



**OPEN SOCIETY
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Implementing Human Rights Decisions

Reflections, Successes, and New Directions

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1 Preface

Just over ten years ago, the Open Society Justice Initiative published a landmark report [*From Judgment to Justice: Implementing International and Regional Human Rights Decisions*](#), which, for the first time, took a close look at the degree to which states actually comply with the decisions of international and regional human right bodies, including the three regional human rights systems (Europe, Africa, the Americas) and the UN treaty body system. The results were, admittedly, sobering. Based on the evidence, the Justice Initiative concluded that an “implementation crisis” afflicted the systems—or rather their member states. A follow-up report, [*From Rights to Remedies*](#) (2013), further explored the crucial role of domestic structures in promoting – and sometimes thwarting – implementation across the three primary institutions of government (the executive, the legislature, and in domestic courts).

Together, these reports helped define a field of implementation advocacy that has grown substantially over the past decade. Reflecting this growth, in 2013, the Justice Initiative joined four universities – Bristol, Middlesex, Pretoria, and Essex – as a partner in a multi-year research project called the [*Human Rights Law Implementation Project \(HRLIP\)*](#). Funded by the Economic and Social Research Council, HRLIP’s mission was to “track selected decisions by UN and regional human rights treaty bodies, against nine countries in Africa, Europe, and the Americas, to see the extent to which States have implemented them and why.” It was the first cross-regional, cross-system study of its kind.

Now, after hundreds of interviews with state officials, judges, court personnel, lawyers, and advocates, the fruits of this research are finally coming to light. And the news is encouraging. As summarized in a [*special 2020 issue of the Journal of Human Rights Practice*](#), “our findings stress that implementation is most certainly occurring and that state authorities, victims, and the broad range of stakeholders at the national and international level still consider this to be a worthwhile endeavor and one in which they are prepared to invest” [\[PDF\]](#).

Looking back from when *From Judgment to Justice* was first published also provides more [“evidence for hope.”](#) A comparison of available data (compiled in the Annex of this report) from then and now suggests that strides have been made when it comes to implementation. Consider the following:

- According to the Department for the Execution of Judgments, which oversees the implementation of judgments from the European Court of Human Rights (ECtHR), despite an equally robust docket there are now fewer cases pending

implementation today than there were ten years ago. Moreover, there has been a significant increase in the number of cases being transferred from “enhanced to standard” review due to substantial – if still partial – compliance from member states (see Annex, 13.1.2).

- States are also implementing judgments more quickly: the number of ECtHR cases closed in under two years or less has doubled since 2011, while the number of judgments still pending after five years has declined. Elsewhere, in the Americas, of the 207 judgments (from 2000 onwards) that have been monitored by the Inter-American Court of Human Rights to date, nearly 2/3 (65 percent) have been “declared fulfilled,” whereas in 2009 the “fulfilled” rate stood at only 10 percent (see Annex, 13.2.2).
- Helping to drive these numbers is the fact there has also been an increase in the number of action plans and reports submitted by states in response to judgments and greater, more frequent monitoring by the regional systems themselves. Over the last decade, for instance, the number of cases reviewed by the Committee of Ministers (the Council of Europe’s political body) has nearly doubled.
- In Africa, it is encouraging to see that the African Court on Human and Peoples’ Rights has taken steps to develop a compliance monitoring framework for both the Court and the African Union. Meanwhile, the African Commission (ACHPR) has instituted new procedural rules that strengthen the role of national human rights commissions in compliance monitoring and reporting. Like the Inter-American Commission, the ACHPR can also now refer cases of non-compliance to relevant African Union organs.

Greater attention to implementation has also had positive effects on how to improve the *process* of implementation. States have increasingly focused on developing domestic structures and/or better coordination in order facilitate their human rights reporting and implementation obligations. Many have created or strengthened National Mechanisms for Reporting and Follow-up to coordinate their responses to – and dialogues with – the UN and other regional bodies. Civil society has seen a similar growth: as the HRLIP’s findings suggest, litigators and advocates are increasingly incorporating implementation into their planning and litigation processes. New organizations like the European Implementation Network have also been created, helping to build a broader, more robust network for implementation advocacy.

Evidence of this strengthened network is on display in this capstone series, which was launched digitally in February 2021. Comprised of ten reflections from both

scholars and practitioners, the series covers some of the topline findings drawn from HRLIP's research, while also highlighting concrete examples of implementation drawn from the Justice Initiative's own experiences working with partners to implement human rights decisions in countries like Cote d'Ivoire and Kazakhstan. There are no easy victories to be found in these contributions, but, together, they demonstrate the value of tenacious, sustained advocacy on behalf of human rights decisions. They also remind us that implementation is not a linear process, but dynamic and iterative. To be sure, there are reasons to worry about the future of human rights. An implementation crisis still endures; enormous challenges remain. But as we look ahead, it's critical to recognize the progress that has been made.

While all of the pieces remain available [online](#) they have been assembled here in one place, with versions available in English, French, and Spanish.* It is our hope that this collection of stories and insight can provide a useful tool for legal practitioners, advocates, scholars, and educators alike.

* Sincere thanks to the Open Society Justice Initiative's Liliana Gamboa and Ashrakat Mohammed for their assistance in translating the French and Spanish editions of this publication.

2 Introduction to the Series

Christian De Vos and Rachel Murray

When the Open Society Justice Initiative (OSJI) published *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* just over 10 years ago, it was ground-breaking in drawing attention both to what happens after a decision is issued by a supranational human rights body and whether states actually comply with those orders. Before then, attention to how human rights decisions were implemented remained largely an academic pursuit, one that was still in its infancy. And while many litigators, advocates, and victims were aware of the failure (or refusal) by states to comply in the context of their own individual cases, at the time broader, more comprehensive data on the nature of the problem was still hard to come by. Systematic inquiries into why, how, and when states *do* comply with human rights decisions was similarly limited.

By diagnosing an “implementation crisis” in the three regional human rights systems – African, American, and European – as well as in the UN Treaty Body system, OSJI’s report helped galvanise attention to these questions, recognizing that non-compliance not only fails to vindicate the rights of those who suffered harm, but threatens the global human rights regime itself. As the report made clear:

The implementation of its judgments is the central measure of a court’s efficacy. Without it, the situation of those who should be helped by the court’s ruling does not improve. Even the best and most profound jurisprudence may be deemed ineffective if not implemented, and the very legitimacy of the court itself may fall into question.

Now, as implementation has gained greater prominence over the last decade, other competing forces have also amassed that threaten the very core of human rights.

These ‘human rights battlegrounds’ range from the targeting of marginalised and vulnerable groups, to climate change, to the huge expansion of technologies that shape our daily lives even as they pose significant threats to fundamental rights. The rise and spread of ‘exclusionary forms of populism,’ as Gerald Neuman notes, has likewise threatened the international human rights system, with attendant forms of backlash aimed at a broad array of international courts and

commissions ranging from the European Court of Human Rights (ECtHR) to the Inter-American Commission on Human Rights, to the International Criminal Court. Most recently, Covid-19's discriminatory impacts has exacerbated inequalities and resulted in a number of emergency measures that either test – or plainly do not respect – the rule of law. The global economic impact of the pandemic has also accelerated a critical financial crisis that supranational bodies and others who fund human rights work have long encountered.

In the face of these challenges it may be fair, then, to ask whether implementation still matters. Some might ask, is a judgment itself not victory enough? Does it make sense to insist on implementing what are often politically unpopular decisions in the midst of those other human rights battlegrounds? And is litigation the best means of securing redress?

“In the face of these challenges, it may be fair, then, to ask whether implementation still matters. Some might ask, is a judgment itself not victory enough?”

In our view, implementation does still matter. It matters for the victims. Leaving aside the obligation of state authorities in international law to ‘right a wrong,’ without implementation the most the victims of human rights violations will achieve is confirmation of the harm they suffered. For many, a decision or judgment from a supranational body alone is insufficient to address the consequences of those violations. Moreover, implementation of a particular decision or judgment rarely benefits only the individuals to whom it specifically relates. Often, they identify systemic problems in that state -- discrimination, historic exclusion, poverty. Implementing these decisions can lead to, for example, amendments to legislation and policies, training of state officials, creating new institutions of state, and ultimately contribute to strengthening the rule of law.

Insisting on implementation has also had salutary effects on how to improve the process of implementation. States have, for instance, also increasingly focused on developing domestic structures and/or better coordination in order to facilitate their human rights reporting and implementation obligations. Taking heed of recommendations made by the UN High Commissioner for Human Rights in her 2012 report, many states have created or strengthened National Mechanisms for Reporting and Follow-up to coordinate their responses to – and dialogues with – the UN and other regional bodies. Systems for monitoring state implementation – from the European Court’s Department for the Execution of Judgments to the Inter-American Court’s compliance hearings – have also expanded and become increasingly sophisticated. Processes aimed at measuring or in some cases ‘grading’ implementation have likewise been developed by some of the UN treaty bodies, and as Philip Leach observes in his contribution to this series, an “evolving and pragmatic remedial” approach by the ECtHR has “ratcheted up”

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pressure on states. All of which indicates the seriousness with which this once invisible part of the human rights system is now taken.

Furthermore, that “the state” is more than just the executive branch – that implementation also involves engaging an [independent judiciary and legislative bodies](#) – has been increasingly recognized. In the words of *From Rights to Remedies*, “As implementation processes become more institutionalized, pathways begin to develop and the prospect for compliance with decisions—and human rights norms more generally—improves.” National human rights institutions have likewise acknowledged that they, too, have a role to play, as have civil society organizations, many of whom continue to advocate nationally and internationally for change as a result of human rights decisions. New organizations, such as [Remedy Australia](#) and the [European Implementation Network](#), have been created in the past decade whose sole focus is on advocating for implementation, while litigators now better understand the importance of the post-decision phase for their work. As Susie Talbot explains in her closing post of the series, NGOs are increasingly incorporating implementation into their planning and pre-decision process, often enabling the remedies that are subsequently requested to be more specific and tailored to victims’ wants and needs.

This collection of ten contributions will be released on a rolling basis. Each piece seeks to explore an aspect of growth and change in the field of implementation advocacy over the past ten years. It takes both the anniversary of *From Judgment to Justice*’s publication as well as the closure of a multi-year research project, the Human Rights Law Implementation Project (HRLIP), as the occasion to reflect on these developments -- at the level of regional and UN systems, in the context of particular states and cases, and through broader thematic reflections on the state of the field. A collaboration amongst the universities of Bristol, Essex, Middlesex, Pretoria and the Justice Initiative, the HRLIP was an Economic and Social Research Council-funded inquiry that examined the factors which impact on the implementation of select decisions by nine states across Europe (Belgium, Georgia, Czech Republic), Africa (Burkina Faso, Cameroon, Zambia), and the Americas (Canada, Columbia, Guatemala). The capstone series also complements a [special 2020 issue of the *Journal of Human Rights Practice*](#) dedicated to HRLIP’s key findings, while also reflecting on concrete examples of implementation drawn from the Justice Initiative’s experiences working with partners in countries ranging from Cote d’Ivoire to Kazakhstan.

Bringing together scholars and practitioners both – with all contributions available in English, French, and Spanish – it is our hope that that this series is an opportunity to look both back and ahead at the field of human rights

implementation, and for it to reach as wide an audience as possible. At a time when the human rights systems' very existence, independence and value is once again questioned, the opportunity to reflect on achievements (even partial ones) helps illustrate that regional and international courts, commissions, and treaty bodies can make a difference. Taking stock and considering new directions can also help fulfil the enduring promise that the decisions of these bodies be realized in practice—transformed from judgements on paper to justice for individuals and communities.

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3 The Power of Hearings: Unleashing Compliance with Judgments at the Inter-American Court of Human Rights

Clara Sandoval

Introduction

Low levels of compliance with the recommendations and orders of supranational human rights bodies remains a major challenge for those of us who see international courts as critical protectors of human rights. One key question we face is what role these bodies should play to ensure implementation of their own decisions? While the dynamics of implementation are multi-factored and multi-actored, human rights bodies like the Inter-American Court of Human Rights do more than mere monitoring of orders; rather, they trigger and cajole implementation in different ways ([Sandoval, Leach and Murray, 2020](#)). Of all international human rights courts, the Inter-American Court of Human Rights has proved to be the most innovative in responding to implementation challenges despite its limited resources. While the strength of its approach arguably rests on its ability to use and combine different tools as required, compliance hearings have proven to be particularly important given their ability to promote dialogue with stakeholders and to build better understanding of the barriers that need to be addressed to move implementation forward.

Hearings as a tool to monitor compliance with judgments

The Inter-American Court's practice of holding hearings to monitor compliance with judgments started in 2007. In contrast, such practice is unknown in the European and UN treaty body systems, and has only been used exceptionally in the African system. The Inter-American Court holds different types of hearings: *Private hearings* are conducted informally, with two or three judges present, the Inter-American Commission, the victims and their legal representatives and the state delegation. They last for about two hours and aim to foster dialogue to address implementation roadblocks and promote the preparation of implementation plans/schedules.

Public hearings are used exceptionally and in cases where there is a manifest failure by the state to comply with the Court's orders. All judges are present, wear

"While the dynamics of implementation are multi-factored and multi-actored, human rights bodies like the Inter-American Court of Human Rights do more than mere monitoring of orders; rather, they trigger and cajole implementation in different ways."

their gowns, and follow a formal protocol. The court held the first such hearing in 2009 in the case of [Sawhoyamaxa Indigenous Community v. Paraguay](#) precisely to respond to the new deaths of people in the community as a result of the reckless behaviour of the Paraguayan state.

The Court also holds *joint monitoring hearings* where the Court monitors similar orders against the same state in various cases that are pending compliance. This has been done in relation to different measures such as the duty to [investigate, prosecute and punish](#) in the case of Guatemala or [rehabilitation](#) in the case of Colombia. And since 2015 the Court also holds *on-site hearings* where it takes supervision to the country in question, and holds hearings with relevant actors both from the government, victims, and their legal representatives. The first on-site hearing was held in [Honduras and Panama](#) in 2015 (IACtHR, Annual Report, 2015, 61).

There are no explicit criteria establishing when the Court can hold a private or a public hearing despite the fact that they were included as a tool for monitoring compliance when the Court's rules of procedure were revised in 2009 ([Art. 69.3](#)). Any party to the case can request them, and the Court can convene it, but the ground(s) on which they are granted is not clear. While it is desirable in principle for such criteria to exist, the lack of such criteria has also permitted the Court to respond with flexibility to the challenges its judgments face in different parts of the region.

The Court has used hearings to activate implementation in cases where years have passed without any updated and detailed information reaching the Court or where specific measures were long overdue as in the case of [Awás Tingni Community v. Nicaragua](#), where seven years after the judgment the Court called a private hearing in 2008 to receive complete information on pending measures, including the creation of an effective mechanism to delimit, demarcate and title the property of the indigenous community, to carry out the actual delimitation, demarcation and titling of the lands as well as paying compensation for pecuniary and non-pecuniary damage. (IACtHR, Order of the President, 14 March 2008, 5). This hearing allowed the Court to invite the parties to the case to reach an agreement. The agreement contained clear indication of steps to be taken and timeframes that applied (IACtHR, Order of the Court, 2008, 8). Nicaragua fully complied with the judgment a year later (IACtHR, Order of the Court, 2009, 5). The Court also uses hearings where it sees an opportunity to influence the decisions of a State as happened in the case of [Fermín Ramírez and Raxcaco](#) in 2008 to dissuade Guatemala from allowing the death penalty.

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What has proven useful to unleash implementation?

Our research found that hearings can facilitate dialogue between the parties to a case. Up to 2019, hearings have been held in relation to almost all states that have accepted the jurisdiction of the Court, except Haiti. However, the Court has held less hearings in relation to states that are not willing to engage in dialogue, on the basis that those hearings cannot be very effective. For example, the Court has held six hearings in relation to Venezuela's compliance with judgments, five of which happened before Venezuela denounced the American Convention in 2012, and only one in 2016. And just recently, in 2019, the Court called a joint hearing on the cases of the [*Girls Yean and Bosico v. Dominican Republic and Expelled Dominicans and Haitians v. Dominican Republic*](#), that the state did not attend. Indeed, state failed to provide any information on compliance with the Court's orders for various years and particularly from 2014, when the State announced its intention not to comply with them based on a decision by its Constitutional Tribunal (IACtHR, Resolution of the Court, 2019, 14).

