee of Ministers enjoys a degree of discretion when determining whether or not a state has complied with a human rights judgment.

Once a judgment is final⁶, the Department of the Execution of Judgments (which acts as the Secretariat of the Committee of Ministers), asks the respective state to either prepare an

⁴ Interviews were carried out with parliamentarians, human rights lawyers and apex court judges in Bulgaria, Germany, Ireland, Turkey and the United Kingdom.

⁵ See paragraphs 1 and 2 of Article 46 of the European Convention on Human Rights and Fundamental Freedoms: ‘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.’

action plan, preferably within six months, that sets out how it will comply with the judgment, or submit an action report detailing the measures already taken. In some cases the compliance requirements, e.g. payment of compensation to applicants, are clearly spelled out in the judgment itself, leaving no room for discussion. In other cases, both the specific compliance requirements and the question at what point the state has adequately fulfilled them are subject to a dialogue between the state, the Secretariat of the Committee of Ministers, and the Committee of Ministers itself. Individual applicants and non-governmental organisations may provide input to these discussions in the form of written submissions.⁷ This deliberative dimension of compliance inevitably permits a range of interpretations regarding what the compliance requirements are and under what conditions they are fulfilled.

Formally, there are three types of compliance requirements: payment of compensation, individual measures and general measures. The payment of compensation is meant to remedy the financial and emotional damage suffered by an applicant due to a human rights violation. States are required to pay such remedies within three months of the final decision. Individual measures aim to reinstate the status of the applicant to her position prior to the relevant human rights violation, or to erase the ongoing consequences of a violation for the applicant herself. Individual measures are therefore case-sensitive. They may include the erasure of criminal charges from records, the halting of deportation orders, the permission of a parent to have access to his child, or the reopening of domestic proceedings before domestic courts. General measures, on the other hand, aim to prevent the recurrence of similar violations in the future. The court resorts to these when a given violation is considered to not be a ‘one-off’ incident, but rather part of a systemic problem.⁸ Such problems may require changes in legislation, regulation, administrative practice, policy, institutional reform, training of public authorities, and awareness-raising of human rights judgments through their translation and dissemination, all of which have financial implications. In cases that concern a conflict between an applicant’s right to privacy or family life versus the economic welfare of the country (Article 8 cases), cases that concern non-discrimination (Article 14 cases), and cases that concern the enjoyment of possessions and the right to property (Protocol 1 Article 1 cases), the allocation of resources plays an especially important role.

The most significant feature of ECtHR judgments with regard to enforcement is that the Court does not have to spell out the compliance requirements for each and every case. Judgments therefore come in three different ways: First, many of the human rights judgments in Europe are ‘declaratory’ judgments. In these cases, the Court establishes that there has been a rights violation, and determines the amount of compensation and legal costs to be paid to the applicant. It leaves it to the state to decide on the best means to remedy the broader consequences of the violation, and to prevent its recurrence through appropriate individual

⁶ A judgment becomes final three months after its delivery if neither of the parties requests the case to be heard by the Grand Chamber.

⁷ Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies:

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Accessed on 30.01.2009.

⁸ In the language of the Committee of Ministers, the former are called ‘isolated cases’ and the latter are called ‘lead cases’. Lead cases point to the fact that other similar violations are imminent due to systemic shortcomings of the domestic system, and that the state has to address these systemic problems in order to comply with the judgment.

and general measures.⁹ Second, alongside awards for compensation, in some judgments the ECtHR goes a step further and indicates what other measures should be taken. For example, it stipulates that a particular law should be changed or that an applicant should be provided with a specific remedy, such as reinstatement or recognition of status.¹⁰ Third, and most recently, the Court has adopted what is called the ‘pilot judgment procedure’ in order to both deal with the backlog of large numbers of identical cases and to respond to requests from the Committee of Ministers to provide more guidance on cases that indicate systemic human rights violations.¹¹ Under this procedure, the Court not only identifies a violation of the Convention, but also an underlying systemic problem that leads to a large number of identical cases from a single country.¹² In the judgment, it offers assistance to the state and the Committee of Ministers in finding an appropriate general solution that would address the entire group of cases. The Court delivers such judgments under Article 46 of the Convention. It allows for a reasonable amount of time for the state to set up a generally effective remedy and for the Committee of Ministers to monitor it. During this period it adjourns the litigation of identical cases and waits for domestic remedies to become installed and implemented. However, it retains the right to reopen adjourned applications if the state fails to provide an adequate remedy for such cases at the national level.

