Clarity and Compliance in the Inter-American Human Rights System*

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Clarity and Compliance

Abstract

This paper leverages a highly detailed, public monitoring system for decisions of the Inter-American Court of Human Rights (IACHR) to test a model of judicial policy implementation. We model the clarity with which the Inter-American Court of Human Rights (IACHR) expresses its remedies to human rights violations in the context of its contentious jurisdiction. We also model the reactions of states to these remedies. Our findings suggest that clarity lowers resistance to IACHR orders, yet uncertainty about the relationship between policy means and policy ends renders IACHR orders less clear. These findings are consistent with general claims in judicial politics about the interdependence of the judicial policy-making process. They also suggest that international judicial reform efforts designed to advance judicial independence without considering the challenges of policy implementation are not only unlikely to succeed but misguided normatively.

I have strongly recommended the Court to apply Article 65 again, so as to bring states that do not comply back to their duties of compliance with the judgments of the Court, but the Court's majority has preferred to take a pragmatic approach. I am against pragmatism in this domain of protection. I think that protection is a matter of principle and there is no room under the American Convention for pragmatism.

—Judge Antônio A. Cançado Trindade, former President of the Inter-American Court of Human Rights, on the court's approach to state compliance.[1]

Introduction

There is a general consensus among institutional theorists that unconstrained government encourages a number of unappealing outcomes in international and domestic politics, including corruption (Alt and Lassen, 2003), low economic growth (Barro, 1997), violent conflict (Bueno de Mesquita et al., 2003), regime instability (North, Summerhill and Weingast, 2001), and the weak, inconsistent protection of human rights (La Porta et al., 2004). Beginning in the middle of the last century, we have also witnessed a growing international consensus about the central role of judicial bodies in providing constraint. Specifically, courts endowed with the formal authority to evaluate governmental behavior in light of domestic and international legal commitments, and which exercise that authority independently,[2] are increasingly perceived to be essential components of a system of constrained governance. Naturally, states, IOs and NGOs devote considerable resources each year to the promotion of independent domestic and international courts (Carothers, 2006; MacKenzie and Sands, 2003), focusing largely on institutional reforms believed to promote independent judging (Garzon, 2002). The effort seems sensible; however, the focus on institutional incentives for independent judging obscures a puzzling feature of process by which judicial decisions are implemented – a feature that we believe has important implications for the ability of courts to ensure constrained governance, and consequently for judicial reform itself. This paper centers on the implementation process.

[1]Tanner (2009, pp. 994-995).

[2]We have in mind a concept of judicial independence in which judges are "the authors of their opinions." In other words, a judge can be said to be independent when her decisions reflect only her sincere evaluation of the record. This definition is consistent with Kornhauser (2002).

It is also generally recognized that courts, domestic and international,[3] rely on other political actors to implement their decisions; and critically, compliance is not always forthcoming. Governments delay the proper implementation of judicial decisions, implement resolutions in ways that undermine their spirit or simply refuse to do anything at all (e.g. Gauri and Brinks, 2008; Vanberg, 2005). Still, judges can exercise control over the implementation process via the ways that they craft and publish their decisions. Indeed, an established literature in judicial politics suggests that the *clarity* of judicial decisions has an important influence on compliance (e.g. Baum, 1976; Spriggs, 1997). Officials are more likely to implement decisions faithfully when judges clearly articulate what is expected. Yet, despite this measure of control, judges are not always clear about what they expect governments to do in order to come into compliance with their legal obligations. If we assume that, all else equal, judges prefer their authority to be respected, why are they frequently vague?[4]

Recent theoretical work suggests that vagueness is a natural manifestation of judges' efforts to address core tensions of judicial policy-making (Staton and Vanberg, 2008). First, as is true for all policy-makers, when judges make policy, they must select means to meet desired ends, and it is not always clear how to do so. A judge may be highly confident that a government has violated its varied commitments to equal treatment under the law, but nevertheless be conflicted about how precisely to ensure that this failure is remedied. Since ill-designed remedies might be counter-productive to underlying goals, resolving this "means-ends" problem is a central challenge of policy-making, judicial or otherwise. Judicial vagueness, on this account, delegates authority for remedying violations to governments, or their agents, who may be better positioned to match particular policy solutions to judicial goals. Second, publicly observed non-compliance may undermine judicial legitimacy (Carrubba, 2009), and vagueness also makes non-compliance less visible. When what is required is unclear, it is more difficult to argue that a government has failed to respond appropriately. In this way, vagueness can serve as a protection against the loss of legitimacy. Of course, precisely because it provides discretion and lowers transparency, vagueness invites non-compliance in a variety

[3]The domestic courts we consider include constitutional courts or supreme courts with constitutional jurisdiction Ginsburg (2003). Internationally, we consider what Romano calls international judicial bodies Romano (1999, pp. 713-14).

[4]*Note: In next draft, incorporate rules/standards debate in the introduction.*

of forms. This is an especially pressing concern when courts review the behavior of governments because the authority to whom policy-making power will be delegated is also the party responsible for the legal violation in the first place. Thus, judges confront a difficult tradeoff when considering how precisely to craft their remedies in cases involving the review of government behavior. Clarity creates pressure for proper implementation, but it also risks (1) a poor link between policy means and policy ends and (2) open defiance that may undermine judicial legitimacy.

In this paper, we empirically test observable implications of this argument on a set of data well-designed to the task. We model the clarity of the remedies issued by Inter-American Court of Human Rights (IACHR) in the context of its contentious jurisdiction. We also model the reactions of states to these remedies. We conduct the study on the IACHR for both theoretical and practical reasons. Recently, scholars have turned greater attention to state compliance with international courts, and to the IACHR specifically (e.g. Hawkins and Jacoby, 2010; Cavallaro and Brewer, 2008; Basch et al., 2010; Hillebrecht, 2010).[5] This work has begun to develop arguments about how the domestic context influences state reactions to international courts. We will evaluate the implications of those arguments against the data we have collected; however, although we believe that features of states that are, strictly speaking, outside the immediate control of international judges (e.g. the quality of the domestic judiciary), can be highly important to compliance outcomes, we wish to stress that the judges of the IACHR influence the process directly.