The majority of private hearings have taken place in relation to Peru, Guatemala and Colombia, three states where constructive dialogue has helped to unleash the dynamics of implementation and where strong civil society organisations are present. These combined elements appear to make the best use of the opportunity provided by the Court. The two States with the most public hearings are Peru and Paraguay, each with three and two hearings, respectively. The following appears to have helped to unleash the dynamics of implementation:

Hearings could involve key State actors

Private hearings allow for informal dialogue that can help parties to a case find a way forward. They create an opportunity for key state actors to be involved in the implementation process ([Murray and De Vos, 2020](#)). Often, those reporting to the Court on implementation and engaging in the process are staff at the Ministry of Foreign Affairs or at a similar institution, but not the entities that have to actually implement the order. For example, the Ministry of Health is often not present when implementation of rehabilitation measures is at stake. Including such key actors at hearings and having the opportunity to enter in direct dialogue with them has helped to move things forward. On-site hearings also help to this end, as many state institutions can be present at the hearings without having to incur in travel costs ([Saavedra, 2020](#)).

Hearings allow victims to participate in the monitoring process

Victims can participate in hearings if they wish. They are more likely to participate if hearings are conducted on on-site ([Saavedra, 2020](#)). Their

participation could be crucial to ensure that they remain at the centre of the process, that they are duly informed of what is going on with respect to implementation and that they can share their views on how to move things forward ([Molina](#), 2020).

Hearings work best when the Court has all relevant information on implementation at hand

Hearings can also be more effective when the Court has all relevant information about the dynamics of implementation at the domestic level at hand ([Donald, Long and Speck](#), 2020). States, however, do not always report to the Court on steps taken to implement its orders or, if they do report, the information they provide can be patchy. Hence, it has proven effective for the Court to request certain information from the state before the hearing takes place or to request key information directly from specific state institutions. This happened in the [Molina Theissen v. Guatemala](#) case in 2019, where the Court requested the Prosecutor General to provide information on the implementation of the duty to investigate, prosecute and punish, and to refer to a draft bill that, at the time, aimed to halt investigations in this and other cases. The more prepared the Court is, the better it will be able to promote implementation of its judgments. People we interviewed during our project also shared that hearings have been effective because they have worked as a pressure mechanism on states, reminding them that they must appear before the Court, get things together, and make progress on implementation.

Public hearings can help to prevent states taking backward steps

Public hearings have played an essential role in preventing states from regressing on the Court's implementation orders. For example, recently in cases such as [Guatemala](#) (March 2019) or [Peru](#) (February 2018), the Court used the hearings, sometimes in connection with precautionary measures, to prevent authorities from taking measures that would halt the investigation, prosecution and punishment of perpetrators of gross human rights violations in various cases decided by the Court. In the case of Guatemala, for example, there was a serious risk that the state would adopt a bill in parliament to halt investigations of serious human rights violations, that would have impacted negatively the orders given by the Court in various cases to duly investigate, prosecute and punish all perpetrators of such atrocities during the armed conflict, including cases like that of [Molina Theissen](#), [Chichupac](#) and other 12 cases. The Court, prompted by civil society organisations, responded in a timely manner to such challenges by calling a public hearing but also by adopting provisional measures to prevent irreparable harm (IACtHR, Resolution of the Court, March 2019).

Public hearings can activate other actors beyond the parties on the dynamics of implementation

Public hearings allow other actors – civil society organisations, international organisations, regional organisations, media, academics – that could have an impact on the dynamics of implementation to know what is happening with specific measures, and to play a role in the implementation process. These actors can provide information to the Court, for example as *amicus curiae*, or by lobbying the state to comply with the Court’s orders. When implementation gets difficult and informal dialogue is not enough, opening the process to other actors can help trigger implementation ([Solano Carboni](#), 2020).

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Joint hearings help highlight structural problems and join efforts to monitor implementation of structural measures

The Court has also joined the same or similar reparation measures ordered in various cases against the same state for the purposes of monitoring compliance. This has happened in particular regarding forms of reparation that aim to tackle structural problems, such as impunity in Guatemala and the need to ensure that the state complies with orders to investigate, prosecute and punish those responsible for gross human rights violations. The Court, besides monitoring the measure in a joint manner, has also held joint hearings and has issued joint resolutions in relation to specific reparation measures across various cases. These measures are in the interest of procedural economy. Given the growing amount of measures that the Court needs to monitor, which by 2019 stood at 1,153 (IACtHR, [Annual Report 2019](#), 61), it is important for the Court to find tools that can allow it to be more effective in triggering compliance. But, more importantly, joint hearings can bring together all relevant actors in different cases that are facing the same challenge, and relevant state institutions, to consider the barriers for implementation. It also allows the Court to gain a more holistic view of the challenges to implementation, and of potential ways to overcome them. Our research found that these hearings give visibility to those structural problems and help to prioritise them.

Conclusions

Inter-American Court hearings to monitor compliance with judgments have helped unleashed the complex dynamics of implementation. Since 2007, when the Court held its first private hearing, it has developed important, creative and original innovations to deal with the complex issues at hand, the latest of which are on-site hearings. Hearings have allowed dialogue, and, in exceptional cases, they have made public the lack of implementation and its adverse consequences. In the years to come, the challenge for the Court is to refine and streamline the

way hearings happen -- in relation to their frequency, the place(s) where they take place, the length of time they take, the methodologies they follow, and to better assess the impact they have had and can have on implementation. Another important task is to understand how to enhance the impact of hearings before and after they take place, so that what has been gained through them can be preserved.

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4 Taking Rights Seriously: Canada's Disappointing Human Rights Implementation Record

Paola Limon

Many of Canada's reports and appearances before regional and international human rights bodies begin by stating that it takes its international human rights obligations very seriously. However, a closer look belies a troubling reality: Canada's promises have largely not translated into the effective implementation of decisions issued by regional and international human rights bodies. This post will briefly explore: (i) Canada's engagement with international human rights mechanisms; (ii) its existing institutional framework for the domestic implementation of regional and international human rights recommendations and orders; and (iii) its implementation record regarding the cases selected for detailed study by the ESRC-funded Human Rights Law Implementation Project.

Overview of Canada's engagement with international human rights mechanisms

At the international level, Canada is a [party](#) to two-thirds of the [core](#) human rights instruments adopted within the United Nations (UN). It therefore has periodic reporting duties to most UN [treaty-monitoring bodies](#), and receives numerous recommendations from their concluding observations. Further, Canada has also accepted the inquiry procedures regarding the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ([CAT](#)) (notably, Canada has yet to submit to [CAT's Optional Protocol](#) despite [repeated promises](#) to ratify) and the Convention on the Elimination of All Forms of Discrimination against Women ([CEDAW](#)). In relation to the latter, Canada has already received recommendations from an inquiry procedure report issued by CEDAW in 2015 in relation to missing and murdered indigenous women and girls ([CEDAW/C/OP.8/CAN/1](#)).

Canada has also accepted the individual communications procedures before three UN treaty bodies: the Human Rights Committee ([CCPR](#)), CAT, and CEDAW. Stemming from this, as of December 2017, Canada had been found to be in violation—or potential violation—of its international obligations in 24 cases decided by the CCPR, 9 decided by the CAT, and 1 decided by CEDAW. On most of these cases—the majority of which relate to flaws in the refugee

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determination system—the respective body has expressly called upon Canada to adopt certain measures to remedy the violations found. Many, if not most, of these cases have been taken by individual lawyers working in the area of asylum and refugee law.

At the regional level, after almost 30 years as a permanent observer, Canada attained full membership to the Organization of American States ([OAS](#)) in 1990, after it ratified the OAS Charter. Consequently, it accepted oversight by the Inter-American Commission on Human Rights ([IACHR](#)), on the basis of the OAS Charter, the American Declaration of the Rights and Duties of Man, and the IACHR’s Statute and Rules of Procedure. Canada has since received numerous recommendations stemming from two IACHR country-thematic reports on its [refugee determination system](#) (2000) and on the issue of [missing and murdered indigenous women](#) (2014). Notably, very few individual petitions have been filed in the Inter-American system. Thus far, only two decisions have been issued on the merits: in the cases of [John Doe et al](#) (2011) and [Suresh](#) (2016), both related to removal proceedings from Canada.

With this panorama, it is quite evident that although Canada could certainly benefit from greater engagement with the Inter-American Human Rights System (IAHRS), it nonetheless already has plenty of international obligations and recommendations pending effective implementation at the domestic level. But what exactly happens in Canada once these decisions and recommendations are handed down by regional and international human rights mechanisms?

The institutional framework for the domestic implementation of regional and international human rights recommendations and decisions in Canada

Surprisingly, there is little public information available on how Canada implements human rights decisions. Our research eventually led the HRLIP team to the Continuing Committee of Officials on Human Rights ([CCOHR](#)), a federal-provincial-territorial group established in 1975, led by the Federal Department of [Canadian Heritage](#) (similar to a ministry of culture), with representatives of the Departments of [Global Affairs](#) (equivalent to a ministry of foreign affairs) and [Justice](#). The CCOHR’s responsibilities [include](#), among others:

1. facilitating consultations between federal, provincial and territorial governments with respect to Canada’s adherence to international human rights treaties;

2. encouraging information exchange among governments in Canada with respect to the interpretation and implementation of international human rights instruments; and
3. facilitating Canada's interactions (reporting and appearances) with UN human rights bodies.

As such, Canadian Heritage would be responsible for coordinating the implementation of concluding observations and other general recommendations issued by international human rights bodies. Strikingly, however, no mention is made in relation to its role regarding general recommendations emanating from the IACHR. Furthermore, the CCOHR does not include policy-making or decision-making authorities. In addition, it only meets once a year in person, and monthly through teleconferences; but it does so behind closed doors, not reporting publicly as to the topics it discusses, let alone the results of those discussions. Moreover, in relation to our research, the greatest limitation of the CCOHR is that it is not involved in the actual implementation of individual human rights decisions. At most, its members are informed of the cases pending and decided, without any action taken to that regard.

Rather, in relation to individual cases, it is Canada's Department of Justice (whose representatives participate in the CCOHR) that is charged with litigation, follow-up and implementation responsibilities. The DOJ acts as a liaison between Global Affairs (who communicates with the relevant international body) and the provincial-territorial and/or subject-matter departments relevant to the specific case. An inter-departmental consultation process is then held, in which officials analyse the treaty body's reasoning, the facts relied on in the decision, the recommendations formulated, and domestic law and jurisprudence in order to determine whether Canada agrees with the decision and, if so, whether or how to comply. As a general rule, the government does not, at any point of the process, engage in direct contact with the petitioners or their representatives. Notably, absent from this process is any discussion within the CCOHR about general recommendations that might overlap with reparations ordered in individual cases.

A closer look at Canada's implementation record regarding the HRLIP's selected cases

Just as there is not an adequate mechanism or process in place to domestically implement international decisions issued in individual cases, Canada's actual implementation record is also poor. For the purposes of its study, the HRLIP identified and tracked [selected decisions](#) issued in 9 individual cases (8 issued by UN treaty bodies and one by the IACHR), taking into account factors such as

their connection to armed conflict or to violations in peace time, the length of time that has passed since the decision was issued, the identity or characteristics of the victims, the structural nature of the violations found and the reparation measures ordered, among others. From these and other related cases, our findings surfaced four types of reactions or attitudes that Canada has shown in relation to implementation of individual decisions issued by regional and international human rights treaty bodies.

Disregard of interim measures

As noted, most of the individual human rights cases decided in relation to Canada refer to imminent removal from the country, alleging flaws in the refugee determination system and the potential violation of the *non-refoulement* principle. In this regard, a first concern related to Canada's implementation record is that of interim measures. In at least three cases before the CAT (Comm. No. 258/2004, *Mostafa Dadar*: [decision](#) / [follow-up](#); Comm. No. 297/2006, *Bachan Singh Sogi*: [decision](#) / [follow-up](#); Comm. No. 505/2012, *P.S.B. and T.K.*: [decision](#)) and two cases before the CCPR (Comm. No. 1051/2002, *Mansour Ahani*: [decision](#); Comm. No. 2091/2011, *A.H.G.*: [decision](#)), Canada deported people who were subjects of protection under interim measures requested by the respective bodies. In *A.H.G.*, arguing that the request had been received too late to stop the deportation; in *Ahani*, given that a domestic court had held that interim measures were not binding; and, in the other three cases, it appears that because the Canadian government simply did not agree with the interim request, it refused to comply with it. Deporting persons protected by interim measures automatically nullifies any eventual decision on the merits of their removal claims and on their compatibility with Canada's international human rights obligations.

Implementation through domestic legal advocacy

In other cases where people have not been deported before a final decision has been taken by the relevant human rights body, some have managed to obtain permanent residency in Canada (among others, Comm. No. 1763/2008, *Ernest Sigman Pillai et al.*: [decision](#) / [follow-up](#); Comm. No. 1881/2009, *Masih Shakeel*: [decision](#); both decided by the CCPR). However, these victories came about not because Canada complied with the international decision *per se*, but because the petitioners were able to pursue new domestic applications for residency and supplied the decision of the international human rights body as evidence of the risk they would face if they were to be sent back to their countries of origin.

As such, these situations—some of which have since been deemed as “satisfactorily implemented” by the treaty bodies—have not occurred as a

consequence of government actions specifically aimed at implementing those international decisions. In fact, at least in the case of Masih Shakeel, the Canadian government had expressly disagreed with the Committee’s decision (CCPR/C/112/R.3). Thus, the favourable outcome for these petitioners came principally because they were able to afford new applications that were assessed differently on the merits. In short, the treaty body’s decisions were contributory, but were not necessarily determinative, to the petitioners’ ultimate victory.

Federalism and non-compliance

Other issues are present in cases not related to removal of persons from Canada. For example, *Arieh Hollis Waldman* (Comm. No. 694/1996) was a case concerning the province of Ontario where public funding is provided for private Catholic schools, but not for other religious denominations. In this case, the Human Rights Committee [established](#) that Canada was “under the obligation to provide an effective remedy that will eliminate this discrimination.” In [response](#), Canada limited itself to saying that matters of education fall under exclusive jurisdiction of the provinces and that the government of Ontario had communicated that it had no plans to extend funding to other private religious schools and that it intended to adhere fully to its constitutional obligation to fund Roman Catholic schools.

This case highlights two important dynamics that impact implementation of international decisions in federal systems. First, instances wherein a state uses its domestic federal structure as a justification for the failure—or refusal—to implement an international decision. And second, the complexities that arise in implementation when recommendations or orders transcend the interests of the specific petitioner, and touch upon matters of local/state/provincial policy. The underlying issues in *Waldman* are [highly controversial](#) at the local level, but it must be emphasized that CCPR did not specify *how* Canada had to go about eliminating this discrimination; rather, it left that to the state’s discretion.

Moreover, international law does not permit countries to simply allege federalism or other [state-structure arguments](#) as an obstacle for compliance with the human rights obligations to which it has committed itself. In cases like *Waldman*, then, it becomes particularly relevant for countries to have effective domestic structures that can facilitate implementation, particularly a mechanism or political body that is capable of bringing together all the relevant actors—from civil society and all levels of government—in order to engage in a dialogue that can help identify adequate alternatives to effectively bring the country into compliance with its

“The Canadian government—at all levels—should ensure that any implementation processes are developed in extensive consultation with provincial and territorial governments, the persons or groups in question, and civil society.”

obligations. Such structures hardly guarantee implementation, but they can better equip the machinery of state to act in that regard.

Inadequate implementation

In 1981, in one of its more significant decisions against Canada, the Human Rights Committee [decided](#) that Sandra Lovelace, a Maliseet Indian who lost her Indian status because she married a non-Indian man, had suffered a human rights violation having “been denied the legal right to reside on the Tobique Reserve, [which] disclose[d] a breach by Canada of article 27 of the Covenant” (Comm. No. 24/1977, [para. 19](#)). However, in contrast to subsequent decisions, the Committee did not formulate an express remedy or recommendation that Canada should implement to comply with the decision. Nevertheless, Canada understood that in order to comply it had to reform the Indian Act to remove the sex discrimination, because Indian men who married non-Indian women did not lose their Indian status. The government did so in 1985, but this reform did not fully eliminate sex discrimination as there were now different categories of Indian status that distinguished between how men and women transmitted that status to their offspring.

“Just as there is not an adequate mechanism or process in place to domestically implement international decisions issued in individual cases, Canada’s actual implementation record is also poor.”