The Pros and Cons of the Juri-political Model

All three forms of judgments outlined above leave a certain ‘breathing space’ for the state and the Committee of Ministers in their respective implementation and monitoring tasks in that they allow for deliberation of what remedies would be appropriate both at the national level and in the context of the Committee of Ministers peer review system. This institutional practice is based on the idea that supranational human rights protection in Europe is subsidiary to national human rights protection and that (democratic) states are better able to assess human rights-related compliance requirements than an international body.¹³ Under a strictly juridical model of enforcement, there are obvious difficulties with this set-up. The discretion left to the state and the peer review body contains the risk of ‘watering down’ the real effects of the judgments and may encourage backdoor diplomatic negotiations about appropriate remedies. When compliance requirements are left ambiguous, states that aim to limit the domestic effects of human rights judgments can use this system to their advantage.

That said, even though the European Human Rights system allows for a space to deliberate

⁹ It is also common for the Court to declare that the finding of a violation in itself is just satisfaction for the applicant. See, for example, *Cassel v. Spain*.

¹⁰ See for example, *Tekeli v. Turkey* (2004) which indicates that the Civil Code needs to be amended to ensure equality between men and women in choosing their names in marriage and *Gorgulu v. Germany* (2004) indicating that a father that was denied custody of his child by domestic proceedings should be given access to his child to remedy the violation of his right to family life.

¹¹ The first case in which the pilot judgment procedure was applied was *Broniowski v. Poland* (2004).

¹² The pilot judgment procedure has been applied to identical cases that reveal systemic problems in a number of countries. Examples include access to property in Northern Cyprus (*Xenides-Arestis v. Turkey*, no. 46347/99, 22.12.2005), length of proceedings and de facto expropriation in Italy (*Scordino v. Italy*, no. 36813/97, 29.03.2006), the system of property restitution in Albania (*Driza v. Albania*, no. 33771/02, judgment, 13.11.2007), compulsory letting and compulsory sale of property in the Slovak Republic (*Urbárska Obec Trenčianske Biskupice v. Slovakia*, no. 74258/01, judgment, 27.11.2007), and inadequate procedures in prison discipline regimes in Turkey (*Gülmez v. Turkey*, no. 16330/02, judgment, 20.05.2008).

¹³ Paolo G. Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’, *American Journal of International Law* 97 (2003), 38-79; Philip Leach, *Taking a Case to the European Court of Human Rights* (London: Blackstone Press Ltd. 2001), p. 93.

how a judgment should be complied with, this does not amount to a purely political compliance process marked by inter-state bargaining and diplomatic negotiations. Instead, the combination of human rights judgments and political deliberations often amounts to a predictable process where similar cases against all countries are treated alike.¹⁴ The Committee of Ministers has in this respect developed a jurisprudence of its own that sets out what measures are required by different types of judgments. Instead of the Court, a judicial body, dictating these measures, its affiliated intergovernmental body takes on this role. In the European context, the space of deliberation left to state authorities and to the Committee of Ministers can therefore be seen in a positive light. It ensures that the compliance process sets out realistic requirements that lead to eventual and in most cases effective implementation. The active involvement in the process of identifying suitable compliance requirements allows state authorities to develop a sense of ownership of this process, and this in turn increases the likelihood of effective compliance. Furthermore, cases are only officially closed once a state has fulfilled the agreed-upon set of juri-political criteria. This makes it impossible for a state to simply ‘sit out’ unpopular court judgments – through recurring discussions of open cases at the level of the Committee of Ministers, compliance pressure is kept up for an in principle unlimited period of time. This ongoing process encourages eventual compliance with court judgments. It allows domestic authorities to come to terms with judgments that are particularly difficult to implement, either because the consequences of implementation are hard to justify to the electorate or to the domestic bureaucratic apparatus, or because the decision-makers find the judgment objectionable based on their own beliefs and ideologies.