That the IACHR is currently doing this pragmatically is a central concern for former court president, Judge Cançado Trinadade, as the quote above suggests. And we think it should be a concern for anyone who cares about the extent to which the international commitments constrain states in practice. The primary implication of our study for the promotion of constrained government underscores a central insight from positive political analysis of law and courts (e.g. Epstein and Knight, 1998; Rogers, 2001; Carrubba, Gabel and Hankla, 2008) – in so far as judicial policy-making is a fundamentally interdependent process, judicial decision-making is, indeed it must be, sensitive to external political environments. But just as judicial decision-making depends on expectations about the process by which decisions are implemented, the implementation process itself depends on the nature of judicial decisions. This interdependence raises immediate questions about the

[5]For a review of work on compliance, see Taylor and Kapiszewski (2010).

capacity of international courts to induce compliance and by so doing promote constraint. Even if clarity is associated with more faithful implementation, are courts always incentivized to be more clear? If they always can be more clear, should they? More broadly, if judicial policy-making is fundamentally interdependent, we should ask whether our efforts to promote independence is ultimately doomed. Might we do better promoting pragmatic judges, and if so, how do we do that without giving up the goal of constraining states via higher law constraints?

We divide the remainder of this paper as follows. In the next section, we summarize the theoretical argument we test, clarifying the logic that supports its key empirical implications. We then briefly discuss the IACHR's jurisdiction and compliance monitoring program. Third, we describe our data and present a set of preliminary tests. We conclude by discussing the implications of this study for both judicial reform and research on domestic and international courts.

The Value of Vagueness

We test empirical implications developed in Staton and Vanberg's model of judicial policy vagueness (Staton and Vanberg, 2008). Rather than develop the model anew here, instead we summarize its key features and logic. The model describes a process in which a court and a government interact over the nature of a policy associated with the government. Policy outcomes are represented by points on the real number line. Preferences over these outcomes are reflected in party by quadratic loss functions. The court and the government differ over the policy outcome they most prefer, though the magnitude of this difference is parameterized.[6] The sequence of actions is simple. The court issues a decision, which communicates the kind of policy it expects to be implemented. By assumption, the court requests that the government adopt a policy at the location of the court's ideal outcome; however, it can vary the clarity with which it makes this request. In light of the request, the government chooses a policy, the policy is mechanistically translated into a policy outcome, at which point utilities are realized.

Reflecting a growing trend in models of judicial politics (Stephenson, 2004; Carrubba, 2005; Clark, 2010), the authors assume a public enforcement mechanism for judicial decisions, so that

[6]The ideal policy outcome of the court is fixed at 0, whereas the ideal outcome of the government is $L > 0$.

governments pay costs for not implementing the policy the court orders.[7] However, the marginal cost of defiance is influenced by the clarity of the court's order, in a way that reflects the underlying public enforcement mechanism. By increasing clarity, the court requires the government to pay more and more of its underlying cost of non-compliance, because it is easier for publics to observe non-compliance when the remedy is clear. Complete clarity maximizes public costs of non-compliance.

In light of this set-up, it would seem that the court might always prefer to maximize clarity. However, the court itself pays a cost for being openly defied, so that even though clarity provides pressure for compliance, it also makes non-compliance increasingly observable, which provides a potential incentive to be vague. Also, reflecting a standard approach to modeling delegation problems in legislative politics (e.g. Huber and Shipan, 2002), though the actors' preferences are defined over outcomes they can only choose policies. In other words, courts can ask for particular means, but means may not produce desired ends, and ends are what courts care about. Technically, a policy outcome is a function of the policy chosen and random error.[8] The model assumes that the government observes both components, but the court only knows the distribution from which the error is drawn. By being vague about the remedy, the court allows the government to make use of its superior information about the link between policies and outcomes. Of course, the consequence of using vagueness in this way is to allow the government to more easily defy the decision.[9]

The government's equilibrium behavior is relatively straightforward. In so far as it moves last and knows the connection between policy choices and policy outcomes, its policy choice is driven by three factors.[10] Clear decisions and high defiance costs place increasing pressure on the government

[7]These costs may manifest in a variety of ways, from electoral losses to public protests to elite critique. The size of these costs may become manifest in a variety of ways, but it is typical to assume that they vary with the legitimacy courts enjoy.

[8]To be clear about this conceptual distinction, policy outcomes are represented by X, itself a function of the policy that the government chooses (p) and random error (ϵ): $X = p+\epsilon$. The random component, ϵ, is drawn from a uniform distribution on the interval $[-\alpha, \alpha]$, so that α reflects the court's beliefs about how large the random component is likely to be in the policy-making process.

[9]The government's utility function is: $U_L(p) = -(L - (p - \epsilon))^2 - abp^2$, where $a \in (0, 1)$ reflects opinion clarity and $b > 0$ reflects the cost of defiance. In turn, the court's utility function is: $U_C(a) = -(p - \epsilon))^2 - acp^2$, where $c \geq 0$ is the weight that the court places on lost utility due to observed defiance relative to utility lost from the policy outcome.

[10]Specifically, the government chooses $\frac{L+\epsilon}{1+ab}$.

to comply, whereas increasing the difference between court and government preferences over policy outcomes decreases this pressure. Thus, *governments should be more likely to comply with judicial decisions as (1) the clarity of the order increases and (2) as the public costs of defiance increase, yet they should be less likely to comply as (3) their policy differences with the court grow more pronounced.*[11]

The court crafts its opinion clarity to balance its varied interests in light of expected government reactions. Although the court has strong incentives to be clear, increases in its uncertainty about the appropriate match between policy solution and outcome renders decisions more vague. When the court anticipates a greater role for the random component in the policy process, it is less clear about remedy, delegating control over the outcome to the government. Yet, precisely because vagueness undermines the public enforcement mechanism, the policy-relevant consequences of vagueness matter, as well. As the court and the government's policy preferences diverge, the court is predicted to be less vague. Thus, the two observable implications we test are that *courts should be increasingly vague as (1) uncertainty about how to implement a policy well increases, and (2) the policy divergence between courts and governments increases.*[12]

Empirics

The IACHR's jurisdiction and its detailed process for monitoring state responses to its decisions have been documented carefully elsewhere (Basch et al., 2010; Hillebrecht, 2010; Cavallaro and Brewer, 2008). Our aim here is to summarize the elements of the system that make it such a useful case for evaluating the theoretical model. Following that summary, we describe our data and

[11]For a completely vague decision, there is no effect of defiance costs, and the government will simply select its ideal policy. Similarly, if defiance costs are literally 0, then vagueness is irrelevant. Accept in these two very extreme cases, the effects of defiance costs and clarity on compliance are positive.