Since then, nearly 40 years after the *Lovelace* case was decided, these remaining issues of discrimination have been taken up by multiple UN treaty-monitoring bodies in the context of the periodic reporting process, as well as by the IACHR in its thematic [report](#) and [hearings](#) on missing and murdered indigenous women and girls. The inadequate implementation of the *Lovelace* decision and the lack of implementation of the recommendations stemming from non-contentious mechanisms has led to further domestic and international litigation ([McIvor](#)). Thus, the *Lovelace* case and the subsequent developments in its underlying issues, illustrate not only the overlap between the regional and international human rights systems, but also the interaction between their different contentious and non-contentious mechanisms. If Canada had adequately and effectively implemented all the recommendations that were handed down by regional and international bodies—through their non-contentious mechanisms—after the *Lovelace* decision, perhaps the *McIvor* litigation would not have been necessary.

Conclusion

While these cases do not represent Canada's entire implementation record, they illustrate serious concerns that need to be addressed. If Canada really does take its international human rights obligations as seriously as it claims, it should:

- Accept full and regular assessment of its domestic human rights record by regional and international human rights mechanisms;
- Engage sincerely and constructively with interim measures and recommendations in individual communications and petitions, as well as with general recommendations stemming from other international human rights mechanisms;
- Refrain from resorting to state-structure arguments as a way to evade compliance;
- Establish a formal process for transparent, effective and accountable implementation of its international human rights obligations, both in the context of general recommendations, as well as those stemming from individual communications and petitions.

In taking these steps, the Canadian government—at all levels—should ensure that any implementation processes are developed in extensive consultation with provincial and territorial governments, the persons or groups in question, and civil society.

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5 Reflections on the Role of Civil Society Organizations in Implementing Cases from the African Commission and Court

Felix Agbor Nkongho

The African Commission on Human and Peoples' Rights forms an integral part of the African human rights system and mechanism for human rights protection and promotion. Since its establishment by the African Charter on Human and Peoples' Rights in 1987, the Commission has received over 600 communications based on violations of rights and freedoms laid down in the Charter. The Commission, together with the African Court on Human and Peoples' Rights (which was established through the 1998 Protocol to the African Charter and became operational in 2004) form dual pillars of the African human rights protection system. The Court was created to reinforce the protective functions of the Commission.

These organs have handled several cases and reached ground-breaking decisions on such contentious matters as self-determination, the right to development, and the right to environment (to name but a few). The bone of contention and the lacuna which has inevitably overshadowed the work of these bodies, however, is the implementation of these decisions by states, especially where complex, politically sensitive matters are concerned. Such cases raise critical issues and challenges for these bodies, since they often touch on the sovereignty of the state, as well as for states, who are often reluctant to comply. In such cases, litigants and civil society actors inevitably face stiff resistance in advocating for implementation. The issue, then, is whether the functions and powers of these organs should be improved upon, or whether they should rely on external bodies to encourage or even enforce implementation where possible, such as national courts, national human rights institutions (NHRIs) and civil society organisations (CSOs).

The challenges become even more heightened when, as noted, it comes to issues that touch on the sovereignty of the state party involved. As has been observed in several cases – not only on the continent but from other regional courts – supranational bodies can make findings that a state has breached its duties under the relevant human rights instrument(s), but can then be reluctant to comment on the implementation of such cases. For example, the International Court of Justice

“The bone of contention and the lacuna which has inevitably overshadowed the work of these bodies (of the African human rights protection system), however, is the implementation of their decisions by states, especially where complex, politically sensitive cases are concerned.”

(ICJ), in its advisory opinion on the “Accordance with international law of the unilateral declaration of independence in respect of Kosovo,” itself limited the scope of its decision to only that case and declined to reach a conclusion on the broader issue of unilateral declarations of independence. Also, in the *Katangese Peoples’ Congress v Zaire* (1995) and in *Kevin Mgwanga Gunme et al v. Cameroon* (2009), the African Commission failed to fully and adequately address the charged issue of self-determination. This can easily be traced to the reluctance of the Commission to intervene in the political situation of countries that affect their sovereignty, notably their territorial boundaries. As the ICJ itself noted in its 1986 *Frontier Dispute* opinion, “the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice.”

By contrast, the Commission and Court appear to be more comfortable addressing issues that fall within the internal affairs of a state, particularly in cases of reported violations of indigenous communities and their land rights. Such ‘invasive’ judgements that touch on the internal affairs of states include those against Nigeria in the Ogoniland case and against Kenya in the well-known Endorois (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*) and Ogiek cases (*African Commission on Human and Peoples’ Right v. Kenya*). Here, the existence of an active civil society that can sustain advocacy on a decision and develop an implementation strategy has been central to the progressive implementation of these decisions.

For instance, it was thanks to efforts of the Centre for Minority Rights Development (Kenya) and of Minority Rights Group (MRG) International on behalf of the Endorois Welfare Council that a complaint was lodged at the African Commission in the first place. CSOs have been recognised as key partners in the follow-up and implementation process. CSOs have employed a range of tools to this end, including engaging various stakeholders and the broader community at the national level in follow-up and implementation of decisions, written correspondence, meetings, and the use of other human rights mechanisms to bring attention and monitor developments. Despite the numerous challenges faced by CSOs with respect to follow-up and implementation, they have been instrumental in keeping the decisions of the Commission and Court alive. For instance, with the Ogiek case, MRG and the Ogiek Peoples Development Program (OPDP) created a task force that made several

recommendations and continuously put pressure on the government of Kenya to take the measures necessary to enforce the judgement.

Notably, in its “Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples’ Rights” (held in September 2018), the Commission identified a number of factors that hinder implementation of its decisions. These included inadequate commitment by states parties; financial and institutional constraints; lack of communication and visibility; and a lack of monitoring mechanisms. Similar constraints face the African Court as well.

“CSOs have been recognised as key partners in the follow-up and implementation process. CSOs have employed a range of tools to this end, including engaging various stakeholders and the broader community at the national level.”

Human rights CSOs can assist the Commission and Court in addressing some of these challenges. Many CSOs already play an important role in supporting the work of these organs through human rights monitoring, standard setting, provision of assistance, and education and sensitisation. In these capacities, these organisations can put pressure on the respective state parties through petitioning the national court system (see, for instance, the post by Masha Lisitsyna and Anastasiya Miller in this series), together with the national human rights institution (NHRI), as a way to enforce judgments of the Commission and the Court. The role of CSOs is again crucial here since they can also write to NHRIs and courts to advise them on the state of implementation of a given decision.

In addition, naming and shaming – a popular strategy to enforce international human rights decisions – has proven to be an effective tool, especially towards garnering international attention for a particular cause. CSOs use news media to publicize violations and urge implementation. Evidence has shown that governments that are put in the spotlight for their abuses and that have not yet implemented the decisions from these organs can be pressured to do so, as the Ogiek case in Kenya illustrates. In May 2017, the Court ruled that by routinely subjecting the Ogiek to arbitrary forced evictions from their ancestral lands in the Mau forest, the government of Kenya had violated seven separate articles of the African Charter, including the right to property, natural resources, development, religion, culture and non-discrimination. Together, OPDP and MRG continuously put pressure on the government when it became obvious that it was hesitant to implement the Court’s decision. This tactic can be better exploited by grassroot organisations, many of whom often represent vulnerable persons and can assist in bringing their cases to public attention.

“Despite the numerous challenges faced by CSOs with respect to follow-up and implementation, they have been instrumental in keeping the decisions of the Commission and Court alive.”

At the same time, the threat of shrinking civic space confronts Africa. The Commission itself noted in its 2018 report that the “restrictive criteria for observer status before the Commission bars smaller grassroots NGOs from engaging at the institutional level with the activities of the Commission.” Grassroot organisations must therefore be appropriately represented in these organs: representation would enable them to have a better understanding of the inner workings of the system and be able to help fill the lacuna that exists in terms of implementation. This would also go a long way to improving the way CSOs report on the failure of states to implement. In addition, the confidential nature and lack of transparency in how communications are submitted to the Commission hinders the monitoring of its procedures when cases are pending. As Article 59(1) of the African Charter provides, “All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.” Such confidentiality – which can only be lifted by the Assembly, a body that is largely political – is problematic and gives states parties enormous leeway and ability to influence the Commission’s decisions.

Human rights CSOs should also improve their cooperation with each other at the national, regional, and international levels to be more effective in naming and shaming, and in pressing for legislation to be adopted or improved that ensures the enforcement of judgements by foreign and/or international courts at the national level. CSOs should also collaborate more to lobby for the integration of implementation and enforcement mechanisms into national human rights plans of action, so as to ensure that these issues are considered from a wider perspective. Mobilizing this kind of support is a forte of many CSOs and would thus give them an ability to raise awareness at the grassroots level on the workings and decisions of the Commission and the Court. By garnering support from litigators in association with willing NHRIs, CSOs can help keep these decisions alive, both for the respondent government and within the human rights system as a whole.

Sensitisation and education efforts that seek to raise awareness and demystify the notion of international judicial bodies as being out of the reach of ordinary individuals is also critical. Through promotional activities of CSOs, such as conferences and trainings, stakeholders can become more aware of how to address human rights abuses that have not been adequately handled by the national human rights system. Indeed, sensitisation can go a long way to publicising human rights decisions and their state of implementation (see, for instance, the posts in this series by Philip Leach and Clara Sandoval). Sensitisation and education of media

and other press actors can also serve to help keep a decision alive and ensure it circulates widely within the human rights community.

Finally, standard setting has always been an important role played by human rights CSOs. Through highlighting certain areas of human rights that have received limited attention by the international community human rights CSOs – in Africa and beyond Africa – have so far succeeded in bringing to the fore issues such as the prohibition of torture, involuntary disappearances, women’s rights, children’s rights, and LGBTQI+ rights. This crucial role of CSOs should be directed towards the implementation of the decisions of international judicial and quasi-judicial bodies as well; for instance, by highlighting the non-compliance of state parties through other mechanisms, like the UN treaty bodies or through other political organs, like the UN Human Rights Council. Failure to implement these decisions is a blatant disregard of human rights values and obligations. It can also be highlighted as an ongoing failure of a state to promote, protect, respect and fulfil its obligations under the African Charter, as well as other binding international human rights instruments.

The state is the primary duty bearer for human rights protection and promotion; failure to implement the decisions of international judicial bodies can therefore be construed as a failure to protect the human rights of individuals. Arguably, these failures could thus be taken by individuals and CSOs before national court systems who are able and willing to hear them. Raising and setting the standards for implementation of decisions of international human rights bodies to the level of a non-derogatory obligation would certainly be an overdue turning point for human rights enforcement.

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6 Addressing Cote d'Ivoire's Statelessness Problem: Utilizing Multiple Tools to Support Implementation of Judgments

Alpha Sesay and Amon Dongo

In 2015, the African Commission on Human and Peoples' Rights (ACHPR) issued its decision in *People v. Cote d'Ivoire*. This case, which concerns statelessness and the right to citizenship for descendants of historic migrants in Cote d'Ivoire, is a good example of how strategic advocacy that is coordinated with local actors can ensure significant implementation of regional human rights decisions. Such advocacy establishes roles for a broad range of actors: the litigants, the state, the ACHPR, Cote d'Ivoire's own national human rights commission and domestic civil society groups working together in coalition. As a result, the Commission's decision has made a significant contribution towards the country's efforts to address its statelessness problem. This can be attributed to several factors, including critical changes in the political environment in the country post-2010, the specificity of some of the relief ordered by the ACHPR, and the significant and robust advocacy undertaken by the litigants and a local civil society coalition to ensure state compliance. Beyond addressing Cote d'Ivoire's statelessness problem, implementing this decision is also crucial to strengthening regional human rights bodies like the ACHPR.

Brief Background

After gaining its independence from colonial rule in 1960, Côte d'Ivoire pursued, under the leadership of then President Felix Houphouët-Boigny, a policy of broad ethnic tolerance and it welcomed the plantation-worker immigrants from neighboring countries. Following Houphouët-Boigny's death in 1993, however, new citizenship policies were introduced by his successor, former President Henri Konan Bedie, based on the ill-defined and exclusionary concept of "Ivoirité." Individuals from the north of Côte d'Ivoire, people known as "dioulas" -- a term applied to predominantly Muslim groups of various ethnicities -- were the ones primarily affected with their citizenship questioned or their right of access to citizenship obstructed. In addition to having their legal citizenship jeopardized, individuals suffered discrimination based on their names, their accents, or their physical appearance and manner of dress, if these somehow indicated "Northern

origin.” According to the nationality code (of 1961, subsequently modified in 1972), even those who had previously been citizens became “foreigners” if they did not have one parent who was born in Côte d'Ivoire (or on the territory that became Côte d'Ivoire after independence). A law passed in 1998 (Loi 98-750 du 23/12/1998, relating to rural land) also set out to prohibit “foreigners” from owning land, voting, or running for public office.

In light of the lack of any national-level remedy to this pervasive, structural discrimination, in 2006, the Open Society Justice Initiative (OSJI) filed a case before the ACHPR on behalf of the affected groups in Cote d’Ivoire. The complaint argued that these Ivoirian policies and practices constituted discrimination, violated the right to citizenship and freedom of movement, and denied people the rights to family and development guaranteed in the African Charter on Human and Peoples’ Rights. Specifically, the Justice Initiative argued that the manner in which one acquired nationality in Côte d’Ivoire was so vague that it was impossible to apply in a consistent and non-discriminatory fashion and, if not corrected, would continue to permit wide-scale discrimination.

In 2015, after almost a decade, the Commission issued a [landmark decision](#), making critically important findings about the right to nationality that were hitherto not explicit in the African Charter. The decision noted that Côte d’Ivoire’s discrimination against “dioulas” is not reflective of the ethnic and cultural diversity that contributed to the formation of the state of Côte d’Ivoire at independence, and that a nationality law that was applied discriminatorily to this group was not only dangerous but failed to appreciate the formation of the country itself. The Commission ordered Cote d’Ivoire to amend its constitution and bring its nationality code in conformity with the African Charter and the [statelessness conventions](#), and put in place – through legislative and administrative means – a simplified declaration procedure that would enable the recognition of Ivoirian nationality to all those affected. The Commission further ordered the state to: (1) improve its birth registration system and ensure that it be administered efficiently and free of discrimination, (2) provide fair and independent courts to hear nationality cases, and (3) introduce sanctions for public officers that discriminatorily or without cause deny access to legal identity documents.

“People v. Cote d’Ivoire, which concerns statelessness and the right to citizenship, is a good example of how strategic advocacy that is coordinated with local actors can ensure significant implementation of regional human rights decisions.”

Implementation and Impact

After the ACHPR spoke, OSJI, together with *Le Mouvement Ivoirien des Droits Humains* (MIDH), began working on legal and administrative reforms to Cote d’Ivoire’s practices on citizenship that would bring them in in line with the

Commission’s decision. We also sought to inform affected communities about the decision and the issues therein, mobilized a civil society coalition that would support the implementation of the decision, and undertook broader advocacy on issues around statelessness in the country. Several key factors were responsible for the progress that has been made to date.

Transition in Political Environment

Notably, in this case, the ACHPR’s judicial decision dovetailed with a changing political environment in Côte d’Ivoire. When the decision was first issued, the government had already introduced a series of reforms and amendments to expand the acquisition of nationality, ratified the Statelessness Conventions, and supported a Protocol to the African Charter on Human and Peoples’ Rights on the Right to a Nationality in Africa. The country had also spearheaded a regional discussion on nationality and statelessness by serving as host to the Ministerial Conference on Statelessness in ECOWAS in 2015. These reforms were made possible mainly because President Alassane Ouattara -- who had assumed office in 2010 – was himself a victim of this divisive law as it had barred him from running for the country’s highest political office. Having previously served as the country’s Prime Minister, it is believed that the nationality law was enacted, in part, to target Ouattara and bar him from running for office after rumors surfaced that his father had been born in neighboring Burkina Faso. He was eventually allowed to run for office, however, and his presidency ushered in much needed reforms for the country’s citizenship law. This change in political environment also provided an opportunity for constructive engagement with the government once the ACHPR issued its 2015 decision.