It is important to note that the ECtHR’s reputation remains largely undamaged by instances of delayed or slow compliance. This is due to the fact that the Court does not have any formal responsibility to monitor compliance with its own judgments. For the juri-political model of task-sharing to work, the judicial body has to be held in very high esteem by the intergovernmental body so that the decisions handed down by one institution are not compromised by the other. In addition, judgments issued by Court have to be clear enough to allow for a reasonable assessment of compliance requirements.

Public Exposure and Civil Society Engagement in the Compliance Process

The involvement of civil society actors in the compliance process carried out at the Committee of Ministers is a relatively new phenomenon in the Council of Europe. Traditionally, non-governmental organisations have either acted as strategic litigants before the European Court of Human Rights, or have submitted amicus briefs in support of applicants in high-profile cases.¹⁵ It was only in 2004 that the Committee of Ministers

¹⁴ The Committee of Ministers issues resolutions on compliance requirements regarding repetitive problems and publishes ‘best practice’ documents outlining compliance requirements in similar cases. See for example Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights (*Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers’ Deputies*); Recommendation CM/Rec(2004)6 of the Committee of Ministers to member States on the improvement of domestic remedies (*adopted by the Committee of Ministers on 12 May 2004 at its 114th Session*); CM/Inf/DH(2007)33 Information Document ‘Round Table on “Non-enforcement of domestic courts decisions in member states: general measures to comply with European Court Judgements” (*Document prepared by the Department for the Execution of the Judgements of the European Court of Human Rights*); Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgements of the European Court of Human Rights (*Adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers’ Deputies*).

¹⁵ See for example strategic litigation carried out by the *Open Society Justice Initiative* with respect to Roma rights cases from Central and Southern Europe, by *Liberty* with respect to counter-terrorism and sexual

adopted new rules recognising that non-governmental organisations can provide input into the compliance process by informing the Committee of Ministers of individual and general measures taken by the state.¹⁶ This type of active involvement has so far taken place on an ad hoc basis; there is no database to track how many non-governmental organisations have provided information on domestic compliance processes to the Committee of Ministers. At the domestic level, the picture is also varied. Whether or not non-governmental organisations are involved in the compliance process depends on a) whether the state itself allows these organisations to access information regarding relevant draft laws and policies, b) whether there is a governmental national focus point that invites the involvement non-governmental organisations, and c) the capacity of domestic NGOs to divert resources to monitor compliance with human rights judgments.

A thorough understanding of the institutional design features of the European Human Rights system is essential for understanding the compliance process. First, in terms of compliance outcomes, there is no deadline for complying with judgments except for a three-month rule for the payment of compensation to individual applicants. Second, states have a considerable degree of leeway in proposing to the Committee of Ministers action plans that set out prospective implementation measures. The Committee of Ministers recognises that some judgments are complied with slowly and that some states are negligent in taking steps towards compliance or in communicating steps taken to the Committee of Ministers.¹⁷ There is no highly developed toolbox of sanctions to react to such instances. Even though it is possible to expel a state from the Council of Europe by majority vote, this has never occurred in the history of the organisation and would run counter to the cooperative and deliberative spirit of this intergovernmental body. The only tool available to the Committee of Ministers is therefore the public exposure of states guilty of slow or negligent implementation processes at the Committee's regular quarterly meetings. The Committee of Ministers undertakes this public exposure by issuing 'interim resolutions' that point to its dissatisfaction with specific aspects of a given compliance process.¹⁸ Protocol 14 to the European Convention on Human Rights constitutes a recent innovation that complements the traditional tools of diplomatic pressure and public shaming is now supplemented by new institutional procedures. It allows the Committee of Ministers to take 'infringement

orientation cases from the United Kingdom, *Interights* with respect to cases from the Caucasus and the Balkans, the Aire Centre with respect to children's rights cases from the United Kingdom, the Kurdish *Human Rights Project* with respect to cases from South-East Turkey, the European Human Rights Centre with respect to cases from Chechnya and the Russian Federation.

¹⁶ Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (*Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies*).