[12]Interestingly, public support has two competing effects on opinion vagueness. Reducing the costs of defiance to its lowest level is predicted to make decisions maximally vague since without a constraint on its behavior, the government will implement its more preferred policy, no matter what the court orders. In such a case, the only thing a court can do is hide non-compliance. However, increases in defiance costs do not necessarily increase clarity. Although increases in the costs of defiance make it less likely that the court will make a maximally vague decision, it also makes it less likely that the court will be maximally clear. Substantively, increasing defiance costs provides courts leverage to better calibrate opinion clarity to the political context.

present the results of our study to date.[13]

The Inter-American Court

The IACHR enjoys both adjudicatory and advisory jurisdiction pursuant to Articles 61-64 of the American Convention on Human Rights.[14] The court's contentious jurisdiction may be triggered by a member state of the OAS or the Inter-American Commission; however, no member state has submitted a case to the Court (Tan 2008, 248). Consequently, the Commission is the principal institution through which cases arrive.

The Commission receives complaints from individuals and non-governmental organizations alleging state violations of human rights obligations under the American Convention or the American Declaration of the Rights and Duties of Man, the latter of which though not legally binding has been interpreted by the IACHR as applicable to member states as the "authoritative interpretation of the human rights commitments contained in the OAS Charter" (Cavallaro and Brewer, 2008, pp. 778-779). Following its own investigation, and in the event that the Commission is satisfied that a member state has violated its obligations and failed to take appropriate measures to remedy the situation, the Commission will either draft a final report to be published in the OAS's Annual Report, or assuming that the state has accepted the IACHR's contentious jurisdiction, submit the case to the IACHR (Reisman, 1995; Pasqualucci, 2003). Having ratified the American Convention and made a separate declaration of consent to the Secretary General of the OAS, decisions of the IACHR are binding on member states (Guzman and Landsidle, 2008).

Litigation at the IACHR unfolds in three stages: 1) a preliminary objection stage,[15] 2) a merits stage and 3) a reparations stage (Cavallaro and Brewer, 2008, p.781). It is the reparations stage that interests us here. The nature of the court's reparations (which we will also refer to

[13]As of this writing, we have collected data on 28 contentious cases resolved between 2006 and 2009. Coding continues to move backward in time and we intend to have the complete set of IACHR cases analyzed by the summer of 2011. Moreover, we are still investing a number of alternative approaches to measurement and estimation, and so we are anxious for comments and suggestions.

[14]The Court's jurisdiction is developed further by the Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the OAS in October 1979.

[15]The most common preliminary objection is the failure to exhaust domestic remedies. While this process is not supposed to delay the progression of the case, it has that effect in practice (Rescia and Seitles, 2000, p.613).

as remedies) provide considerable leverage over the empirical questions we hope to pursue. First, there is considerable variation in the kinds of policy challenges involved in remedying a violation of the Convention. Although the court commonly requires monetary damages, pecuniary and non-pecuniary, it also typically provides a number of equitable remedies. For example, in *Montero Aranguren y otros (Retén de Catia) vs. Venezuela*,[16] a case concerning the extrajudicial killings of 37 state prisoners, the court required both for the payment of monetary damages to the victims' families, but it also insisted that Venezuela adopt a program for police and penal officials educating them in Venezuela's human rights obligations (p 62). Second, as Hawkins and Jacoby (2010) have speculated and we show below, there is considerable variation in the clarity of these orders. And finally, the court's own monitoring system provides detailed information on state reactions to their decisions.

Data

The central challenge in evaluating claims regarding compliance with judicial decision lies in measuring the concept of interest. The IACHR represents a particularly useful empirical context because it has run a detailed monitoring system for its decisions in contentious cases since 1996. Challenged in 2003 by Panama in the *Baena* case, the court found inherent power to monitor compliance deriving from its status as an international judicial body, and specific legal authority derived from Articles 33, 62(1), 62(3) and 65 of the American Convention (Hawkins and Jacoby, 2010).[17]

The IACHR's compliance reports are developed currently by staff specifically charged with this task, primarily via direct communication with the defendant states, the Commission, and the victims representatives regarding the status of certain reparations. The Court also collects information from "expert declarations and reports" and on ocassion from hearings with defendant states.[18] Critically, for each remedy it issues, the court characterizes in great detail states' implementation efforts. A wealth of information is available for analysis. In this paper, we focus on two related

[16] *Caso Montero Aranguren y otros (Retén de Catia) vs. Venezuela*, Inter-Am Ct. (July 5, 2006).

[17] See the competence judgment of the court: *Baena y otros vs. Panama*, Inter-Am Ct. (November 28, 2003). Procedures for monitoring compliance with judgments are specified by Article 69 of the court's Rule of Procedures.

[18] See IACHR Rules of Procedure, Article 69.

aspects of the reports in order to operationalize our dependent variables.

The unit of analysis for our study is the IACHR remedy. To date, we have coded every final decision to a contentious case resolved by the court between 2006 and 2009,[19] which also has at least one compliance report. This results in 183 remedies. The average number of remedies per case is 4.2 with a standard deviation of 2.4.

Response Variables

As has been described elsewhere (e.g. Hawkins and Jacoby, 2010; Hillebrecht, 2010), for every case in which the IACHR issues a merits decision, it reports clearly in its compliance report whether the state has complied or not with each remedy. Thus, we will create a binary variable, *Comply*, which takes a value of 1 if the court is satisfied that the remedy has been properly implemented and 0 otherwise. Although valuable, this indicator runs the risk of under-estimating the court's compliance problems. Critically, states may comply with orders eventually, but engage in significant delay. If they eventually implement the order, it is certainly reasonable to code the state as having complied, but if compliance followed a protracted period of delay, such a coding will miss what we believe is substantively meaningful defiance.[20] To address this issue, we also develop a binary variable *Resist*, which indicates whether there is evidence of state delay or resistence with respect to a remedy. Specifically, *Resist* takes a value of 1 if there is such evidence and 0 otherwise.[21]

[19]We consider the results presented here to be preliminary in so far as we are dealing with cases that may not have sufficient time to induce proper implementation.