The ACHPR acknowledged these reforms in its decision; however, it noted that they had not yet addressed the problems identified in the original communication, nor addressed the root causes of people without a nationality. Indeed, at the time of the Commission’s decision, an estimated 700,000 people remained stateless in Cote d’Ivoire, approximately 300,000 of whom were “foundlings,” or children of unknown parentage. To address these gaps – and to ensure that the Commission’s decision would be complied with – the Justice Initiative, together with partners, developed a robust advocacy strategy to support implementation of the Commission’s decision.

Role of Civil Society

Mobilizing local civil society was important in many respects. The coalition known as Civil Society against Statelessness (CICA) was set up in March 2016 with the support of OSJI and the UNHCR office in Abidjan. It serves as the

“The government has since engaged Civil Society against Statelessness as an official partner for implementation of the national action plan. A local civil society constituency ... was also in a better position to provide credible feedback on implementation to the ACHPR.”

umbrella organization for individual NGOs and today brings together around 30 leading human rights NGOs in the country. Its mandate is to coordinate interventions on statelessness, interface with the government, and lead strategic advocacy around statelessness in Cote d'Ivoire. CICA holds quarterly coordination meetings involving NGOs, UNHCR, government and certain technical and financial partners. In addition to promoting domestic literacy on statelessness and the ACHPR decision, CICA was therefore in a strong position to support strategic advocacy at national and international level and ensured better coordination of initiatives and pooling of efforts in the fight against statelessness in Côte d'Ivoire.

With the appointment of a government focal point on statelessness within the country's justice ministry, the coalition also ensured better coordination and collaboration with government. When the government pursued efforts to develop and eventually validate a national action plan on eradicating statelessness, for instance, civil society had a seat at the table as a result of the coalition. The government has since engaged CICA as an official partner for implementation of the national action plan. A local civil society constituency like CICA and its members was also in a better position to provide credible feedback on implementation to the ACHPR. For this reason, when Cote d'Ivoire's human rights report was due for review by the ACHPR in 2016, a shadow report and feedback from local civil society proved to be a valuable support to commissioners as they engaged with Ivorian state representatives around the case.

Coordinated Advocacy and the ACHPR's Role

In many cases, ensuring state implementation of regional human rights decisions requires proactive efforts and engagements by the litigants/complainants. It also requires engagement at both national and regional levels to be coordinated. In addition to working with the defendant-state, litigants must always engage the ACHPR and honor their reporting obligations under the Commission's rules of procedure. To that end, within 180 days of the Commission's decision, the Justice Initiative made a submission to the ACHPR opining on what the Ivorian government had (and had not done) to implement the decision. Unlike many other cases, the Ivorian government provided a detailed response to that submission, which then became the basis of a roundtable discussion during the Commission's ordinary session in April 2016. That roundtable event brought together representatives from the Commission, the Ivorian government, civil society, the national human rights commission and the Justice Initiative to discuss what needed to be done to implement the decision.

The role of the Commission, as its rules make clear, is also crucial to supporting state compliance with its decisions. To that end, in addition to engaging government at the national level, it is important to note that litigants and civil society were in a position to provide information to the ACHPR and urge it on the measures it needed to undertake in order to support implementation. During the Commission's promotional visit to Cote d'Ivoire in 2016, for instance, commissioners met with civil society groups, gathered information, and raised issues relation to the decision in meetings with government officials. On that basis it was important that, during the Commission's 2016 session, commissioners could then seek answers from the government delegation on what needed to be done to ensure compliance with the decision. A coordinated feedback loop between national level-advocacy and regionally focused advocacy was therefore critical.

Constructive Dialogue among Stakeholders

Constructive dialogue among various stakeholders is crucial to ensuring compliance. In this case, such dialogue brought various actors including the government, the ACHPR, affected communities, litigants and civil society to discuss the importance of the decision, the challenges the country faced, and opportunities for ensuring implementation. During the April 2016 roundtable dialogue, stakeholders were able to hold a very honest discussion on how to work together to ensure implementation of the decision. Dialogues like this can be rare but are important to foster collaboration among the parties and, as noted, have involvement from the ACHPR itself. That regional-level dialogue was later replicated at the national level when the country's national human rights commission hosted a daylong conference to discuss compliance with the ACHPR decision. The conference provided another opportunity for the human rights commission, government officials and agencies, international organizations, victims, and civil society to discuss implementation of the decision. This was important as it not only provided a forum for local actors to discuss implementation of the decision, but also underscored the crucial role for national human rights commissions in monitoring compliance and in working with various actors (including the government's own focal point on statelessness) to help play a coordinating role for implementation.

Five years after the Commission's decision, it is noteworthy that Cote d'Ivoire has undertaken significant reforms to address its statelessness problem. These include:

“Implementing new laws and administrative reforms will require continued work by local civil society, engagement and monitoring by the national human rights commission, ongoing coordination with international partners.”

1. Conducting a referendum and amending its constitution to eliminate its citizenship discrimination provisions (articles 35 and 65), as recommended by the ACHPR.
2. Becoming a party to the 1954 UN Convention on Stateless Persons as well as the 1961 UN Convention on the Reduction of Statelessness and ratifying the African Charter on the Rights and Welfare of the Child, which contains provisions relating to children’s right to nationality.
3. Adopting the Abidjan Declaration, which contains ambitious commitments to address and eradicate statelessness in West Africa, such as ensuring that every child acquires a nationality at birth and that all unaccompanied children (“foundlings”) are considered nationals of the state in which they are found. As required by the Abidjan Declaration, the state began working in 2016 with civil society organizations to develop, by 2024, a “National Action Plan for the Eradication of Statelessness.”
4. Finally, in November 2018, Cote d'Ivoire adopted two new laws to prevent statelessness. The first was the Civil Status law, meant to reform the process of obtaining birth registration documents. With this new law, the once cumbersome process of obtaining birth registration, which excluded thousands of people from the system, has been simplified and decentralized. The second was the Special Law, which restored identity for those who have been without any form of documentation and therefore at risk of statelessness.

The implementation of these two laws – as well as the process of renewing national identity cards – began in early 2020. Civil society input, as part of its implementation advocacy, has been crucial to government’s efforts to institute these reforms. Cote d’Ivoire now has a dedicated local civil society coalition that has built expertise on the issue of statelessness in Africa, has remained committed to ensuring that the government implements the reforms it has put in place, and is able to share its expertise with counterparts in other African countries. For instance, CICA has now become an active player in broader efforts to see the African Union adopt a “Protocol to the African Charter on the Right to Nationality in Africa.” But working with civil society to support implementation of a decision is not enough. Efforts should also be made to build the capacity of civil society, in order to focused on constituency building and to ensure the sustainability of the gains made.

All of this is a good example of how advocacy not only supports implementation of judgments or ensures legal and administrative reforms, but also works towards other goals in the process – creating a constituency of engaged actors, building

skills locally to continue the body of work around the subject matter of the litigation.

Still, significant gaps remain. Many people in Cote d'Ivoire continue to lack documentation, are stateless, or remain at risk of being stateless. Implementing new laws and administrative reforms will require continued work by local civil society, engagement and monitoring by the national human rights commission, ongoing coordination with international partners, and continued commitment from successive Ivorian governments. And, as noted, ongoing engagement by the ACHPR is crucial to ensuring state compliance with its decision as well. While the Commission has had some limited engagement with the government on the need to implement its decision, such engagement has been driven mainly by civil society and litigants. It is important, then, that the Commission uses the provisions of its own rules relating to implementation, such as appointing a rapporteur for specific communications, providing information in its activity report to the African Union on the status of implementation, and requiring information from states on what they have done to ensure implementation of decisions. It is therefore critical for the Commission to engage the Ivorian government on the status of implementation of its decision, especially to identify the gaps that remain at the national level.

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7 Litigating Torture in Central Asia: Lessons Learned from Kyrgyzstan and Kazakhstan¹

Masha Lisitsyna and Anastasiya Miller

Even in countries with limited respect for the rule of law, the decision of a UN treaty body can make a difference. Such is the case in Kazakhstan and Kyrgyzstan, where NGOs, lawyers, survivors of torture and the families of those who died in custody have used creative legal strategies to obtain reparations based on UN treaty bodies' decisions in individual cases. In this post, we share the journey to seek justice for Alexander Gerasimov, a torture survivor from Kazakhstan who won the first ever lawsuit in Central Asia for compensation based on a decision of UN Committee Against Torture (UNCAT), and the stories of several families of victims of police killings in Kyrgyzstan.

Kyrgyzstan and Kazakhstan have vibrant civil societies, but it is not easy to seek accountability for the abuses of law enforcement. Similar to other countries in Central Asia, both lack judicial independence and are not within the jurisdiction of the European Court of Human Rights. UN treaty bodies effectively remain the only international avenue for individual complaints. NGOs in both countries have engaged in multi-year advocacy and domestic litigation to make UN committees' decisions matter domestically. These include Youth Human Rights Group (today the Legal Prosperity Foundation, which Masha co-founded and led from 1995-2007) and the Kazakhstan International Bureau on Human Rights - KIBHR (where Anastasiya led strategic litigation practice from 2006-2018). In 2004, the Open Society Justice Initiative (OSJI) joined forces with the local NGO coalitions to support their work. Together, lawyers filed complaints on behalf of survivors of torture and the families of victims to the UN Human Rights Committee (UNHRC) and to UNCAT, and were active in efforts to force the governments to implement the decisions of those bodies.

Kazakhstan: The Case of Alexander Gerasimov

Our client, [Alexander Gerasimov](#), was the first plaintiff in Kazakhstan to ask a local court for reparations based on a UN committee decision. In March 2007, Gerasimov was then a 38-year old construction worker who went to the local

¹ Article available in Russia [here](#)

police station in Kostanay (Northern Kazakhstan) to ask about his arrested stepson. Instead of giving him answers, the police arbitrarily detained and tortured Gerasimov in an attempt to get a confession of murder, threatening him with sexual violence, tying his hands to the floor, and suffocating him. After 24 hours, they released him without charge. Gerasimov spent two weeks in the hospital. Local authorities argued that his injuries were not sufficiently serious for them to investigate the case.

In 2010, OSJI and KIBHR filed a complaint on his behalf to UNCAT. After the committee communicated Gerasimov's complaint to the government, the local police department reopened a criminal case against its officers but it brought no results, only re-traumatization for our client. In 2012, the Committee concluded that Kazakhstan had failed to comply with a number of obligations under the UN Convention against Torture. The committee urged Kazakhstan to conduct a proper investigation to hold those responsible for Gerasimov's torture accountable, to take effective measures to ensure that he and his family were protected from intimidation, and to provide him with adequate reparation for the suffering inflicted, including compensation and rehabilitation, and to prevent similar violations in the future.

The government did not provide Gerasimov with any reparations, and there was no law about implementing UN committees' decisions that we could rely on. Despite the low likelihood of success, together with Gerasimov we decided to turn to the domestic courts. We developed our arguments based on existing legislation and focused on compensation as it was a "known territory" for judges. Gerasimov, represented by Anastasiya and co-counsel Snezhanna Kim, filed a civil complaint against the police on the basis of civil and civil procedure codes. It was important to require the police, as an institution, responsible for torture to at least pay compensation. Based on our previous negative experience, we did not ask for the criminal case to be reopened.

Compensation, in addition to being inadequate in amount, does not constitute a holistic reparation. But in bringing a case that had never before been considered by the country's judiciary, without clear existing legal procedure, against powerful state actors, we felt that we had to be realistic about what we were asking judges to do.

We argued that UNCAT had established that the torture took place and that the investigation was not effective, and asked the court to order compensation. Because public attention is an important aspect of strategic litigation, Gerasimov and the legal team gave interviews and journalists observed the court hearings. A

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psychologist provided support to Gerasimov before and throughout the legal proceedings. We also submitted as evidence a report by a specialized psychologist on the trauma caused by torture based on international documentation standards found in the [Istanbul Protocol](#). In November 2013, Gerasimov won in the Kosntanai city court. The following year, the appeals court and the Supreme Court both denied the Ministry of Interior request to overturn the decision.

The decision of the city court – as affirmed by the higher courts – included most of our arguments. Chief amongst them was that international treaties ratified by Kazakhstan have priority over national legislation and that decisions of the UN committees are binding. Articles 26-27 of the [Vienna Convention on the Law of Treaties](#) provide that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith,” and “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” [Kazakhstan’s law on international treaties](#) has similar provisions. According to the national legislation, the Ministry of Foreign Affairs monitors implementation of international treaties but, in fact, it never replied to the 2012 UNCAT decision nor took any action to afford reparations to Gerasimov. The courts, on the other hand, cited the decision and granted an equivalent of 13,000 USD compensation for moral damages from torture and arbitrary detention.

Because Kazakhstan does not have a system of legal precedent, subsequent decisions from the same court could be different. For instance, we referred to the Gerasimov decision in the next case on behalf of [Rasim Bayramov](#) and received a similar ruling, though with significantly lower compensation. In other cases, however, the courts disputed the fact of torture, despite the UNCAT finding otherwise, and refused to grant any reparations. The fact that Gerasimov himself was not charged with any crime likely helped the Kosntanai city judge to decide in his favor, though that should hardly be relevant for awarding reparations to a torture survivor.

“I wish my father were here to see that the justice exists,” Gerasimov said after winning his case. His father, a retired police officer, had died five years prior. It was his father who had submitted on his son’s behalf the first complaint about torture to the local authorities when Alexander was still in the hospital; he told him to never give up. The mere fact that the UN and the judiciary “ratified” his story was as important to Gerasimov as receiving the compensation.

“The role and tenacity of the complainant(s) is crucial. For many survivors, having their ‘day in court’ matters. Judges in civil and administrative cases, unlike criminal, might be more sensitive to the suffering of the victims of abuse by state agents.”

Kyrgyzstan: The Cases of Tashkenbai Moidunov and Azimjan Askarov

We followed a similar litigation approach as the one pursued in Kazakhstan but, in light of Kyrgyz legislation, we sought compensation from the Ministry of Finance as the agency responsible for the state budget. This was an important tactical decision as it allowed the cases to be heard in the capital instead of local courts, where judges could be intimidated by the police involved in torture.

In October 2004, 46-year old [Tashkenbai Moidunov](#) was arrested in southern Kyrgyzstan after an argument on the street with his wife; a few hours after being detained in police custody, he was found dead. Despite this atrocity, only one police officer received a short, suspended sentence for negligence in Moidunov's death. Almost 13 years later, however, domestic courts in Kyrgyzstan, relying on legal arguments similar to those we raised in Gerasimov's case, recognized the obligation of the government to implement a UNHRC decision requiring that compensation be paid to Moidunov's family.

To achieve this result, we organized a psychological evaluation of the mother and sister of Moidunov to help calculate the requested amount of compensation. Sadly, Moidunov's mother died before his case could be decided but his sister continued on. In January 2017, the Supreme Court of Kyrgyzstan denied an appeal from the Ministry of Finance, making the decision final. It was an extremely low amount of compensation (\$3,000 USD), hardly commensurate with the gravity of the violation. But the family saw it as at least some measure of justice.

In other cases – like those of [Turdubek Akmatov](#) and [Rahmanberdi Enazarov](#) – no perpetrators were convicted, but courts still supported our claims for reparation. In both cases, the government argued that a criminal conviction of policemen was necessary for considering a request for compensation, but the court supported our argument that, [“it is necessary to follow the Views of the Human Rights Committee that indicate that persons, those rights were violated, have the right to recover moral damages regardless of any related criminal proceedings.”](#) To support these arguments, Sardor Abdukholilov, counsel for Akmatov and Enazarov both, asked the Polish Helsinki Foundation for Human Rights and the Kazakhstan NGO Coalition against Torture to submit amicus briefs, which is unusual in Kyrgyzstan. The amici supported the obligation to implement the decisions of the UN HRC citing, among others, the *Gerasimov* case and a 2018 [decision](#) by the Supreme Court of Spain on the binding nature of a decision issued by the UN Committee on the Elimination of all Forms of Discrimination against Women.

NGOs also tirelessly advocated for legislation in support of the implementation of UN treaty bodies' decisions in Kyrgyzstan. The biggest breakthrough came during constitutional reforms that were ushered in after a change of power, following popular protests in 2005 and 2010. The Constitutional Assemblies developing proposals for amendments at the time included civil society members, who were seeking a constitutional level of protection for the right of individuals to appeal to international bodies and a state obligation to implement those decisions. After 2010, Article 41(2) of the Constitution stated that where such international human rights bodies recognize a violation of rights and freedoms, the government must take measures for their restoration and/or redress.