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¹⁷ Report of Committee of Ministers on Slow and Negligent Judgments. *Activity Report: Sustained action to ensure the effectiveness of the implementation of the ECHR at national and European levels* (as adopted by the CDDH at its 66th meeting, 25-28 March 2008).

http://www.coe.int/t/e/human_rights/cddh/3_committees/01.%20steering%20committee%20for%20human%20rights%20%28cddh%29/05.%20meeting%20reports/66thAddI_en.asp Accessed on 9 April 2010.

¹⁸ For a recent example, see Interim Resolution CM/ResDH(2010)35 on the *Execution of the judgments of the European Court of Human Rights in 31 cases against the Russian Federation mainly concerning conditions of detention in remand prisons* (as adopted by the Committee of Ministers on 09 March 2010 at the 1078th meeting of the Ministers' Deputies).

[https://wcd.coe.int/ViewDoc.jsp?](https://wcd.coe.int/ViewDoc.jsp?id=1594661&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)

[id=1594661&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?id=1594661&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383) Accessed on 13 April 2010.

proceedings' against a state that fails to co-operate with it.¹⁹ These proceedings enable the European Court of Human Rights to play a more direct role in the compliance process by empowering it to determine to what extent a state has complied with a court judgment. Given that the procedure is so new it is difficult to assess its effectiveness in inducing compliance.

Domestic Costs of Implementing Human Rights Judgments: A tri-dimensional model

There are three well-established facts regarding compliance with European Court of Human Rights judgments: a) States take the lead in deciding on the content of general measures, b) compliance can take a long time in cases that require individual or general measures, and c) there is eventual compliance with most of the judgments most of the time. We also know that it is not possible to make general statements regarding which is the most compliant state or which types of cases are most speedily complied with. Not only is there variation in compliance across the different Council of Europe member states, but individual states also differ in their reaction to ECtHR judgments on a case-by-case basis. Making sense of this rather incoherent picture first requires a careful mapping of the range of factors influencing compliance. Based on this mapping it would be possible to analyze which combination of factors makes it more or less likely for compliance to take place, and what types of domestic settings are more responsive to what types of compliance factors. This analysis would then indicate the most promising avenues for inducing compliance, and would accordingly allow us to develop strategies for non-governmental organisations to offset compliance costs in different domestic settings.

Thinking of Compliance in Terms of Perceived Costs

In this paper, we argue that the timing and the extent of compliance with human rights judgments in Europe is determined by the weighing of pro- and anti-compliance incentives by domestic decision-makers. For non-governmental organizations aiming to influence decision-makers' compliance calculations, in-depth knowledge of both types of incentives is important. In pursuing different compliance-inducing strategies (a non-exhaustive list of which is included in part three of this paper), they can either try and offset the costs of anti-compliance incentives, or capitalize on the pro-compliance incentive by publicly emphasizing their relevance.

Pro-compliance incentives may include cases in which political elites welcome the opportunity to be able to point to an ECtHR judgment for justifying a long-overdue but unpopular reform to the electorate; they can encompass general ideals like democracy-stabilization or context-specific ambitions of joining the European Union. While certainly existent, pro-compliance incentives cannot help us understand delays in the implementation of judgments, or the large degree of contestation that many ECtHR judgments face. In order to better understand these, we must turn towards anti-compliance incentives, or what we call compliance costs.

Focussing on *perceived* costs of compliance as opposed to costs of compliance per se allows us to recognise that political and legal contexts within which compliance decisions are taken matter when it comes to human rights judgments: Human rights judgments are the result of interpretive processes about highly-contested questions regarding entitlement of individuals from the political community. These judgments frequently bring the claims of

¹⁹ See Art. 16 of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention
<http://conventions.coe.int/Treaty/EN/Treaties/html/194.htm> Accessed on 9 April 2010.

disenfranchised and marginalised individuals into conflict with public morals, national security, national ideologies, traditions, long-established and unchallenged majority views or bureaucratic practices. It is for this reason that the way compliance costs are perceived by decision-makers plays an important role in human rights compliance decisions rather than more quantifiable or measurable costs, such as material costs.