[20]See Staton (2010, p.93–101) for an empirical analysis of compliance that conceptualizes compliance in this way.

[21]This variable is derived from a categorical indicator we have also coded. We use the binary variable in this application in order to balance the desire to keep observations which are coded originally as an "unknown level of resistance" against the need to have to assign a value to such remedies in order to generate an ordinal indicator. The original variable is measured as follows: (0) *No resistance* – The state complied with the remedy and evidence of that compliance can be seen in the Compliance Report; (1) *Minor resistance* – The state engaged in some delay, but eventually complied with the remedy. No evidence in the compliance reports of the Court expressing significant concern over delays. Compliance is evident by the second compliance report; (2) *Substantial resistance* – The state delayed or continues to delay the implementation of the remedy considerably and theres some evidence in the compliance record of the Court expressing concern over State delay. The implementation, if it occurs it, does not occur until compliance report 3 or later; (3) *Massive resistance* – The State has failed to implement the remedy despite long-term (e.g. 4 Compliance Reports or more) monitoring from the court. Considerable evidence in the compliance record of

To capture the clarity of each remedy, we asked a coder unfamiliar with our theoretical aims to provide a subjective evaluation of each remedy, according to the following rules:[22]

- **Clear** - What is required of the state is completely unambiguous. For example, consider the first remedy in the Montero Aranguren case, where the IACHR is requiring monetary damages to be shared among the victims' families. There can be no question here about what is required.

  > *La Corte fija en equidad el valor de las compensaciones por dicho concepto en los siguientes términos: a) por cada una de las 37 víctimas ejecutadas, la Corte fija la cantidad de US$ 75.000,00 (setenta y cinco mil dólares de los Estados Unidos de América.*

- **Somewhat Clear** - What is required of the state is fairly clear, but how it should be done is not completely obvious. For example, consider the following remedy from the eighth remedy in Montero. Clearly, a public apology is required and a time frame is given; however, precisely how this is to be done and where is not articulated:

  > *La Corte dispone que el Estado debe realizar un acto público de reconocimiento de su responsabilidad internacional y pedir una disculpa pública a los familiares de las víctimas por los hechos violatorios a los derechos humanos establecidos en la presente Sentencia. Este acto deber realizarse en presencia de los familiares de*

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the Court expressing significant concern over delay. Despite at least 4 compliance reports, there is no evidence that the remedy has been implemented; (4) *Uncertain Resistance* – Some level of resistance is evident since the remedy has not been implemented as of the latest compliance report on file, but due to the small number of reports (2 or fewer) it is difficult to assess the level of resistance. *Resist* is coded such that it is 1 if any resistance is detected.

[22]We also have coded the number of words the court used to describe each remedy, which has been used by legislative scholars as proxy for discretion (e.g. Huber and Shipan, 2002). Unfortunately, there correlation between the subjective indicator and this alleged objective indicator is -.15 in our sample. Casual examination of the remedies suggests that word counts are unlikely to be particularly useful. Although the court can order a clear monetary damage in relatively few words, it also does not take very many words to require the vaguest of programming policies. For this reason, we use the subjective measure. Our coding protocol calls for a 10% sample to be double-coded, but have yet to reach this stage in our study. Thus, again, we stress that these results are preliminary.

las víctimas y con la participación de miembros de las más altas autoridades del Estado. Deberá celebrarse dentro de un plazo de seis meses contados a partir de la notificación de la presente Sentencia.

- **Vague** - The remedy is extremely unclear, leaving considerable discretion to the state. For example, we consider the seventh remedy in Montero to fall into this category. Although it is clear that a program should be developed, many details are left unspecified:

  La Corte considera oportuno que el Estado diseñe e implemente un programa de capacitación sobre derechos humanos y estándares internacionales en materia de personas privadas de la libertad, dirigido a agentes policiales y penitenciarios.

We have found in repeated evaluations that although there may be reasonable conceptual reasons to justify a trichotomous coding of clarity, as an empirical matter, there is no difference between the first two categories. Thus, in this paper we report the findings associated with a binary variable, *Clear*, which is coded as 1 if the remedy was judged to be clear or somewhat clear and 0 otherwise.[23]

Table 1 displays the bivariate distribution of the response variables, for both the compliance and resistance indicators. The table reflects previous findings suggesting that compliance on the IACHR is, generally speaking, a problem. We identify resistance with nearly 84% of the remedies. Indeed, the court itself only codes 31% of its remedies as having been implemented to its satisfaction. Of greater theoretical interest, though, is the relationship between remedy clarity and compliance. For both indicators, the proportion of cases in which there is evidence of some sort of resistance is lower for clear remedies. To consider this relationship further, we require a model of the process that is both consistent with theoretical expectations and addresses obvious structural features of the data. But first, it will be useful to describe the key causal variables in that analysis.

Key Causal Variables

To capture relative differences in uncertainty the IACHR might have over the link between policy means and policy ends for particular remedies, we adopt a relatively coarse approach, which depends on fundamental differences in the policy-making contexts associated with each remedy. The key is to recognize that not every kind of reparation involves the same kind of policy-making challenge.

[23]The results we report are in no way sensitive to this choice.

For example, pecuniary damages present almost no challenge at all. Any judge in the world, with little to no help, could transfer money between two bank accounts without error. All she would need is access. In contrast, providing clean drinking water or acceptable healthcare present important policy-making challenges, fraught with uncertainties about how precisely to implement the policy. Our measure of uncertainty, *Uncertain* is binary and answers a simple question: Could a reasonable person carry out the task without error in the absence of policy-making expertise? *Uncertain* is coded 1 if yes and 0 otherwise.[24]

Measuring the policy differences between the IACHR and the sitting government at the level of the remedy represents a significant challenge. Our approach assumes that the theoretically relevant policy differences between the court and the defendant government (i.e. how much the court and the government differ over ideal policy outcomes) are likely correlated with a state's underlying human rights record. Better records likely reflect closer connections between the court and the government. Although we cannot observe this record directly, there are a number of observable indicators of it. Thus, we create a scale of indicators that are likely manifestations of poor human rights practices.[25] Specifically, we conducted a principal components factor analysis of Cingranelli and Richards (2010)'s physical integrity index and the PRS indices for law and order and internal conflict. Our measure of policy difference, *Record*, is then the factor score for each state on the first factor at the time the case was resolved.[26]

Finally, we require an indicator of the publicly-induced costs of non-compliance that a government might pay for defying the IACHR. Ideally, we might appeal to a measure of the IACHR's legitimacy in each state. Although costs probably vary by case, and perhaps by remedy, this would

[24]The following remedy types were considered to present little to no problems with implementation: 1) Pecuniary and non-percuniary money damages, 2) Publication of Decision, 3) Acknowledge responsibility for violation, 4) Release information, 5) Strike criminal conviction from record, 6) Sponsor an academic scholarship. The following remedy types received a 1: 1) Undertake criminal proceeding/Investigate, 2) Change or modify a law, 3) Implement programs.