In addition, human rights lawyers successfully proposed an amendment related to “new circumstances” in criminal cases in the country’s criminal procedure code. Now, according to Article 442.4(3), “a sentence or a judicial decision may be revoked and the procedure may be resumed in cases ordered by a recognized international body based on the international treaties to which the Kyrgyz Republic is a party.” In 2017, the government then adopted a regulation to guide the interaction between state entities and the UN treaty bodies. While far from perfect, this regulation created a procedural ground to rely on for implementation litigation, as it stated that the amount of compensation should be determined by a court.

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Finally, in the midst of ethnic violence in southern Kyrgyzstan in 2010, a well-known human rights defender – [Azimjan Askarov](#) – was arrested after a police officer was allegedly killed during an outburst of violence close to Askarov’s town. Askarov was tortured and blamed for the violence and sentenced to [life imprisonment after an unfair trial](#). During each trial hearing, judges and lawyers involved in the case were threatened and intimidated. In 2016, the UN HRC issued a [decision](#) ordering a rare remedy: that Askarov’s conviction be quashed and that he be immediately released. But during the 2017 constitutional referendum, among other regressive steps, the Kyrgyz government used Askarov’s case to justify repealing the Article 41(2) constitutional guarantee that civil society had fought for. And although Askarov’s case was reopened in accordance with the country’s amended criminal procedure code, a [report](#) from the International Commission of Jurists concluded that the court’s review was superficial and simply confirmed the earlier verdict. Unfortunately, in such “political” cases, facts or arguments do not matter unless the political situation changes. Askarov died in prison in July 2020, allegedly after contracting COVID-19.

Some Lessons Learned

The main lesson from our combined forty years of working in this area? UN treaty bodies alone will never get their decisions implemented. The committees can forward to the states the follow-up submissions of applicants, contact country missions in Geneva, and issue follow-up reports. But without the efforts of the applicants themselves and lawyers and NGOs representing them - and vigorous advocacy at the domestic level – the chances of compliance are slim.

Moreover, these victories – even partial victories – come with a clear message: one needs to be prepared to support the applicants, the litigation and the advocacy for the long haul. Our experience is reasonably positive, as was the 2018 decision of Spain’s Supreme Court. However, the risk of losing is always there. Not all of our cases in Kazakhstan were successful and domestic courts in Ukraine and Sri Lanka have also issued adverse decisions.

Reflecting on our experience of litigating these kinds of cases, we would also offer the following reflections to other practitioners and advocates working on strategic human rights litigation:

- No intervention by UN treaty bodies replaces persistent advocacy by civil society at the domestic level.
- The selection of initial cases is critical and political context matters. In most of these cases, you are going against “the system” and trying the unknown. A judge might be confused and concerned about the possible repercussions to them of these kinds of arguments. In “political” cases, they might be even more careful or anxious.
- Use creative legal arguments and be strategic in your requests. Even if the judiciary is not independent, take courts seriously and make clear arguments, reference earlier cases, and bring evidence and amici submissions. In the Central Asian context, we made a strategic decision to keep our cases in the “known territory” of compensation.
- The role and tenacity of the complainant(s) is crucial. For many survivors, having their “day in court” matters. Judges in civil and administrative cases, unlike criminal, might be more sensitive to the suffering of the victims of abuse by state agents. These proceedings might be particularly important for survivors to attend.
- Consider including several family members as plaintiffs. Family support for the plaintiffs in seeking justice helps to get through protracted proceedings, as

does psychological support and ensuring swift reaction to any intimidation or acts of reprisal.

- In some countries, there will be an additional challenge that local legislation requires a criminal conviction of perpetrators before reparations can be afforded. Proactively argue in your lawsuit that such a requirement is itself a violation of a state's international obligations.

States rarely want to accept accountability for rights violations and advocates need to start somewhere, despite the odds. While leveraging international obligations requires advocates to commit to long litigation timelines, the growing use of the UN individual complaints mechanisms offers survivors and families of victims an opportunity to seek justice. In some cases, it can also force states to finally face facts and implement the change that is required of them.

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8 Some Justice out of Repression and Reprisals: On the Plight of Human Rights Defenders in Azerbaijan

Philip Leach

Introduction

Sticking your neck out for human rights in Azerbaijan has proven to be especially perilous in recent years. Lawyers, activists, journalists and others have been prosecuted, denied their liberty, banned from leaving the country, convicted and imprisoned for considerable periods. Civil society organisations have been prevented from receiving external funding and have been closed down. The legal profession, in particular, has been a recent target, with lawyers being suspended and then disbarred, some for having the temerity to tell the media about their clients' ill-treatment in Azerbaijani prisons.

In response, the global human rights apparatus has been employed and engaged to full effect, with cases being despatched to the European Court of Human Rights, rights-monitoring bodies within the Council of Europe, and UN bodies vigorously weighing in, and international civil society actively taking up the gauntlet. The former chair of the Azerbaijani NGO, Human Rights Club, Rasul Jafarov, has run the full gamut of such experiences - from being prosecuted and imprisoned in 2014 to being pardoned, released, compensated. He also had his conviction quashed in April 2020 after having won his case in Strasbourg and with pressure being exerted on his behalf by the Committee of Ministers.

This contribution to the HRLIP/OSJI series seeks to review and assess the extent to which there has been successful implementation of the cases brought on behalf of the Azerbaijani human rights defenders, and to consider what factors were instrumental in achieving progress for this beleaguered group.

Targeting human rights defenders and the Strasbourg response

A former reporter at the Institute for Reporters' Freedom and Safety, Rasul Jafarov was the founder of the Human Rights Club and was instrumental in the 'Sing for Democracy' campaign in 2012 (when Azerbaijan hosted the Eurovision Song Contest), as well as the 'Art for Democracy' initiative. The pressure exerted by the Azerbaijani authorities on Jafarov has been sustained over several years. From 2011 onwards, the authorities repeatedly refused to register Human Rights Club, which the European Court, in 2019, [found to be unlawful](#), in breach of

Article 11 of the European Convention, both because of the inadequacies of the state registration law and the failure of the Ministry of Justice to comply with the domestic law. In July and August 2014, Jafarov discovered that he was banned from leaving the country, his bank accounts were frozen and the Human Rights Club's office was searched and documents seized. He was then summoned to the Prosecutor General's Office, where he was charged with illegal entrepreneurship, large-scale tax evasion and abuse of power, and immediately subjected to pre-trial detention. By April 2015, high level embezzlement had been added to the list of charges: he was convicted on all counts and sentenced to six and a half years' imprisonment.

The European Court's judgment in the [Jafarov case](#) (which resulted in his being pardoned and released on the same day) was one of the first in a series of remarkable decisions concerning embattled Azerbaijani human rights defenders, including [Intigam Aliyev](#), [Anar Mammadli](#), investigative journalist [Khadija Ismayilova](#), [Leyla Yunusova](#) and [Arif Yunusov](#) and board members of the [civic movement, NIDA](#), as well as opposition politician [Ilgar Mammadov](#). In essence, the Court found that all of their prosecutions amounted to an abuse of the criminal law. Not only was there no reasonable suspicion for arresting and detaining them, and an absence of any serious judicial oversight, but also even more fundamentally – and exceptionally – the Court went further to find that in prosecuting them, the aim of the Azerbaijani authorities had specifically been to silence and punish them - for their activities in the fields of human rights, social rights and electoral monitoring, and to stop any future such work. More than that, as a result the Court found an unprecedented series of violations of Article 18 of the Convention, because of the authorities' ulterior motives. They were restricting the applicants' rights for purposes other than those prescribed by the Convention.

How to implement Article 18 judgments?

The Court's novel recent utilisation of [Article 18](#) to signal states' bad faith in bringing about political prosecutions – hitherto rarely applied and little understood – has been the subject of much commentary (see, for example, [here](#), [here](#), [here](#) and [here](#)), but the focus of this post is to consider the implications of such findings for the restitution of the applicants' rights and the implementation of these judgments. How would these decisions impact upon the human rights defenders' extant criminal convictions and, in any event, how would President Ilham Aliyev's authoritarian regime respond to this level of scrutiny and accountability at the international level?

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The European Human Rights Advocacy Centre ([EHRAC](#)) represents a number of these applicants, including Jafarov and Aliyev. Given the heavily detrimental impact on Azerbaijani civil society, and human rights defenders in particular, these were identified as strategic priorities for EHRAC. So, too for the European Implementation Network ([EIN](#)), which, having adopted a strategy of prioritising the shrinking of civil society space across Europe, highlighted this group of cases at its periodic briefings for diplomats in Strasbourg.

The Article 18 misuse of criminal law verdicts in these cases were linked to findings that the applicants' pre-trial detention had been unjustified, in breach of Article 5 (Right to Liberty and Security) of the Convention. In other words, the very decision to bring criminal prosecutions was the target, not the fairness of the ultimate trials as such (these are the subject of separate litigation). Accordingly, the key question implementation raised here was whether or not the remedy required by these judgments was the quashing of the applicants' convictions. At EHRAC we took the view that this should indeed happen: a breach of Article 18, together with Article 5, meant that the criminal proceedings as a whole were irreparably tainted.

Although there was no clear precedent for this, in a smattering of previous Article 18 cases, against [Moldova](#) and [Ukraine](#), the decisions had led to convictions being quashed. In August 2016 the Azerbaijani Supreme Court rejected Jafarov's application for his case to be re-opened. Our response was to commission an [expert opinion](#) from Julian Knowles QC who concluded that the Court's findings in the *Jafarov* case made it clear that the whole criminal case against him was politically motivated, and accordingly that his conviction was based on procedural errors or shortcomings 'of such gravity that a serious doubt is cast on the legitimacy of his conviction.'

The Committee of Ministers upping the ante

The evolving stance of the Committee of Ministers, the body that supervises the implementation of European Court decisions, towards these cases over time is clearly detectable. The initial focus of its decisions (between 2014-2016) was understandably on getting the politician Ilgar Mammadov released from custody in Baku. When they also started to consider Jafarov's case in 2017, the Committee at first limited itself to requesting information about his application to re-open his case. By June 2019, however, the Committee was [requesting information](#) from the Azerbaijani authorities more pointedly as to 'measures which could be taken to erase the consequences of the impugned criminal proceedings', and by September their position had clarified and hardened,

[stipulating](#) that the Court’s findings ‘make it clear that Azerbaijan is required rapidly to eliminate all the remaining negative consequences of the criminal charges brought against each of the applicants, principally by ensuring that the convictions are quashed and deleted from their criminal records’. By December 2019, this position had been [extended](#) to ‘the elimination of all other consequences of the criminal charges.... including by fully restoring [the applicants’] civil and political rights in time for the next parliamentary elections’. The Committee’s March 2020 [Interim Resolution](#) deeply regretted that ‘the applicants’ convictions still stand and they still suffer the negative consequences thereof, including the inability fully to resume their professional and political activities’.

A month later – in April 2020 – the Azerbaijani Supreme Court finally quashed the convictions of [Mammadov](#) and [Jafarov](#), as well as awarding them compensation and confirming a separate right to claim pecuniary damages (although the other applicants still await such an outcome). How did such a significant turnaround, albeit long-awaited, come about?

Facilitating implementation

There were a number of factors at play in these cases, which as Sandoval, Leach and Murray have [argued](#), come together to facilitate successful implementation. Firstly, there was the Court’s application of Article 46 in order to facilitate the implementation of judgments, by proposing specific steps to be taken by the authorities. The use of Article 46 in this way provides a stronger degree of judicialization of the execution process, which undoubtedly strengthened the Committee’s resolve over time. These developments arose on the back of the concerted pressure exerted in relation to the Mammadov case – given the grave situation of an opposition politician unlawfully imprisoned by a European regime – and the unique, successful use of [infringement proceedings](#) (under Article 46(4) of the Convention) in his case, which led to his release in August 2018. But beyond that, the Court used a series of judgments to ratchet up the pressure over time and the Court and the Committee worked in tandem – reflecting what Donald and Speck [have suggested](#) amounts to an evolving and pragmatic remedial approach by the Court, which seeks also to assist the Committee in its execution role.

Two years after the first *Mammadov* judgment, the *Jafarov* case was the first in which the Court explicitly found that an activist (as opposed to a politician) had been targeted because of their human rights work. Another two years on, in the *Aliyev* judgment, in 2018, drawing on five previous similar cases, the Court

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underlined that they were not ‘isolated incidents’, but reflected ‘a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law.’ This led the Court to apply Article 46 and require the Azerbaijani authorities to take steps to protect this group, by ceasing the arrests, detention and prosecutions. For Mr Aliyev himself, implementation meant restoring his professional activities, with measures that should be ‘feasible, timely, adequate and sufficient to ensure the maximum possible reparation for the violations found by the Court’. Two years further on again, in 2020, the Court found that the cases of *Khadija Ismayilova* and *Leyla Yunusova and Arif Yunusov* were also part of this pattern, taking into account the increasingly harsh and restrictive laws regulating NGO registration and activities.

The development of the Committee’s position, as outlined above, tracked the Court’s escalations. By grouping similar cases together, the Committee sought to reveal and underline the systemic nature of the problem. This was underscored by the Council of Europe’s Commissioner for Human Rights, who [intervened](#) as a third party in four of the Azerbaijani cases, to identify a ‘clear pattern of repression in Azerbaijan against those expressing dissent or criticism of the authorities’. One especially significant moment was the judgment in the third *Mammadov* case in May 2019, confirming that Azerbaijan had not complied with the first *Mammadov* judgment, thereby vindicating the Committee’s 2017 decision to invoke Article 46(4) and instigate infringement proceedings. A month later, in June 2019, the Committee took note of the Court’s finding in that decision that the original finding of a violation of Article 18, together with Article 5, ‘vitiating any action resulting from the imposition of the charges’ (§ 189). The Committee also continually relied on the Court’s finding of a pattern in these cases, which it again underlined in its March 2020 [Interim Resolution](#). This is the multi-layered system of European implementation in action, as [identified](#) by Speck.

As Donald and Speck have [elaborated](#), the lack of specificity of Court judgments may create uncertainty as to what is required by way of implementation. Here, questions about the effects of an Article 18 judgment, coupled with stipulations to ‘restore the professional activities’ of applicants like Aliyev may have created a degree of ambiguity. Yet, to its credit, the Committee stepped in decisively to clarify that implementation required the quashing of convictions and the end to all other detrimental consequences.

A second influential element has been the very active engagement of civil society. In addition to multiple submissions made by Ilgar Mammadov himself, EHRAC

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made eight submissions on individual measures as regards Jafarov (in the period from 2016-2020) and six relating to Aliyev (2019-2020). Furthermore, there were five submissions concerning general measures, lodged by seven different NGOs, both national and international. Equally instrumental were the EIN briefings on these cases (nine [EIN briefings](#) were held in Strasbourg, or online, between 2016 and 2020) which helped to ensure that government delegates were continually appraised of the latest developments, and remained fully aware of the very detrimental consequences for the applicants—frozen bank accounts, travel bans, the inability to stand for election—of their extant convictions. By involving the applicants themselves in some of these briefings (for example, through video presentations), they also addressed the lack of ‘victim engagement’, which Donald, Long and Speck have [noted](#) is a deficiency of the European system.

Conclusion

It has been a long and difficult road for Azerbaijani human rights defenders. After years of severe, state-sanctioned repression, the 2020 acquittals of Ilgar Mammadov and Rasul Jafarov were highly significant, and represented vindication of the efforts of the many actors involved. Given the absence of space for advocacy at the national level, the interventions of the international human rights mechanisms have been decisive here, aided and supported by intensive civil society efforts.

Much remains to be done, however, before these cases can be said to have been fully implemented. First and foremost, the convictions of the other human rights defenders need to be quashed, but these cases also raise more far-reaching questions as to what steps need to be taken in order for the applicants’ professional and political activities to be restored and for there to be a genuinely conducive environment for the defence of human rights in Azerbaijan. It has been argued that this will require the reform of [legislation and practice controlling the regulation of NGOs](#), and NGO funding, as well as fundamental [judicial reform](#). There is no doubt that considerable tenacity has been required, by everyone concerned, to keep these issues in the spotlight in recent years, but there is still more to do.