We submit that there are three types of cost that are taken into account in compliance equations by decision-makers: political, institutional, and normative costs. This three-pronged typology rests on two different factors in decisions on compliance: a) the responsiveness of decision-makers to their political, legal and institutional environment b) the subjective beliefs of decision-makers themselves about appropriate conduct. Political and institutional costs stem from the interaction of decision-makers with other actors. Normative costs concern the types of beliefs that decision-makers hold, such as beliefs in human rights, democracy, the welfare state, national security, or national ideology.

Political costs grow out of the prospective complier's responsiveness to reactions from domestic constituents. In domestic settings with regular democratic elections - the dominant picture in Europe - elected politicians are inevitably concerned about how the positions they take on single-issue human rights cases will affect the support they receive from dominant domestic groups and voters. For example, human rights cases that concern the protection of the rights of individuals perceived as unpopular in society at large may make decision-makers more 'reluctant compliers' or more prone to contest the types of measures to fully comply with a judgment. Judgments that conflict with dominant majority ideologies would therefore incur high political costs. Conversely, decisions that have popular support are likely to make decision-makers 'willing compliers'. In democratic countries where the political culture is more responsive to pressure from civil society, and allows for the active participation of civil society in decision-making mechanisms, we would expect that pressure exerted by civil society (be it pro- or anti-compliance) would alter the political costs for decision-makers. In countries where such pressure is missing, weak or heavily hampered, more traditional forms of influence, such as pressure from religious or nationalist communities, may play a similar role.

Institutional costs arise from the concern of decision-making elites to effectively govern a complex administrative system. They require political elites in decision-making positions to make strategic choices depending on the reactions of bureaucratic, judicial and local authority elites. Institutional costs occur when there are competing interests within different parts of the state apparatus, for example when the judiciary is more or less willing to comply with human rights judgments than other parts of the system. When encountering resistance from the state apparatus, decision-makers face a number of choices: A majority government may force institutions to change their policies by changing legislation or by issuing directives. Alternatively, it can opt for a compromise by finding ways to minimally comply with a judgment. In states with long-standing constitutional law traditions in which long-standing legal or bureaucratic traditions are perceived to be particularly difficult to alter by politicians, an interpretation of a right by the ECtHR that runs counter to the traditional domestic interpretation can raise the institutional costs of compliance to a considerable extent.

Normative costs arise from ideational commitments of decision-makers and from what they consider to be appropriate behaviour. They are therefore based on the norms, ideas and beliefs that decision-makers refer to in their work. Apart from normative costs (normative anti-compliance incentives), there may also be normative pro-compliance incentives. In the European context, the former include commitment to domestic rule, domestic traditions, rule

of law, the democratic ownership of decisions and substantive national ideologies that are part of the national elite consciousness. The latter include the views decision-makers hold about respecting human rights judgments, the rule of law, the legitimacy of human rights courts and belonging to a common European human rights space. Ideas, therefore, can play both a positive and a negative role in compliance decisions.

This tri-dimensional account of perceived costs of compliance views decision-makers as agents embedded in domestic contexts who are both carriers of ideas and responsive to the constraints imposed by the environment – in the European context that of established, new, or fragile democracies.²⁰ While this view assumes that standards of appropriate behaviour are gained through acting in social environments, it does not hold that the behaviour of actors can be reduced to an examination of the environment itself. Recognizing this gap between decision-makers' perceptions of the environment and the systematic features of the environment itself makes it possible to develop more complex assumptions about political behaviour.²¹

The multi-layered compliance model presented in this paper argues that decision-making elites are not only moved by the incentive of staying in power – which makes them responsive to domestic constituents –, but also by considerations of effective governance and by identities, beliefs and values. It therefore advances a more fine-grained argument on domestic sources of compliance than has so far been established in the literature.²² It further points to the limitations of accounts that draw on principal-agent theory to explain elites' responsiveness to sizeable or powerful domestic interest groups under the pressure of regular competitive elections.²³ The emphasis on the responsiveness of compliers to the demands of societal actors assumes that the compliers' (agents') compliance calculations are a function of domestic groups' (principals') comparative leverage over them.²⁴ However, this is only one type of strategic calculation among others, and approaches that focus solely on this are prone to ignoring additional or alternative relevant factors. It is for instance reasonable to assume that decision-makers not only have an interest in remaining in power, but also strive for effective government. If this is the case, then institutional conflicts, be it between the judiciary and the executive or between different levels or departments of government, are key to understanding compliance puzzles. Furthermore, the ideational dispositions of elites are able to trigger behaviour that compels compliers to act in certain ways without pursuing specific strategic objectives. Compliers can be motivated by pro-compliance norms, as in the case of widespread respect for human rights and international institutions, or by anti-compliance norms, such as a clear preference for solutions that are arrived at through domestic democratic processes.