[25]Although the internal conflict index may not appear to be precisely on point, PRS indicates that governments are rated on this scale at least partially with respect to whether they use arbitrary violence against their own people. For a description of the PRS measures, see `http://www.prsgroup.com/ICRG_Methodology.aspx`.

[26]The factor analysis revealed only one factor with an eigenvalue over 1 (1.92), and each variable loaded highly on this factor.

be a reasonable strategy. Unfortunately, we are aware of no such indicator. In its place, we appeal to the Latinobarometer's judicial confidence measure, which provides a survey-based measure of citizen's confidence in their domestic judiciary.[27] The assumptions here are that the costs of defying the IACHR are correlated strongly with the costs of defying domestic courts, which is itself associated with average judicial confidence. *Costs*, reports average judicial confidence for a state in the year of the IACHR's final decision. Table 2 displays sample summary statistics for these variables and the others analyzed below.

Analysis

The data we analyze present a three-level hierarchical structure, with remedies i nested within cases j which are nested within states k. We begin with a model that includes covariates suggested only by the argument. We thus consider the following system:

$$Pr(Clear_{ijk} = 1) = logit^{-1}(\alpha_0 + \alpha_1 Uncertain_{ijk} + \alpha_2 Record_{jk} + \psi^2_{jk} + \psi^3_k) \quad (1)$$

$$Pr(Comply_{ijk} = 1) = logit^{-1}(\beta_0 + \beta_1 Clear_{ijk} + \beta_2 Costs_{jk} + \beta_3 Record_{jk} + \zeta^2_{jk} + \zeta^3_k) \quad (2)$$

The ψ and ζ parameters reflect modeled random intercepts for cases and states.[28] This system is recursive, and assuming no correlation of errors across equations, we estimate it equation by equation.[29]

Results

Consider first the left most column of Table 3, which displays GLS estimates for equation (2) using the IACHR's own binary indicator of compliance. It would appear that states are more likely to comply as remedy clarity increases. Likewise, states with poor human rights contexts, as measured by the *Record* index, which we take to reflect underlying policy similarity between the IACHR and sitting governments, are less likely to comply with IACHR remedies. And the defiance costs indicator, average citizen confidence in the domestic judiciary, is estimated to be positively related

[27] Latinobarómetro [2006,2007,2008,2009].

[28] Specially, we assume that $\psi^2_{jk} \sim N(0, \gamma^{(2)})$; $\psi^3_k \sim N(0, \gamma^{(3)})$; $\zeta^2_{jk} \sim N(0, \upsilon^{(2)})$; $\zeta^3_k \sim N(0, \upsilon^{(3)})$.

[29] The results are not sensitive to this assumption. We have estimated the system simultaneously via a bivariate probit model with no significant changes in results.

to compliance. That said, the result is not particularly precise. Similar results are evident in the second column, which displays the estimates using our binary measure of state resistance.

Figure 1 fleshes out the substantive impact of human rights context and remedy clarity on resistance. The solid black line reflects the population averaged predicted probability of resistance across the range of the human rights index, for clear remedies. The dashed line shows the same estimates for vague remedies. Across this range, the difference between the probability of resistance for clear and vague remedies is roughly .2. Moving from a state with a very poor record of protecting human rights (e.g. one standard deviation below the mean) during this period to a state with a very good record is associated with difference of about .26.

Returning to Table 3, the right most column displays the estimates for equation (1), predicting the probability of a clear rule. Obviously, the estimate for a state's human rights record runs counter to the theoretical prediction; however, it is also very imprecisely estimated. In contrast, the model suggests strong support for the role of uncertainty in remedy clarity. When the IACHR confronts policy challenges which, by their very nature, involve a degree of uncertainty about the mapping between means and ends, the court is more vague. Table 4 shows the substantive effect on remedy clarity of the kind of uncertainty we are measuring in this application. Whereas the predicted probability of a clear decision is .82 when the remedy challenge does not require a significant means-ends problem (e.g. imposing money damages), it is only .38 when there is such a problem.

An important question to ask in light of these results is whether the variable *Uncertain* simply reflects another way of measuring remedy clarity. In other words, is clarity on both sides of the equation? Conceptually, we believe that there is an important difference between the nature of the nature of policy challenge the particular remedy must solve, which we believe is what *Uncertain* indicates and the clarity of the remedy itself. This distinction is reflected in the data. If there were no difference between *Uncertain* and *Clear*, then we would expect very little variation in clarity among remedies where *Uncertain* is coded as 0, i.e. where we believe there to be serious means-ends problem. In reality, the Court does sometimes issue clear remedies when our rough measure would treat the general policy challenge as involving more uncertainty. For example, we treat remedies that are designed to "Investigate criminal activities" as situations in which courts are likely to have greater uncertainty about the means-ends problem relative to, say, asking a state to make an

apology. At a bare minimum, the investigative process, done badly, can reinforce harms already done. They may also create new human rights violations, by say inducing officials of the state to intimidate witnesses as they carry out the criminal investigation.