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9 The Power of Persistence: How NGOs can Ensure that Judgments Lead to Justice

Dr. Alice Donald

On 17 May 2012, around 30 lesbian, gay, bisexual and transgender (LGBT) activists gathered peacefully in the Georgian capital, Tbilisi, to mark the International Day against Homophobia and Transphobia, or IDAHOT. The organisers had warned the police about violence by groups linked to the Orthodox Church—warnings that materialised when around 100 counter-demonstrators encircled the IDAHOT marchers, grabbed and tore up their banners, and punched and kicked those at the front. As the counter-demonstrators shouted that LGBT people were “perverts” and “sinners” who should be “burnt to death”, police refused to intervene and proceeded to arrest and detain several of the peaceful marchers.

Three years later, in the ground-breaking judgment of *Identoba and Others v Georgia*, the European Court of Human Rights found a violation not only of the right to freedom of peaceful assembly under Article 11 of the European Convention on Human Rights, but also, for the first time in a case of homophobic and transphobic hate crime, a violation of Article 3 (prohibition of inhuman and degrading treatment), in conjunction with Article 14 (prohibition of discrimination). This was due to the authorities’ failure to fulfil their positive obligation both to protect the IDAHOT marchers and launch effective investigations to identify the perpetrators and unmask their discriminatory motives. Aside from monetary compensation, the Court did not identify any specific remedies. Instead, this task fell to the Committee of Ministers (CM), the intergovernmental arm of the Council of Europe, which monitors the implementation of the Court’s judgments.

Five years on from the judgment, *Identoba* (along with a similar group of cases concerning the authorities’ failure to prevent inhuman and degrading violence against Jehovah’s Witnesses; see [here](#), [here](#) and [here](#)) is still being monitored by the CM. This supervision is taking place under its intensive or ‘enhanced’ procedure, reflecting the complexity of the steps needed to tackle the roots of the violations in systemic discrimination. On three occasions, in [2018](#), [2019](#) and [2020](#), the Georgian government claimed that it had done enough to guarantee

“Rule 9 submissions in *Identoba* have shone a spotlight on evidence that has been glaringly absent from Georgian government submissions. Take, for example, evidence of whether the authorities have guaranteed non-repetition of the violation.”

non-repetition of the violations and called for the cases to be closed. Each time, the CM disagreed.

Identoba paints a bleak picture of Georgia’s persistent failure to prevent or adequately investigate homophobic and transphobic hate crimes (unlike some LGBT rights cases against other states, which have yielded more tangible progress). Yet, by another measure, *Identoba* is a success story—success, that is, on the part of NGOs and Georgia’s national human rights institution (NHRI), known as the Public Defender. It is their submissions to the CM—11 in total since 2016—that have helped to ensure that both *Identoba* and the cases concerning religiously-motivated hate crimes remain under the CM’s scrutiny until genuine progress emerges at the national level.

The rest of this post focuses on *Identoba*, and explores the impact of submissions made by NGOs and the Public Defender under Rule 9.2 of the CM’s rules. The so-called ‘Rule 9’ submissions in this case exemplify the potential for NGOs and NHRIs to supplement or correct the ‘official’ record of events and to propose both qualitative and quantitative benchmarks by which the CM can assess implementation—a particularly difficult task where violations are rooted in prejudicial attitudes or other systemic causes.

What, then, are the features of the submissions in *Identoba* that provide lessons for other NGOs or NHRIs that are considering engaging with the CM’s monitoring process? Below, I highlight the importance of alliance-building, persistence, and strategy with respect to timing. I also discuss the different ways in which Rule 9 submissions in *Identoba* have supplemented or corrected the official record in a way that the CM could not have achieved alone.

Alliance-building

The seven submissions that focus solely or partly on *Identoba* were made either by the Public Defender or, singly or jointly, by four Georgian NGOs: the Georgian Young Lawyers’ Association (GYLA); the Human Rights Education and Monitoring Centre (EMC); *Identoba* (one of the litigants in the case); and the Women’s Initiatives Support Group (WISG). In addition, two international NGOs, Amnesty International and ILGA-Europe, joined the NGO submissions (Amnesty once and ILGA-Europe four times). The European Implementation Network (EIN), which supports civil society advocacy the implementation of judgments, highlights the importance of such alliance building both in their domestic advocacy and in exerting impact at the CM level. When NGOs combine,

it argues, their message is amplified, resources and expertise are shared, and the evidence-gathering net is widened (see [here](#), pp. 30-32).

The respective submissions certainly show evidence of coordination; for example, all have united around the demand for the creation of a specialised police unit to deal with racist, homophobic and transphobic hate crime in Georgia—a move first proposed by the [European Commission against Racism and Intolerance](#) (a Council of Europe body) in 2016. This measure was endorsed by the CM in [2019](#) and again in its most recent examination of the case in [September 2020](#). Thus far, the Georgian government has rejected the idea (see [here](#), paras 42-45); yet it remains to be seen whether the combined pressure of the CM and domestic advocacy will prompt a rethink on this matter by the time of the next examination by the CM in December 2021.

Timing and persistence

The timing of submissions is critically important, too. As [EIN argues](#), in order to have maximum impact, Rule 9 submissions should be made at the right time to influence the quarterly CM meeting at which a case is listed for consideration. In practice, this means making a submission several weeks ahead, so that it can inform the documentation (known as ‘notes on the agenda’) relied upon by government delegates who will scrutinise the state’s action, or inaction, in the particular case. In the case of *Identoba*, EIN has also [briefed](#) members of the CM.

The submissions made by NGOs and the Public Defender in *Identoba* succeeded in this objective: the CM has debated the implementation of the case at four separate meetings and each time, the notes on the agenda show the visible imprint of evidence and arguments submitted under Rule 9 (in [2016](#), [2018](#), [2019](#) and [2020](#))—including the recommendation for a specialised hate crimes unit noted above. The Georgian government has a ‘right of reply’ to Rule 9 submissions, but has not exercised it in this case, suggesting that it has been unable to refute the evidence presented by NGOs and the Public Defender. By contrast, the Rule 9 submissions *do* address directly points made in the government submissions, enabling the CM to hone in on inconsistencies and omissions in the official account.

The sheer persistence of those making Rule 9 submissions in this case must also be applauded. The organisations making submissions have not missed a single opportunity to inform and influence the CM’s deliberations and have doggedly tracked different types of data that evince the state’s failure to implement the judgment fully to date.

“Statistical data provides a ‘hard-edged’ measure of implementation. The onus on government agencies to provide reliable, disaggregated data for criminal proceedings ... linked to sexual orientation and gender identity has been a primary focus for advocacy by NGOs.”

Setting the record straight

The Rule 9 submissions in *Identoba* have shone a spotlight on evidence that has been glaringly absent from Georgian government submissions. Take, for example, evidence of whether the authorities have guaranteed non-repetition of the violation in respect of how IDAHOT or other LGBT events have been marked since 2012—an obvious measure of implementation. The Rule 9 submissions demonstrate that only twice has IDAHOT been celebrated in relative safety in Tbilisi (in 2015 and 2017)—and even then, only briefly and behind police cordons that rendered the gathering invisible to the public, thus defeating its purpose. In 2013, IDAHOT marchers suffered egregious violence, as 20,000 counter demonstrators armed with iron batons attacked them with the apparent collusion of the police, leading to a [fresh complaint](#) to the Court. In every other year, the march has been cancelled due to vigilante threats and the failure of the police to guarantee protection (see [here](#), paras 32-39; [here](#), paras 17-19; and [here](#), paras 28-33; note that in 2020, events were online due to COVID-19). Not only that, but Tbilisi Pride in June 2019 and an LGBT film showing in November 2019 were also violently disrupted by far right groups—events which are not referred to in any government submission.

In some instances, Rule 9 submissions have generated and interpreted evidence that corrects or refutes the official account—and that would have been difficult, if not impossible, for the CM itself to ascertain. Three such examples are presented below:

Statistical Data

Statistical data provides a ‘hard-edged’ measure of implementation. The onus on government agencies to provide reliable, disaggregated data for criminal proceedings initiated on grounds linked to sexual orientation and gender identity has been a primary focus for advocacy by NGOs and the Public Defender—and progress has been made in this regard. In its [latest submission](#) (para 35), the Georgian government presents disaggregated figures for prosecutions initiated for hate crimes in 2019: there were 187 in total (four times more than in 2016), of which 32 were homophobic and/or transphobic. While welcoming this apparent progress, a [joint submission](#) by EMC, WISG and ILGA-Europe (para 13) notes that many victims of homophobic or transphobic hate crimes do not report to the authorities for fear of forcible ‘outing’, re-victimisation and ill-treatment by the police. Original research conducted by three NGOs found 257 unreported cases between 2016 and 2020. While these figures cannot be verified, the NGOs venture—and the government does not refute—that the true number of such hate crimes is ‘far higher than the official statistics.’

“Funding bodies should support work by civil society to promote implementation as well as litigation. For their part, monitoring bodies ... should do more to incentivise and facilitate civil society engagement.”

Tracking domestic case law

It is not only statistics that are potentially misleading, but also the interpretation of domestic court decisions. Again, NGO evidence acts as a corrective to the official account. For example, a Supreme Court decision presented in the government’s [2018 submission](#) (para 45) as illustrating the effectiveness of hate crime investigations—and [cited approvingly](#) by the CM—was not all that it seemed. The relevant NGO submission explains that in this case—in which a transgender woman was murdered and set alight by an assailant with a history of transphobia—the Prosecutor’s Office had failed to identify a transphobic motive. This meant that the Supreme Court was unable to use the ‘aggravated circumstances’ provision of Article 53 of the Georgian Criminal Code, adopted in 2012, which would have permitted the imposition of a higher sentence (see [here](#), para 20). NGOs have consistently deplored the under-use of Article 53, which was not applied in any case concerning homophobia or transphobia until 2016. This case exemplifies the difficulty for supranational bodies of monitoring changes in case law, especially where, as in Georgia, decisions are not always published. In such instances, NGO evidence can ensure that isolated domestic rulings are not misrepresented as a trend and that changes to bring domestic case law into conformity with Convention requirements are truly embedded, especially in the absence of a unifying opinion by an apex court.

Assessing measures to combat discriminatory attitudes

Identoba epitomises the difficulty of assessing guarantees of non-repetition which require changes to discriminatory attitudes and behaviour through measures such as training of law enforcement officers, judges and prosecutors. Here, both qualitative and quantitative indicators are needed. For example, the government presented an impressive figure of 2,300 prosecutors who were trained in 2017 on discrimination and investigation of hate crimes (see [here](#), para 49). This development was welcomed by NGOs; yet, organisations involved in delivering such training raised doubts as to its efficacy, since its content was largely perfunctory (see [here](#), paras 32-35). These limitations suggest that supranational bodies like the CM should insist that governments provide not only statistics for numbers trained, but also qualitative data about curricula and measures of impact.

Lessons for the future—and for other human rights systems

The implementation of *Identoba* is a story half told. There is a year to go until the CM will turn its spotlight back on the case. So far, it is a story of disappointing progress by the Georgian government, whose submissions to the CM have been partial and sometimes inaccurate. In this respect, *Identoba* is not an isolated

example. Research undertaken for the Human Rights Law Implementation Project shows that supranational bodies may often need to detect distortion or incompleteness in the official narrative: the authorities may portray a violation as an isolated event; downplay the need for a holistic response to prevent recurrence; exaggerate the scope or effects of reform; or conceal negative side effects. Accordingly, there is an onus on supranational bodies like the CM, given their limited fact-finding capacity, to elicit information from diverse sources, including NGOs and NHRIs—and, as the CM has in the case of *Identoba*, to give it visible, probative value, since NGOs are unlikely to invest resources in the monitoring process if their submissions are disregarded.

It is in this sense that *Identoba* reveals success, even amid the slow progress made by the Georgian authorities. Persistent and meticulous submission of evidence by NGOs and the Public Defender, and coordination in their recommendations, have demonstrably influenced the CM's negotiation with the Georgian authorities and helped to set the benchmarks for what successful implementation would look like. This includes the establishment of a specialised police hate crimes unit as, in effect, a prerequisite for closure of the case. Thus, NGOs have successfully used Strasbourg as a channel to exert influence.

Rule 9 submissions are made in only a small minority of cases in Europe: 133 in 2019, out of more than 5,000 cases pending before the CM (see [here](#), p. 70). The HRLIP research suggests that NGO submissions are starting to increase from a low base in the inter-American human rights system, but feature little in the African system. Across these three regions, NGOs—including those engaged in litigation—cite the same reasons for their limited involvement in the monitoring of implementation: lack of resources and lack of knowledge as to *how* to engage with processes at the supranational level.

This suggests that funding bodies should support work by civil society to promote implementation as well as litigation. For their part, monitoring bodies (the CM in Europe, and human rights Courts and Commissions in the Americas and Africa) should do more to incentivise and facilitate civil society engagement. The CM has commendably created a website providing guidance to that end. It has every reason to do so. As *Identoba* demonstrates, NGOs and NHRIs can be the 'eyes and ears' on the ground that the CM lacks, and preserve the possibility that justice will be done for victims—and potential victims—of grievous human rights abuses.

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10 How Can NGOs Push for Implementation—and What’s Stopping Them? A Conversation with NGO Leaders in the Americas, Africa and Europe

Anne-Katrin Speck with Viviana Krsticevic, Gaye Sowe, and George Stafford

How can non-government organisations promote the implementation of human rights judgments and decisions? And why should they devote their scarce resources to doing so? In July 2020, **Anne-Katrin Speck**, a member of the HRLIP research team and now a doctoral researcher at the Human Rights Centre of Ghent University, met online to discuss these questions with **Viviana Krsticevic**, Executive Director of the [Center for Justice and International Law](#) (CEJIL); **Gaye Sowe**, Executive Director of the [Institute for Human Rights and Development in Africa](#) (IHRDA); and **George Stafford**, Director of the [European Implementation Network](#) (EIN). This is an edited transcript of their conversation.

AKS: I am delighted to be joined by the executive directors of three leading human rights NGOs in the Americas, Africa and Europe. The organisations you represent all actively promote the effective implementation of judgments and decisions of the human rights courts and commissions in your respective regions. Let us cut right to the chase. In the face of major challenges impacting human rights work everywhere—a global pandemic, the rise of populism and authoritarianism, and attempts to undermine the rule of law even in supposedly established democracies—does implementation of individual rulings still matter?

George: Absolutely, yes. In Europe, the judgments of the European Court of Human Rights do not just mean justice for one person. They have to involve implementation across the whole society, resolving the underlying human rights issue for everyone. So if a journalist is killed, not only does the family of the victim get compensation and a proper investigation, but also it is expected that the state will adopt reforms to ensure other journalists will not be targeted. That is the level of reform that comes out of proper implementation. If we had perfect implementation of ECtHR judgments, we would have really significant and helpful solutions to all the types of problems that you referred to.

AKS: Is this equally true from an Inter-American perspective?

Viviana: I would say it is even *more* true in the Americas. The European system is arguably less ambitious in terms of resolving structural and systemic problems, which can be explained by the way in which it has developed historically. For example, it is more restrained as regards the reparations it prescribes. I think the Inter-American system has moved in a more promising direction in this respect. The Inter-American Court has only issued around 250 rulings in its 40-year history, but each of those judgments contains carefully crafted reparation orders aimed at engaging different institutional actors domestically in trying to address the underlying issues. The Inter-American Court has changed the history of many countries. Can you say the same of the European system?

George: The theory of the European system as it stands today, although it might not have been conceived that way originally, is that it should produce results not only for individuals but also for the rest of society. But you are right, Viviana, that in the judgments themselves, the European Court is reluctant to specify structural remedies, and rarely does so. But when it comes to the implementation phase before the Committee of Ministers, there is still an obligation on states to put forward their own plan to remedy the underlying shortcomings. Let me give you an example of a case won by a Moldovan LGBTI rights group, who were saying that their protests were being unjustifiably and unreasonably banned by the state authorities. After a long period of implementation (with various bumps in the road), for the last two years running there have been LGBTI rights protests in the capital of Moldova—and that is the result of structural reforms, not only justice for the individuals.

AKS: Gaye, from an African perspective, why should NGOs be concerned about the implementation of individual rulings?

Gaye: It is true that regional courts and commissions can help push for change, maybe especially so in the African human rights system. Africa is unique in the sense that the African Charter allows the Court and Commission to draw from other jurisdictions. This means that nothing prevents me, when litigating a case, from referring to a ground-breaking ruling from the Inter-American or European system. At IHRDA, we rely a lot on the jurisprudence of the Inter-American system, especially when it comes to requesting specific reparations. One example is a [case](#) we brought against Mali, which resulted in a [landmark ruling](#) on women's and children's rights. When the system is that flexible, you can make good use of it to push for change. We see that we are often better off at the

“How can non-government organisations promote the implementation of human rights judgments and decisions? And why should they devote their scarce resources to doing so?”

regional level, especially bearing in mind how conservative some of the national judiciaries are in our region.