The Domestic Setting: Does it make a difference in how costs are distributed?

²⁰ This view of political elites in democracies draws upon literature that studies role conceptions of elites and holds that there is a relationship between a specific social position and expected behaviour. See, for example, Jan Beyers, 'Multiple Embeddedness and Socialization in Europe: The Case of Council Officials', *International Organisation* 59 (2005), 899-936.

²¹ Sheri Berman, *The Social Democratic Moment: Ideas and Politics in the Making in Interwar Europe* (Cambridge, MA: Harvard University Press 1998).

²² Xinyuan Dai, *International Institutions and National Processes* (Cambridge University Press 2007) and Simmons, Beth. *Explaining variation on State commitment to and Compliance with International Human Rights Treaties*, paper presented at International Legal Theory Colloquium Interpretation and Judgment in International Law, New York 2007.

²³ Xinyuan Dai, *International Institutions and National Processes* (Cambridge University Press 2007)

²⁴ Xinyuan Dai, *International Institutions and National Processes*, p. 70.

In individual compliance decisions, political, institutional and normative incentives can induce both compliance and non-compliance, and can pull decision-makers in opposite and sometimes incompatible directions. The context within which compliance decisions are taken is therefore essential for analysing and predicting whether and how compliance with human rights judgments takes place.

One lesson we can learn from Europe when analyzing the distribution of compliance costs is whether the stability and historical rootedness of a democratic system affect the likelihood of compliance with human rights judgments. Starting in the early 1990s, the Council of Europe expanded from its original Western European base eastwards. It now counts among its members the parliamentary democracies of the United Kingdom and Scandinavia, the constitutional democracies of continental Europe, and transitional states in Eastern and Central Europe and the Caucasus. It therefore encompasses a wide variation of regime types. This variation in political systems, as well as the fact that a core group of Western European states originally founded the European civil and political rights system, create a number of important dynamics affecting compliance equations.

The older democracies of Europe view the Council of Europe as a way to expand human rights, democracy and the rule of law towards the newer democracies. The judgments of the European Court of Human Rights are regarded as a non-partisan and objective way of assessing the human rights records of these countries. In aiming to encourage the newcomers to develop structures that respect human rights, these older democracies feel compelled to set an example and comply with judgments against themselves.²⁵ The desire to hold others accountable for their human rights records therefore constitutes an incentive to comply for older democracies. Transitional states at the Eastern periphery of Europe, on the other hand, tend to be more motivated by a desire to develop a 'European' identity that replaces previous communist or authoritarian traditions. More generally they strive to belong to a zone of democracy and rule of law. These different types of compliance incentives suggests that the way in which an international human rights system is set up and the motivations for states supporting the system operate as normative reasons for elites to comply with human rights judgments.

In both established and newer democracies there are different types of anti-compliance dynamics at work. Older democracies with well-established rule of law systems have a lot of trust in these systems and therefore tend to view the European Court of Human Rights as being less competent to adjudicate on highly divisive rights claims than domestic judiciaries or parliaments.²⁶ Along similar lines, democratic decision-makers may contest the decisions of the ECtHR on normative grounds by arguing that the Court lacks the legitimacy to initiate far-reaching changes in democratic domestic settings. In the case of transitional states, anti-compliance dynamics tend to be rooted in arguments concerning the need to protect either the national identity or semi-authoritarian practices or ideologies that are entrenched in the political, judicial or bureaucratic culture of a given country.

In both democratic and transitional contexts we expect a competition between political, institutional and normative costs. What is likely to differ, however, is the domestic leverage of non-governmental organizations and the international leverage of the Committee of

²⁵ 'If we stopped complying with the Convention what would happen in Russia and other countries where democracy and the rule of law are less deeply rooted.' Interview, 15.07.2008.