Yet in such cases, our coder found that only about one half of the remedies were vague. The standard example of a vague order to investigate, which we expected to find in a larger percentage of classes, is reflected well by Escher y Otros v. Brasil, a case dealing with the Brazilian state's illegal monitoring of lawyers. Here the court ordered a criminal investigation as follows: "El Estado debe investigar los hechos que generaron las violaciones del presente caso."[30]

Compare that order to an order to investigate in the Montero case, seeking an end to what it regarded as a continuing *de facto* amnesty:

> *El Estado debe remover, en un plazo razonable, todos los obstáculos y mecanismos de hecho y derecho que mantienen la impunidad en el presente caso; otorgar garantías de seguridad suficientes a las autoridades judiciales, fiscales, testigos, operadores de justicia y a las víctimas, y utilizar todas las medidas a su alcance para diligenciar el proceso, con el fin de identificar, juzgar y sancionar a los responsables de los hechos de violencia y atender situaciones de emergencia en el Retén; del uso excesivo de la fuerza, y de la ejecución extrajudicial de varios internos.*
>
> *El Estado debe asegurar que los familiares de las víctimas tengan el pleno acceso y capacidad de actuar en todas las etapas e instancias de dichas investigaciones, de acuerdo con la ley interna y las normas de la Convención Americana. Los resultados de las investigaciones deberán ser públicamente divulgados por el Estado, de manera tal que la sociedad venezolana pueda conocer la verdad acerca de los hechos del presente caso.*
>
> *Los referidos procedimientos, además, deberán tomar expresamente en cuenta, entre otras normas técnicas, las normas establecidas en el Manual de Naciones Unidas sobre la Prevención e Investigación Eficaces de Ejecuciones Extralegales, Arbitrarias y Sumarias.*
>
> *Además, como la Corte lo ha señalado en su jurisprudencia constante, ninguna ley ni disposición de derecho interno, incluyendo leyes de amnistía y plazos de prescripción*

[30] *Note: Insert citation.*

puede impedir a un Estado cumplir la orden de la Corte de investigar y sancionar a los responsables de graves violaciones de derechos humanos. En particular, las disposiciones de amnistía, las reglas de prescripción y el establecimiento de excluyentes de responsabilidad que pretendan impedir la investigacin y sanción de los responsables de las violaciones graves de los derechos humanos son inadmisibles, ya que dichas violaciones contravienen derechos inderogables reconocidos por el Derecho Internacional de los Derechos Humanos.

Although our measure of uncertainty is coarse, it is unlikely that the policy-making challenge of the remedy is identical to the way in which the remedy is expressed. If anything, *Uncertain* contains higher random measurement error than we would like, which is suppressing a potentially stronger effect than we observe.

Alternative Explanations of Compliance

Prior research suggests alternative explanations of state compliance, which may bear on the results just reviewed. Table 5 addresses a number of these alternatives, showing GLS models for the resistance variable. Model 1 addresses two ideas. The first, developed in Cavallaro and Brewer (2008, pp. 792-793) suggests that non-governmental organizations can create pressure for media coverage in a case and in that way increase pressures for compliance. While we find no effect of direct media coverage on compliance,[31] here we show the results when controlling for the number of NGOs supporting a complainant's case before the IACHR. Since it is possible that the incentive to be vague may be lower when there are NGOs present to monitor the decision and pressure states to comply, it may be that the clarity estimates in Table 3 are biased upward.

The second claim we evaluate deals with constraints on executive power. Hillebrecht (2010) suggests that states use reactions to the IACHR to signal commitments to human rights to a variety of external communities. According to the argument, executives should be increasingly likely to comply as they are increasingly constrained by other internal institutions. The logic of the argument is as follows. All else equal, executives would like to promote an image of protecting human rights. Unfortunately, when an unconstrained executive complies, it serves as no credible

[31] *Note: Describe this approach in future draft.*

signal of a general human rights commitment. IACHR cases are infrequent enough that an executive could comply with a particular decision without making a commitment to human rights. On the other hand, when a constrained executive complies, international and domestic observers can more readily accept the compliance as a signal of a commitment to human rights.

To test these claims, we first counted the number of NGOs participating in each case on behalf of the complainant. This variable is labeled *NGO Support* in Table 5. To capture constraints on executive choice, we appeal to the Polity IV measure of executive constraints (Marshall and Jaggers, 2005). The first column in Table 5 displays no change in the clarity estimates on resistance, but it does suggest that increasing the number of NGO advocates decreases resistance. That said, we find no support for the notion that constrained governments are less likely to resist. Indeed, if anything, greater constraints are associated with greater resistance.[32]

It is possible that the executive constraints measure captures too much information about policy constraint that is unrelated to human rights behavior. It is also possible that NGOs are more likely to pursue cases in states where there is a tradition of respecting judicial decisions. Model 2 considers the effect of domestic judicial independence, which has been shown to be positively associated with good human rights practices (e.g. Cross, 1999; Keith, 2002; Powell and Staton, 2009), and which Hillebrecht (2010) lists as the kind of constraint that should be particularly useful for signaling a human rights commitment. To measure domestic judicial independence, we appeal to Tate and Keith's three category measure of judicial independence (Tate and Keith, 2009), derived from the U.S. State Department's Human Rights Report. We include dummy variables for partially and fully independent judicial systems. As Model 2 suggests, the NGO effect decreases considerably, suggesting that NGOs are more likely to join cases in which their domestic court system functions relatively well. Consistent with Hillebrecht, states with partially independent judiciaries are less likely than states with dependent judiciaries to resist IACHR remedies; however, contrary to the Hillebrecht logic, if anything, resistance seems to be higher in states with fully independent judiciaries.

Model 3 considers a very plausible argument reviewed in Hawkins and Jacoby (2010). If the implementation of all legal obligations depends on a well-run bureaucratic process, then we might

[32]This result does not depend on the dependent variable used.

expect that this would be true of international legal orders, as well. For this reason, we should expect that states with high quality bureaucracies should be less likely to resist orders, simply because they are better equipped to implement them. Model 3 includes the PRS index of bureaucratic quality, which we find has a very large impact on resistance. As is clear, the effect of partial independence reverses sign and the effect of full judicial independence is stronger and statistically significant. Neither of these changes is consistent with the notion that constrained executives use IACHR reactions to signal a commitment to human rights. If anything, the conclusion is that states with highly independent courts may be less likely to implement IACHR orders.

The judicial independence finding bears some consideration. Prior research has found that the independence of a judicial system advances human rights outcomes generally. These findings complicate that picture. One is tempted to conclude simply that states are less likely to comply when they have independent courts, but this says very little about the mechanism underlying the finding. If it is the case that third parties are impacted negatively by the remedies of the IACHR, then we might expect them to seek legal protection against government efforts to implement these orders. And they should be better able to stop governments from implementing international orders where courts are independent. In practice then, judicial independence may have two effects on human rights outcomes – one general effect, which advances human rights and one specific effect that undermines them, at least in particular cases. Future research might consider the kinds of remedies that are defied in states with highly independent courts.