AKS: You all seem to agree that effective implementation of human rights judgments is a cause worth working for, since it can lead to tangible improvements in people's lives. What makes civil society organisations particularly well placed to push for implementation?

Gaye: In most instances, we litigate the cases ourselves, so we understand the issues and context really well. After putting together evidence, presenting a case, arguing it, and winning it, we are better placed than anybody else to push for implementation. Also, there is pressure to be put on governments at the local level. This is something that civil society organisations can work on.

Viviana: And they can do so through various means, combining advocacy, mobilisation, press work, creating institutions and alliances, and other advocacy with key actors.

George: I agree, and I would say there are three concrete ways in which civil society can make a huge contribution to implementation. The first is setting the agenda for reform: through submissions in the implementation process, civil society actors can say what really needs to be done to resolve the issue...

AKS: ... which is especially important in the European system, where the Court rarely specifies remedies, as we heard before.

George: Exactly. A lot of the time governments are very minimalist in the solutions they put forward. NGOs are really key to providing input at that stage because they can say that “this reform is not going to be effective without this additional component, and here is the evidence to show why.”

The second way for civil society to promote implementation is pushing reforms forward. Viviana already alluded to the sheer number of judgments that are produced by the ECtHR. In 2019 alone, the Court found [violations in 790 cases](#). The obligation this puts on states to produce reforms is not matched by many states' commitment or infrastructure. A piece of paper from Strasbourg does not create change on its own. You need people at the local level to get involved, and NGOs are well placed to do that because they have the information and networks, and they are invested in the result.

The third is preventing early case closure. We frequently see governments submit that they have remedied a problem and that the case should be closed—only for the problems to crop up again. Obviously, it is a disastrous result for the whole strategic litigation process if supervision of implementation is ended before

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George Stafford

"When a state makes a submission regarding the implementation of a case, an NGO seeking to provide information will not usually be aware of what the state has said. This is why we are suggesting that the Commission and Court organise implementation hearings."

Gaye Sowe

anything really happens. So it is important to have civil society input into the implementation monitoring process to prevent this.

Viviana: One more aspect I want to underline is that, in all three systems, civil society organisations play a role in litigating for institutional change. We litigate and do advocacy not only to get results for the victim, but to change the supranational system itself. We help *create* these systems. The Europeans have pushed for more transparency and accountability from the Committee of Ministers, for example. That is important to recognise in our own strategies, because it makes you see the process of compliance and impact in more dynamic ways. It also helps explain the evolution of our respective systems.

AKS: I am keen to get your take on what might be hampering greater civil society involvement in the implementation of human rights judgments.

Gaye: I would mention two obstacles in relation to the African system. The first is a lack of transparency. When a state makes a submission regarding the implementation of a case, an NGO seeking to provide information will not usually be aware of what the state has said. This is why we are suggesting that the Commission and Court organise implementation hearings. The African Committee of Experts on the Rights and Welfare of the Child already does this. Such face-to-face exchanges could help because you get evidence on what that state has – or has not – done.

The second impediment is that, at the African level, we do not have a network like EIN that works exclusively on implementation. IHRDA and a few other NGOs, such as REDRESS, do what they can to make sure rulings from the African Commission and Court lead to real changes on the ground. Implementation also comes up here and there in discussions of the Litigators' Group, a collective of civil society organisations that take cases to the African Commission. So there are some efforts on implementation at the regional level, but they are rather disjointed.

George: From a European perspective, too, I would say there are two main barriers. The first is a lack of awareness of how implementation works. But I think the awareness issue is diminishing, partly as a result of the wider recognition by all people involved in litigation that implementation is fundamental. The second issue is funding. We surveyed the organisations of our network and the number one reason they said they were not working more on implementation was that there aren't any funding mechanisms specifically designed for this issue. To my mind, there needs to be more support for

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Viviana Krsticevic

implementation advocacy because civil society groups are really keen to work on it.

Viviana: To me, the issues of awareness and funding are interlinked. I appreciate that we see more and more academics and NGOs publish [pieces](#) which elucidate that implementation takes time and is an iterative process. They explain the question of feedback loops and how changes in the landscape at the national and international level over time can be a powerful contribution to more structural changes. This understanding of the process must be fostered among funders, who are often impatient because they do not fully understand that it takes a lot of time and money to implement a case. If they give you money to do something, you can make a contribution in the development of the law, but in order for that to change the patterns and entrenched power dynamics domestically, you need sustained engagement over time. That is sometimes missed in the narrative on compliance and impact. Fatigue is also a big problem, with many cases going on for years.

George: I agree with that. And because people can get fatigued, it is so important that NGOs work on cases that they have not litigated themselves, and that they pick up the baton when those who brought the case get fatigued. We see that in the Czech Republic now, where [NGOs are working](#) on a [case](#) concerning ethnic discrimination in schools that they did not originally bring. Some judgments concern really endemic and difficult issues that simply will not get solved in five or ten years. That is why this idea that NGOs should work only on their own cases is problematic.

AKS: *If you could speak directly to an NGO wishing to get involved in advocacy for implementation for the first time, what advice would you give them?*

George: I would say that you should think about implementation at the national and international level. Those who get involved in implementation are often lawyers who tend to focus on the international monitoring mechanism and ways to influence the supervisory body’s assessment. That is obviously a fundamental part of the process, but the work at the national level is key as well. It is here where I would like to see more progress. Implementation must ultimately happen at the national level. So form alliances, have a good strategy to influence those in power, and foster your media relationships to generate good coverage.

Viviana: First, make implementation your first consideration. Think about implementation as you are strategizing, choosing issues to take up, and identifying your allies. Second, be mindful that, as things develop, you may need to adapt your strategy. Also, be mindful of the changes in the international and local landscape. That can be make or break in understanding the possibilities and

limitations that a case presents and finding points of leverage. Finally, be patient, hopeful, and part of a community. That will sustain you when you're losing hope. It will allow you to go for the long-haul.

Gaye: I agree with Viviana that that implementation should be factored into a case from the very beginning. NGOs engaging in strategic litigation at the regional level need to understand that implementation helps instill confidence in the human rights system. When you speak to a person who has had their rights violated, the first question they ask will be: "If I spend years litigating, what will I get out of it at the end of the day?" If you do not have evidence to convince them that after you get a decision there will be implementation, it will be extremely hard to get buy-in from that person. So, it is important to have a plan from the time of inception. This also means you should have realistic expectations as to what you can achieve. I think that those of us who litigate are beginning to realise that it is not always about getting the most progressive decisions if it does not have any meaningful impact on people's daily lives. Of course, we want judgments implemented in a certain way, but depending on the context, some solutions are not realistic or workable. If you are overly ambitious, it will look like you have failed before you even started. So, plan ahead and be realistic.

11 A New Court for Human Rights Cases: The Court of Justice of the European Union

Kersty McCourt and Márta Pardavi

Introduction

The European Court of Human Rights, based in Strasbourg, has traditionally been a preferred venue for civil society organisations seeking redress for human rights violations. By contrast, the European Union (EU) was more focused on the internal market and regulation of the four EU freedoms of capital, goods, labour and services. Even after the Charter of Fundamental Rights (Charter) was adopted in 2007, and become a core pillar of EU law, limited cases of rights violations came before the Court of Justice of the European Union (CJEU), the EU's judicial branch (based in Luxembourg). However, whilst currently underutilised, EU law has the potential to be a powerful tool to protect and defend rights. It encompasses detailed legislation in areas such as non-discrimination, personal data, and migration and the Charter covers a broad range of rights surpassing, in some cases, the rights protected in the European Convention on Human Rights.

Signalling possible new avenues for rights protection, 2020 saw a number of significant cases before the CJEU that explicitly set out to protect fundamental rights. These cases have set precedents – for the first time the court provided detailed guidance on the right to freedom of association, academic freedom, and the independence of the judiciary – and open the door to a more proactive approach to rights litigation. However, for rights to be restored on the ground, CJEU judgments need to be implemented. The CJEU has one significant advantage over other regional courts in this regard: it can impose hefty fines reaching figures of hundreds of thousands of euros per day. But it takes time to reach this stage and it is possible that the CJEU may be beleaguered by some of the same issues relating to implementation as other international and regional tribunals.

This post seeks to unpack a new area of rights protection. It looks at the formal systems in place to ensure implementation of CJEU judgments and poses a series of questions to help promote effective implementation. By focusing attention on these new rights-based cases while they are still limited in number we aim to open a discussion, learn from the experiences of other tribunals, and encourage good practice. Our contribution will focus primarily on the case of the *European*

Commission v Hungary (C-78/18) on the transparency of associations, as well as *European Commission v Hungary* (C-66/18) on higher education.

Deteriorating rights in Hungary

In 2010, following an election victory that resulted in a constitutional supermajority in the Hungarian parliament, Viktor Orbán's government began to systematically undermine checks and balances by weakening, or occupying, institutions that exercise control over the executive branch. This steady erosion of Hungary's constitutional democracy started with organs designed to counterbalance executive power, continued by starving, buying up or closing down independent media outlets, and by tailoring the electoral system to suit the ruling party coalition. It then reached civil society, academia and cultural institutions and while, in some ways, the Hungarian judiciary resisted this dismantling, recent changes will have a significant impact on the independence of domestic courts. In ten years, an 'illiberal state' was built in the middle of Europe, leading the V-Dem Institute to conclude that "Hungary is no longer a democracy, leaving the EU with its first non-democratic Member State."

Independent civil society organisations working on human rights, accountability and refugee protection become the target of extensive smear campaigns and vigorous attacks from the government and its allied media outlets. After years of depicting NGOs as illegitimate political actors serving foreign interests in June 2017, the Hungarian Parliament adopted a law on the transparency of foreign-funded organisations ("NGO law").

The NGO law mirrors Russia's foreign agent law (a 2012 law requiring non-profit organisations that receive foreign support to declare themselves as "foreign agents") and in the preamble states that foreign funding may "endanger the political, economic interests of the country as well as the operation of statutory institutions without undue influence." It requires that any foundation or association receiving foreign funding (including funding from natural persons, charities and the European Commission) over EUR 25,000 per year must register as a "foreign-funded organisation." Failure to comply is at first sanctioned with a fine, but ultimately results in the NGO's dissolution through a simplified termination procedure.

This new legislation did not serve the otherwise legitimate aim of safeguarding transparency, as existing laws already contained adequate provisions. Instead, it blacklists NGOs through the use of negative labels and connotations, violates the privacy of donors, and has a strong chilling effect on NGOs and their freedom of

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association and expression. In protest, ten prominent Hungarian NGOs publicly announced their refusal to register or label themselves as a “foreign-funded organisation,: both for reasons of principle but also to use the opportunity to challenge the legislation in a Hungarian court. A further 23 NGOs turned to the Hungarian Constitutional Court, while a group of 14 NGOs applied to the European Court of Human Rights to challenge the law. The ECtHR found the application inadmissible as it considered that the domestic remedy in the form of a constitutional complaint had yet to be exhausted. The Constitutional Court decided to wait for the CJEU judgment after the EU also took action against Hungary but, to date, its proceedings remain suspended.

The response of the EU

The EU had a range of tools at its disposal to address the deteriorating situation in Hungary and other member states. One possibility was a more political approach, ultimately leading to what is known as the Article 7 process and the suspension of a member states’ voting rights. The Commission opted not to take this approach but another avenue, which can be pursued concurrently, is litigation, which targets individual pieces of legislation. The litigation process starts with what is known as “infringement proceedings” initiated by the EU against a member state and then a period of dialogue between the parties. If there is no satisfactory resolution during this pre-litigation phase, the Commission can then refer the case to the CJEU. As the “guardian of the treaties” the Commission is in the driving seat. Unfortunately, there is no direct access to the CJEU for victims or other affected parties.

The Commission sent a letter of formal notice – the first step in the infringement process – to the Hungarian government on 13 July 2017 with a two-month deadline to respond. In the press release the Commission concluded that the Hungarian law did not comply with EU law as it interfered with the right to freedom of association, introduced unjustified restrictions on the free movement of capital, and raised concerns regarding the protection of personal data. The government failed to address the Commission’s concerns, leading to the issuance of a “reasoned opinion” from the EU in October and, then, a referral to the CJEU on 7 December 2017. It took until 18 June 2020 for the court to hand down a judgment.

The court ruled the Hungarian legislation unlawful, affirming for the first time that the right to freedom of association is protected by EU law and “constitutes one of the essential bases of a democratic and pluralist society.” The judgment set out the substantive elements of freedom of association, including the right to

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access funding, and in doing so provided judicial guidance that will be crucial for the future development of EU law and to defend civil society.

Following a similar path and timeframe was another case against Hungary addressing the law on higher education institutions, in particular the Central European University (CEU). The CEU is a private university, accredited in both the United States and Hungary, which had become the country's most prestigious graduate school with a diverse student body and faculty from all over the world. The school was founded by the Budapest-born financier George Soros, whom Orbán has vilified as a nefarious intruder in Hungary's affairs. Soros intended the university to "become a prototype of an open society," one that could counter the kind of illiberal democracy Orbán seeks. In April 2017, however, the Hungarian Parliament passed a law setting conditions that threatened to render CEU's continued presence in the country illegal. Despite mass street protests in Budapest and an international campaign to save CEU, the Hungarian government was unwilling to resolve the terms of the university's continued operations in Hungary.

In a judgment on 6 October 2020, the CJEU again found Hungary to be in violation of EU law, including provisions of the Charter relating to academic freedom and the freedom to conduct business. This judgment will also be an important source of inspiration for future litigation, affirming the interconnection between the EU's market freedoms and fundamental rights and providing guidance on areas of law that had previously been under-explored by the CJEU.

Despite advocacy from civil society, the CJEU failed to adopt an expedited procedure or to impose interim measures on the Hungarian government. In the intervening three-and-a-half years between the adoption of the laws targeting NGOs and CEU and the court's judgments, civil society continued to be attacked and many organisations felt unable to continue their operations in Hungary. The Open Society Foundations, for example, moved its Budapest office to Berlin and the CEU moved its campus to Vienna. The slow pace of court proceedings meant that, by the time the judgments were handed down, rights had already been irreversibly violated. This is deeply regrettable: the intricate ecosystem of independent civil society and academia that the Hungarian government sought to destroy was precious and should have been protected, much like the natural environment. Indeed, in 2017, when the Polish government sought to cut down the UNESCO-protected Białowieża Forest, the CJEU ordered interim measures requiring Poland to cease its activities, accompanied by a penalty payment of at least €100 000 per day. A similar approach should have been taken here.

Implementing CJEU judgments

A judgment from the CJEU is immediately binding on member states and needs to be implemented. If, despite the court’s judgment, a member state fails to make changes and continues to violate EU law, the Commission may refer the member state back to the court. The Commission can first issue a “reasoned opinion” on the specific points where the state has failed to comply with the judgment and then ask the court to impose fines. The court will then decide to impose financial penalties, which can either be a lump sum and/or a daily payment based on the gravity of the violations, the period over which EU law has not been applied, and the country’s ability to pay. As in the Polish case, fines can be in the region of €100 000 per day.

NGOs in Hungary and elsewhere in Europe welcomed the CJEU’s judgments and called on the Hungarian government to repeal the NGO Law. In response, Prime Minister Orbán alluded to the influence Soros and “international networks” control over international courts when commenting on the judgment. The minister of justice also stressed that the government would continue to insist on the transparency of NGO funding and find the means necessary to achieve this aim.

Surprisingly, despite the decision of prominent human rights organisations not to register as “foreign funded,” the Hungarian prosecutor’s office has not, to date, opened any investigations. However, a number of NGOs have reported being rejected from EU funding opportunities on the grounds of not having complied with the NGO Law. In September 2020, for instance, the Tempus Public Foundation, established by the Hungarian government to distribute international funds, including Erasmus+ funds, rejected several grant applications from NGOs because they did not comply with the requirement to self-identify as a foreign-funded organisation. Meanwhile the European Commission has sent two letters to the Hungarian government, the latest on 29 October 2020, urging it to inform them of steps taken. After more than six months, in February 2021, the European Commission sent a letter of formal notice to the Hungarian government. This opens a formal dialogue that could lead to the case being referred back to the CJEU.