²⁶ 'I don't see why we need a foreign court to make these decisions...my argument is that it is for me, the nation state, to decide what is mine and what I leave to someone else.' Interview, 20.05.2008.

Ministers or other states within the European Human Rights system in altering decision-makers' perceptions of these costs as well as their subsequent compliance-related actions..

Strengths and Weaknesses of Compliance-Inducing Strategies

In light of the discussion above, a number of strategies can be identified to offset the costs of compliance with human rights judgments perceived by decision-makers. Within the overall pool of strategies, top-down strategies can be distinguished from bottom-up strategies, with the former encompassing strategies that aim to influence policy makers and the latter encompassing strategies that aim to influence public opinion. They can also be categorised as information-focussed versus lobbying-focussed versus coalition-building-focussed strategies, or, cutting them up in yet a different manner, as institutional strategies versus discursive strategies. In the light of the three-dimensional model of compliance costs developed above, it is important to note that non-governmental organisations first need to map the distribution of costs involved in each compliance decision. Only then will they be able to make an informed choice among the range of possible strategies. In some cases, it may be strategically wise to focus on the most resistant institution, for example the Parliament or the Ministry of Justice or Education. In other cases, increasing the provision of information to all decision-makers may be more suitable. In cases with high normative costs, discursive strategies like shaming decision-makers or providing alternative normative frames may be most appropriate.

Below we offer a non-exhaustive list of compliance-inducing strategies:

a) *Strengthening pro-compliance constituents*

This is a capacity-building strategy which aims to raise the civil society awareness of human rights judgments and the processes through which compliance takes place. It is a long-term strategy the success of which depends on the accessibility and responsiveness of relevant decision-makers' responsiveness to interest groups.

b) *Lobbying for institutional monitoring at the state level*

The Committee of Ministers has recommended this strategy to its member states. It is based on the idea that compliance problems may be due to a lack of institutional capacity rather than with normative or political costs. An increase in institutional capacity at the domestic level may therefore offset institutional conflicts or institutional costs that have so far hindered compliance. Institutional monitoring at the state level can be carried out by a focal point, a national human rights institution or a parliamentary assembly. While such bodies do not have independent decision-making power, they may be well-placed to exert pressure on the actual decision-makers.

c) *Increasing the information base*

This strategy is based on the assumption that incomplete information may lead to a false perception of high political, institutional or even normative costs. By providing information about the ramifications of a case to decision-makers and the general public, large non-governmental organisations may be able to alter decision-makers' perception of costs. Increasing the information base can be done by lobbying decision-makers in charge of access to relevant information, or by providing information to the media.

d) Targeting the most compliance-friendly constituents, setting up compliance coalitions

This strategy may be preferred when there is a high level of normative resistance to a judgment from one part of the state, be it the executive, the legislature or the judiciary. By identifying the parts of the state that are more sympathetic to the judgment, non-governmental organisations can aim to influence compliance outcomes in the long term. For example, in cases where the government is in a close coalition with a major interest group (cf. Taskin v. Turkey), targeting the judiciary is one way of bringing about compliance.

e) Campaigning for access of civil society groups to the drafting process of legislation and administrative changes

This strategy is based on the assumption that the legislator and the policy makers are responsive to consultation by civil society groups and that the inclusion of compliance constituents would increase the likelihood of compliance. One disadvantage of this process is that civil society groups of all affiliations, including those that are anti-compliance, are likely to participate in this process. In cases where the decision-makers perceive the political or the normative costs to be high, they can use the anti-compliance groups strategically in consultation processes.

f) Organising citizen protest

This is a bottom-up strategy that may be useful in cases when decision-makers are reluctant to comply with human rights judgments. Its success depends on the responsiveness of decision-makers to such protest, and on the symbolic value of citizen protest to alter the normative calculations of actors.

g) Providing early access to civil society in formulating compliance requirements and following up compliance at the international level

This strategy is informed by the 'boomerang effect' of non-governmental action through international institutions. In the European context, this requires non-governmental organisations to communicate with the Committee of Ministers and its secretariat as soon as the decision is made final, and to inform them of their own views of what compliance really requires. Through this process, the Committee of Ministers is provided with an alternative to the compliance requirements outlined in the mandatory action plan of the government authorities. This alternative account may influence the negotiations on the action plan as well as the subsequent assessment of whether the targets in the action plan are adequately met. Non-governmental organisations can also inform the Secretariat or the individual member states sitting on the Committee of Ministers of the state of implementation regarding specific Court judgments. This can help to prevent the premature closing of a case by the Committee of Ministers.