Finally, what of the robustness of the clarity and human rights practices results? First and foremost, the effect of clarity is quite robust to the inclusion of these additional structure factors. That said, the estimates for *Record* are sensitive to specification. In our view, the major concern lies in Model 3, where the magnitude of the estimates drops dramatically. It is certainly possible that bureaucratic quality *causes* a state's human rights record, suggesting that the effect of *Record* in Table 3 are biased upward. Though this might be true, it is also possible that bureaucratic quality is just another manifestation of a state's underlying human rights practices, and for this reason, it may be that the indicator provides information on the policy differences between the state and the IACHR.[33]

[33]A principal components factor analysis of the three variables used in the human rights index, as well as the bureaucratic quality index again returns one critical factor. That said, the bureaucratic

Summary

We find strong support for the claim that the clarity of IACHR remedies influences reactions of state governments to these remedies. Clarity seems to create pressure for compliance. Yet we have also found that policy areas in which judges should be relatively more uncertain about the means-ends problem are those in which the IACHR is most likely to be vague. We have also found that states with poor human rights records are less likely to comply than states with good records; however, we find no effect of human rights record on remedy clarity itself. We have also found mixed results for our measure of defiance costs – citizen confidence in the domestic judiciary. Finally, we find a strong effect of bureaucratic quality on resistance to IACHR orders, which may be consistent with the Staton and Vanberg predictions. We find little evidence consistent with the notion states use reactions to these remedies to signal a commitment to human rights.

Conclusion

In order for courts to meaningfully constrain government behavior, they must be able to issue decisions that command compliance when governments would rather not, at least on occasion. Just like prior studies, we find considerable resistance to IACHR orders in a variety of cases. Having said that, it is neither true that the IACHR is always ignored nor that it has no influence over the process. Like other courts in other contexts, the IACHR can exercise a measure of control over compliance via the clarity with which it expresses itself. Although clarity cannot resolve defiance in all cases, it influences state behavior on the margin, and this may be the best an international court can hope for.

In so far as this is true, Judge Cançado Trindade's concern is particularly alarming. Our findings to date suggest support for a theoretical model in which vagueness is driven by pragmatic concerns. And pragmatism on the IACHR, in the form of vague remedies, may undermine the protection of human rights, by rendering a potentially powerful court weak. This would be an even more alarming concern if the only use of vagueness was to manage legitimacy concerns by hiding non-compliance. But this is not the only use of vagueness. Judges can manipulate clarity in order to avoid locking in significant policy mistakes.

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quality index loads less strongly on this factor than the other three variables.

No matter the reason for vagueness, the point is that judicial policy making is inherently interdependent. Because of this interdependence, and potentially for very good normative reasons, courts must be pragmatic. Whether or not they should be, we believe that, under many conditions, it will be impossible to induce fully independent judges. It should not be surprising that our international judicial reform efforts have had mixed effects at best.

If this theoretical orientation is right, then it may be quite unwise to continue promoting judicial independence only. Concerning international courts, this argument and a variety of its implications, is developed in greater detail by Posner and Yoo (2005). But for Posner and Yoo, the central concern is that you cannot easily force states to make changes in policies to which they have fundamental commitments. This may be an impossible task in the context of a powerful state. Although we do not deny the challenge Posner and Yoo raise, the problem is not just that courts frequently cannot gain compliance. That much is likely true. The critical point is that we may not want courts than can. And this is not because of an abstract violation of democratic commitments to majoritarianism. Simply put, courts, certainly international courts, often do not have the kind of information necessary to match policy means to policy ends, and for that reason, they will want to depend on the information domestic actors can bring to bear. Vagueness addresses this problem. The cost, as Staton and Vanberg argue, is to give up some measure of control over policy outcomes. Managing this tradeoff is the central challenge of pragmatism.

If we must have pragmatic judges, we need to ask how to train them to be pragmatic without giving up all concerns with constraining states. Police patrol monitoring schemes like the those of the IACHR and the European Court of Human Rights seem like absolutely necessary components of such an approach. It is one thing to be vague in order to allow for the efficient use of information. It is quite another to use vagueness simply to avoid being exposed as weak. A vigorous monitoring system (carried out honestly of course) can advance the first goal without promoting pragmatism of the second sort. This is but one institutional approach to addressing the issue. We are not wed to a particular strategy for encouraging more effective legal institutions, but we are confident that the right approach needs to take seriously the political challenges and constraints judges confront as they attempt to enforce legal obligations.

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	Compliance (Row %)	Non-Compliance (Row %)
Clear Remedy	45 (36)	81 (64)
Vague Remedy	11 (20)	44 (80)
	No Resistance	Resistance
Clear Remedy	26 (21)	100 (79)
Vague Remedy	3 (5)	52 (95)

Table 1: *Relationship between Clarity and Compliance (Resistance).* Displays the distribution of Comply and Resist for both values of Clear. Row percentages are shown in parentheses.

Variable	Mean	Standard Deviation	Range	N
Comply	0.31		$\{0, 1\}$	181
Resist	0.84		$\{0, 1\}$	181
Uncertain	0.30		$\{0, 1\}$	166
Record	0	0.97	$(1.31, 1.96)$	183
Costs	3.05	0.46	$(1.31, 3.43)$	174
Executive Constraints	5.92	1.11	$(4, 7)$	174
NGO Support	0.36	0.83	$(0, 3)$	183
Partial Jud. Indep.	0.28		$\{0, 1\}$	173
Full Jud. Indep.	0.29		$\{0, 1\}$	173

Table 2: *Summary statistics.*

	Compliance	Resistance	Clarity
Clear	1.31^{**} (0.56)	-2.08^{*} (1.10)	–
Costs	1.33 (1.17)	-1.21 (1.25)	–
Record	-0.78^{*} (0.47)	0.43^{**} (0.21)	0.16 (0.17)
Uncertainty	–	–	-2.13^{***} (0.27)
Constant	-1.63^{**} (0.52)	3.59^{**} (1.18)	1.65^{***} (1.79)
N	172	172	166
Cases	27	27	28
States	12	12	13
$\gamma^{(2)}$	0.57	1.41	–
$\gamma^{(3)}$	1.35	1.69	–
$\upsilon^{(2)}$	–	–	$< .01$
$\upsilon^{(3)}$	–	–	$< .01$

Table 3: *Compliance and Clarity Models.* Effect of remedy clarity (Clear), domestic judicial confidence (Costs), and human rights index (Record) on state reactions to IACHR remedies and effect of policy uncertainty (Uncertain) and human rights record on remedy clarity; GLS estimates shown (standard errors in parentheses); dependent variable for the first model is the probability of the court finding compliance; dependent variable for the second model is the probability of observing state resistance; estimated variances for case and-state random intercepts not displayed; judicial confidence has been mean centered; $^{***}p \leq 0.01^{**}p \leq 0.05;^{*}p \leq 0.10$ (two-tailed).

Policy Type	Predicted Probability	95% Conf. Int.
Uncertain=1	.38	(.26, .53)
Uncertain=0	.82	(.76, .89)

Table 4: *Predicted Probability of Clear Remedy.* Table shows the predicted probability of a clear remedy for both values of *Uncertain*. Policy challenges that raise no questions about the proper mapping between means and ends are coded as certain, whereas challenges that raise implementation questions are coded as uncertain.

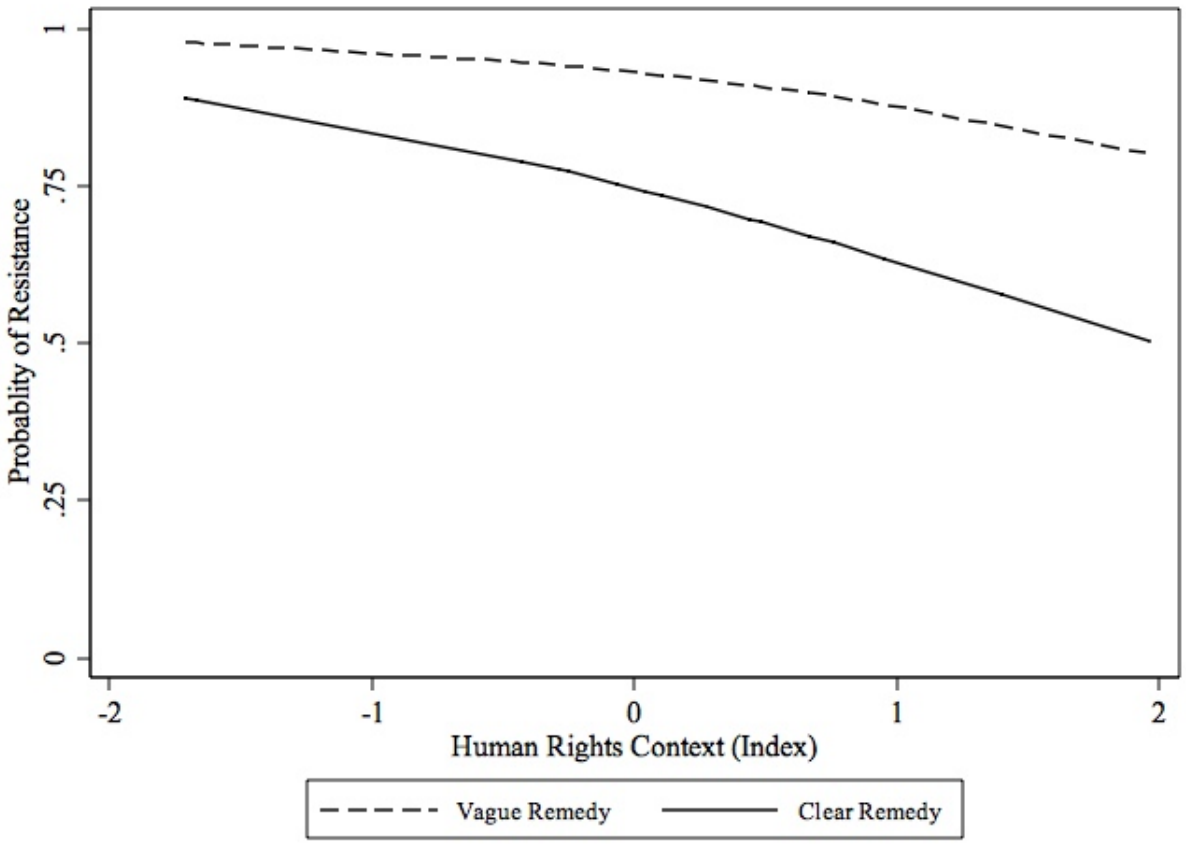

Figure 1: *Predicted Probability of Resistance.* The figure shows population averaged predicted probabilities of resistance across the range of the human rights index, for clear and vague remedies, and within the observed range of the index.

	Model 1	Model 2	Model 3
Clear	-2.09^{*}	-1.94^{*}	-1.91^{*}
	(1.16)	(1.17)	(1.11)
Costs	-1.94	-1.15^{*}	-0.04
	(1.46)	(1.05)	(0.85)
Record	-0.48	-1.14^{*}	-0.12
	(0.91)	(0.71)	(0.44)
NGO Support	-0.85^{**}	-0.46	–
	(0.43)	(0.56)	
Executive Constraints	0.48	–	–
	(0.62)		
Partial Jud. Indep.	–	-2.11^{*}	0.603
		(1.22)	(1.05)
Full Jud. Indep.	–	1.50	1.88^{**}
		(1.16)	(0.62)
Bureaucratic Quality	–	–	-3.21^{***}
			(0.92)
Constant	1.14^{**}	4.21^{**}	9.23^{***}
	(3.09)	(1.34)	(1.95)
N	172	162	162
Cases	27	25	25
States	12	11	11
$\gamma^{(2)}$	0.99	1.10	0.53
$\gamma^{(3)}$	1.38	0.02	$< .01$

Table 5: *Alternative Models* Original model plus indicators for the number of NGOs in support of the plaintiff, Polity IV's Executive Constraints scale, Tate and Keith's judicial independence measure, and PRS's indicator of bureaucratic quality; GLS estimates shown (standard errors in parentheses); dependent variable is the probability of observing state resistance; estimated variances for case andstate random intercepts not displayed; judicial confidence has been mean centered; $^{***}p \leq 0.01^{**}p \leq 0.05;^{*}\, p \leq 0.10$ (two-tailed).