Conclusion

This paper argues that the enforcement of civil and political rights judgments in Europe is a function of both the design of the European Human Rights system, and of the domestic compliance dynamics found in Europe. As to regime design, the European juri-political model which grants states a margin of discretion with regard to specific compliance requirements is unique. It not only shapes the process of compliance, but also affects how compliance costs are identified and what opportunities exist for non-governmental organisations to intervene in the compliance process. When thinking about enforcement of economic and social rights, the juri-political model also has some important advantages: It allows states to realistically assess what measures need to be taken. By affording states more ownership of the compliance decision it furthermore increases the legitimacy of the process. However, it is important to bear in mind that the ECtHR's well-developed and well-reasoned jurisprudence acts as a safeguard against arbitrary and counterproductive domestic involvement in the compliance process. The jurisprudence of the Court that has been established over a period of fifty years therefore limits the range of options a state may choose from when implementing a human rights judgment.

With regard to domestic compliance dynamics, the paper argues that they are best understood when thinking about them in terms of perceived political, institutional and normative compliance costs. It is important to carefully analyze the distribution of these costs in different country contexts and with respect to different types of judgments. Considering compliance from the perspective of the decision-maker rather than in terms of objective conditions enables us to better understand and assess the within-country variation that is present in all countries responding to European Court of Human Rights judgments. This variation manifests in certain judgments that are speedily complied with despite requiring significant legislative changes, while others feature significant delays in compliance despite requiring far less demanding implementation process.

Both regime design and the perceived costs of compliance need to be taken into account when assessing the relative merits of different compliance-inducing strategies for non-governmental organisations. Regime design plays a role in how one can determine the compliance requirements and the prospects of indirectly influencing decisions-makers through engaging institutions and processes outside of the state. Since the introduction of new rules in 2004, the European Human Rights system has featured significant opportunities for non-governmental organisations to become involved in both the determination of compliance requirements and in the decision at what point these requirements have been met. In contrast to a set-up where a judicial body has the exclusive responsibility of determining compliance requirements, this clearly constitutes an important opportunity for non-governmental organizations to be part of the debate on the effective protection of human rights, be they civil and political or social and economic rights. By publicizing the measures taken by governments in response to human rights judgments, non-governmental organisations can furthermore expose states that try to limit the implementation process to a superficial engagement with the issues at hand.

In terms of influencing the domestic compliance processes, the key lesson of this paper is that there is no 'one-size-fits-all' approach. This is due to the different costs of compliance involved in different contexts and individual cases. While cases clearly differ with regard to how demanding their compliance requirements are and accordingly require more or less demanding civil society advocacy, even the obstacles to compliance may change as the contexts changes. Human rights cases that concern marginalised communities and disadvantaged groups, for instance, often require policies targeted at the improvement of the rights of these groups. These tend to be difficult judgments to implement. In these cases,

rather than expecting the judicial decision to directly bring about compliance, it is advisable to factor in compliance strategies even before the judicial litigation process starts. The lesson from Europe is that the judgment itself rarely, if ever, does the work in securing compliance all by itself.

A common question asked about research that focuses on the European Human rights system is to what extent lessons from this particular context that enjoys sustained and widespread support from members of the elite and the general public can be applied to other regional systems that do not have the pedigree of the European system and do not enjoy the same degree of support. We have tried to show that the support the European Human Rights system enjoys is an important factor in understanding compliance with its judgments, but that this does not suffice for explaining the widespread delays in compliance or the substantial degree of contestation that compliance requirements face. That said, increasing the popularity and the support base for a judicial process at the international level should be added to the list of compliance-inducing that non-governmental organisations interested in furthering the protection of human rights would want to pursue.