Questions for effective implementation

The fines that the CJEU is able to impose gives the court greater teeth than many other regional courts who rely on more limited sanctioning authority, goodwill, and diplomatic pressure to ensure the implementation of judgments. But it is no guarantee of success; despite the threat of financial penalties, the Hungarian

“The next months will prove decisive as to whether the Hungarian government will take adequate steps to comply with these judgments and, if it does not, what the Commission and CJEU will do next.”

government remains recalcitrant in its refusal to comply with the court's judgments. Long timelines are an added challenge. As noted, without an expedited procedure or interim measures, it took over three years to reach a judgment and, six months post judgment, the case still has not been referred back to the CJEU for penalties. Meanwhile, the [Commission has asked](#) the Hungarian government to "share draft modifications to the existing law and provide a clear timeline when they would adopt the necessary legal modifications."

All of this raises four key questions both for these two cases and other, future rights-based cases. The first relates to what constitutes implementation of a judgment. In the Hungarian context it should be relatively straightforward, since a piece of legislation was found to be in violation of EU law. So long as the legislation persists the violation remains. Questions may, however, arise if legislation is only partly repealed or adapted in some way. Are such modifications sufficient to ensure compliance? Do they appear to comply but, in practice, will violations persist? In other cases, a legislative solution may be insufficient and closer examination of how implementation works in practice and on the ground will be required.

This leads to the second and third questions on how prescriptive judgments should be and the question of documentation. Experience and research from other tribunals shows that the more precise the direction given in a judgment, the greater the chance of effective implementation (see, for instance, [Murray and Sandoval](#)). The CJEU judges did not specify that the NGO law be repealed, even though this is the obvious conclusion and only solution to remedy the violations.

The questions of implementation in practice then raises the issue of documentation and monitoring. Who assesses whether implementation is effective and how do they measure that? The Commission is well placed to compare legislative amendments but has very limited capacity to carry out monitoring on the ground. If, for example, the Commission needs information on how schools are putting legislation into practice or how the independence of judicial selection is being assured, then it often relies on civil society organisations to provide information, collect, data and present it to the Commission. In some cases (for example on air quality), the Commission is playing a more active monitoring role, but at present, for human rights cases, there is no system in place to contract out this kind of monitoring or provide guidance as to what kind of information is required. Are there cases where a certain level of statistical information is necessary and, if so, how wide a sample is needed? Similarly, what form should witness testimony take and how should the Commission deal with sensitive information?

The final question concerns the role of different actors. In the human rights sector, the Commission generally relies on civil society to provide information about human rights violations on the ground. Apart from the standard complaint procedure – open to any citizen to report a suspected violation of EU law – there is no further formal role for civil society in the infringement process and all documents are confidential. It is therefore difficult for those outside the Commission to access information, understand the stage of proceedings, and know how to provide the most relevant and targeted information. Drawing from the experience of other regional tribunals, the Commission could hold a formal briefing with civil society organisations and the relevant national human rights institution to understand the extent of implementation and associated challenges. Such briefings should allow the Commission to request additional, targeted information to help inform and complement the information provided by the government.

The next months will prove decisive as to whether the Hungarian government will take adequate steps to comply with these judgments and, if it does not, what the Commission and CJEU will do next. More broadly, they will also provide critical lessons for future rights claims brought before the court and how to shape the actions of all actors involved – and affected – to ensure effective and timely implementation.

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12 More than the Sum of our Parts: Reflections on Collective Implementation of Economic, Social and Cultural Rights Decisions

Susie Talbot

The process of implementing economic, social and cultural rights (ESCR) decisions is multifaceted. In addition to seeking redress for individual claimants, litigation and implementation strategies often aim to ensure the same type of violations won't occur for similarly situated communities in the future, as a result of underlying systems, structures, practices or power dynamics. It can also be a significant opportunity – given the captured attention of states and others at such times – to revisit, evolve and even reimagine our economic, social and political systems more broadly.

In this context, working collectively in the human rights field can enable us to achieve far more than would be possible to achieve alone. This post outlines some of the key themes emerging from collaborative experiences with NGOs, social movements, lawyers, academics and allies in connection with ESCR decision implementation, drawing particular insights from the case of *MBD v. Spain*, decided by the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2017. These include shared visioning and early planning, the use of official follow-up procedures, countering resource constraint claims, and the importance of contextualising cases within broader socio-economic and ecological realities. Each should be taken as an invitation for further exploration, tailored to the conditions of specific cases and led by the communities most affected by the relevant human rights issues.

A shared vision and early planning for implementation

It may initially seem somewhat counterintuitive to begin thinking seriously about the implementation stage of a case prior to a court or quasi-judicial body actually handing down its final decision. However, effective implementation is commonly bolstered by a clear vision from the start of litigation as to what exactly those involved hope to achieve, beyond securing formal affirmation that a human rights violation has occurred.

“Effective implementation is commonly bolstered by a clear vision from the start of litigation as to what exactly those involved hope to achieve, beyond securing formal affirmation that a human rights violation has occurred.”

Agreeing on this collective vision can be challenging. It may be possible to link human rights violations to discrete and identifiable state action, such as a discriminatory law or forced eviction, in which case it might then be relatively straightforward for claimants to pinpoint an appropriate remedy to correct the claimed violation. The process is more complex, however, where violations arise as a result of a failure by the state to undertake positive steps to adopt programs, enact legislation, and allocate resources necessary to progressively realise rights and ensure, for example, adequate food, housing, or access to healthcare or education. In outlining a proposed roadmap for the positive measures a state should be expected to take, the concept of ‘reasonableness’ is a useful tool. Used by CESCR, among others, as a standard of assessment in disputes, it can also support claimants to construct persuasive suggestions about potential courses of action for states during the implementation stage. Bruce Porter’s excellent [article](#) on the reasons for including reasonableness in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) is instructive here, as is [CESCR’s 2007 statement on maximum available resources](#), which includes a non-exhaustive list of the factors the Committee takes into account in making this assessment.

A shared vision can then translate into specific remedial requests, making it easier for the respondent state, decision-maker and wider public to understand the exact changes claimants are seeking. ESCR [case law](#) from around the world provides useful examples of the range of potential remedies beyond simply seeking a declaration of violation or financial compensation, such as urgent interim measures, investigations, apologies, restitution, ecological restoration and changes to law, policy or practice, and orders for retention of court supervision. Early clarity about the path forward also gives claimants and their allies time to take preparatory steps, for example, devising an appropriate monitoring strategy or identifying and building relationships with the government officials and departments likely to be involved in implementation.

The process of developing this longer-term vision and complementary remedial strategy is itself an opportunity for mobilising the public and encouraging participatory implementation efforts. In recent years, strategic litigators in the field of human rights and climate change have created accessible websites to explain cases and strengthen support (see examples [here](#)), and have also ‘crowdsourced’ remedy suggestions. For instance, in taking the government to court to establish a legal obligation to reduce greenhouse gas emissions, claimants in *Urgenda Foundation v. the State of the Netherlands* gathered input from 800 Dutch organisations to compile a comprehensive ‘[Climate Solutions Plan](#)’,

offering a range of publicly supported measures to help the government comply with the court's order.

Using and strengthening official follow-up procedures

Official follow-up procedures connected with UN treaty bodies and regional human rights mechanisms provide an excellent opportunity to share relevant information, particularly where this adds to or differs from what the state is reporting. Such processes also encourage collective action, drawing in allies to learn from the case, foster solidarity, and contribute to the implementation process through the provision of particular expertise or comparative material.

For example, in 2017 CESCR adopted its [Working Methods Concerning the Committee's Follow-Up to Views under the OP-ICESCR](#). This outlines the timeline for exchange of information, the Committee's approach to the publication of material, and rules on the participation of civil society. In 2018, a coalition of NGOs and academics from different countries worked together to support effective implementation of *MBD v. Spain*. This case involved the court-ordered eviction of a family from their rented home in Spain, leaving them without alternative housing despite the family's lack of income, vulnerability, and repeated requests for support. (Further information about the case, including outline of the collective implementation activity, relevant documents, and reflections on the use of the follow-up procedure can be found [here](#), as an illustration of how the process works in practice.) In its [collective submission on implementation](#), the coalition offered international and comparative examples of laws, policies and practices from various jurisdictions to suggest ways forward for Spain to implement CESCR's views including, for example, ways to engage meaningfully with tenants at risk of eviction, security of tenure practices following lease expirations and guidance regarding disaggregated data collection, as well as relevant factual information including an overview of the current stock and public spending on social housing in Spain and how this compares to other European states.

Action in specific cases can also benefit from complementary, longer-term dialogue between civil society and decision-makers about official follow-up procedures generally, as these vary across human rights complaints mechanisms in terms of their availability and effectiveness. Such dialogue can deepen an understanding of ongoing challenges and the types of remedial and decision-making approaches that support effective implementation in practice. As an example, this collective civil society [key proposals discussion paper](#) advocates for, among other things, precise and practical orders, guidance for states regarding

“Official follow-up procedures connected with UN treaty bodies and regional human rights mechanisms provide an excellent opportunity to share relevant information, particularly where this adds to or differs from what the state is reporting.”

implementation plans, a participatory approach to follow-up, greater clarity regarding compliance assessments, and adequate resourcing and greater visibility for follow-up mechanisms. This paper was developed on the basis of cross-jurisdictional practice and shared analysis, including discussions with various UN treaty bodies.

Countering resource constraint claims by states

It's not uncommon for states to claim that they lack the resources necessary to comply with the orders made. Claimants need to be able to determine whether this is true or whether the government is simply unwilling or unable to direct resources in alignment with their human rights obligations, particularly as [research](#) indicates that the manageability of the order for the government in terms of resources is one of the key factors a court will consider in issuing an order with any budgetary implication.

Claimants and lawyers can turn to the extensive guidance available on key concepts such as 'progressive realisation' and 'maximum available resources', as interpreted and explained through case law, UN treaty body concluding observations and general comments, UN special procedure reports and academic materials, among other sources. There are also quite a few human rights NGOs with expertise in investigating how governments generate and allocate resources over time and how they determine their macroeconomic policies, as well as the ways in which this happens (such as, who participates in decision-making and how information is exchanged) – see, for example, member organisations of the [economic policy](#) and [monitoring](#) working groups of the global human rights network, ESCR-Net. Incorporating this existing knowledge or seeking the support of these organisations in relation to specific cases – for instance, connected with human rights-budget analysis, participatory budgeting, tax justice, macroeconomic policy analysis and other practices – can help to strengthen arguments to counter anticipated or actual resource challenges.

For example, during the implementation of the *MBD v. Spain*, some of the groups involved in the collective submission contributed recommendations on the progressive realisation of relevant rights within the maximum of available resources, including information on changes to the Spanish housing budget over time and as compared to other public sector expenditures, potential policy alternatives to increase Spain's fiscal space for housing and other social schemes in an equitable manner, and suggestions for potential avenues for altering the ways in which the government generates and allocates resources through its tax

“It’s not uncommon for states to claim that they lack the resources necessary to comply with the orders made. Claimants need to be able to determine whether this is true or whether the government is simply unwilling or unable to direct resources.”

system. Providing this material allowed CESCR to ask more specific questions in its assessment of the state’s proposed implementation plans.

A topic which receives little explicit mention in the area of human rights implementation at present is that of monetary policy (i.e., the control of money supply and use of tools such as interest rates), despite its importance to the issue of resource constraints, as well as to emerging or revitalised ideas such as universal basic income, national job guarantees and the funding of new green deals and other human rights-based social and environmental justice initiatives. While decisions about spending are inherently political, misconceptions about money are often used to continue privileging the interests of corporations and private wealth. Taking time to revisit our understanding of [how money operates in reality](#) (including recognition that, in addition to taxing and borrowing to access revenues, many governments create their own new money to flow into the financial system), which of our common assumptions are actually myths, and which questions are important for advocates and treaty bodies to ask governments in this context may stimulate a reclaiming of participatory decision-making about the creation and use of money in alignment with human rights principles and for the benefit of those most marginalised and vulnerable in society, as well as bolster complementary economic analysis and tax justice objectives.

Contextualising cases within broader socio-economic and ecological realities

Understanding how specific cases connect with the broader ESCR movement encourages a continuous cycle of shared expertise, lived experiences, intersectional analysis, solidarity and collaborative action, as advocates continually reiterate and apply international human rights principles. This process also gives us a greater sense of the entirety of long-held global narratives and practices – such as capitalism, patriarchy, colonialism, resource extraction and debt servicing – and the ways in which these manifest in concrete contexts and impact on human rights. In turn, this facilitates the gathering together of existing and emerging alternatives, as well as joint action to co-create new global narratives and practices.

For example, the collective engagement in the implementation of the CESCR case against Spain was enhanced as a result of a [longer-term cross-jurisdictional exploration into ESCR implementation](#) generally. Similarly, the strategic implementation of ESCR decisions can be strengthened as we view seemingly distinct issues in different localities – for example, mining in Zimbabwe or to the privatisation of healthcare in Brazil – as connected to broader neoliberal economic practices, through [collaborative investigation](#) aimed at both

understanding how the current dominant economic system impacts the enjoyment of human rights (through pervasive practices of extraction, deregulation, privatisation of public services, violence and othering), and nurturing human rights-aligned alternative economic practices.

A final thought regarding a challenge that is increasing in relevance but not yet addressed to a great extent in practice. How can advocates better frame our remedial and connected implementation human rights strategies within ecological contexts and the boundaries of the natural world? The inherent anthropocentric nature of human rights can lead to implementation strategies that address immediate and even structural human rights violations, but may not serve humans or the rest of the living world in the longer term. Examples might include implementation in relation to the construction of social housing without considering sustainable building materials, or in relation to food supplies without prioritising regenerative practices. As we increasingly experience the escalating impacts of the climate and ecological crises, with disproportionate impacts on the most marginalised and vulnerable communities, this is a question we will have to face more explicitly – and indeed collectively – as human rights practitioners.

Susie Talbot is the Founder and Director of the [Anima Mundi Law Initiative](#) and was previously the Legal Director for ESCR-Net – the International Network for Economic, Social and Cultural Rights.

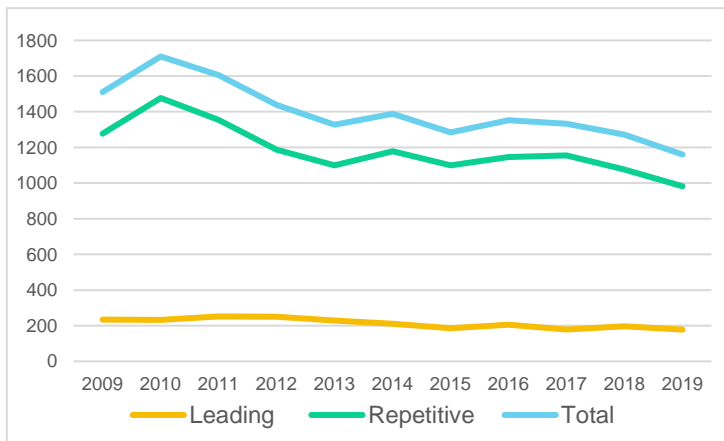
13 Annex

13.1 European Court of Human Rights (ECtHR)

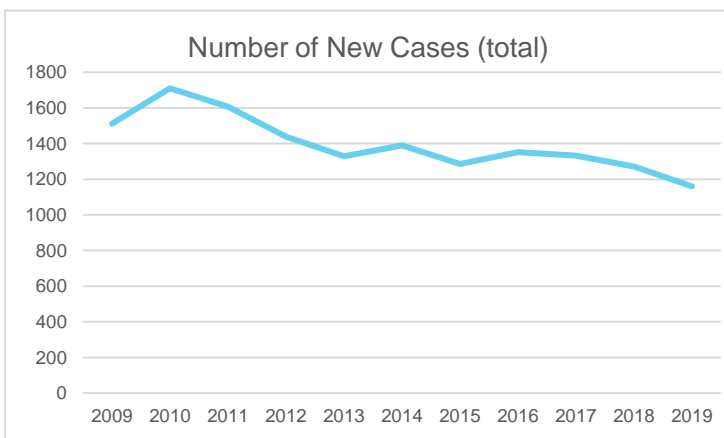
13.1.1 Number of New and Pending Cases

As a general overview, the total number of new and pending cases filed before the ECtHR has declined from 2009 to 2019 (see Tables 1 and 2), while the number of closed cases has increased.

Table 1: New cases

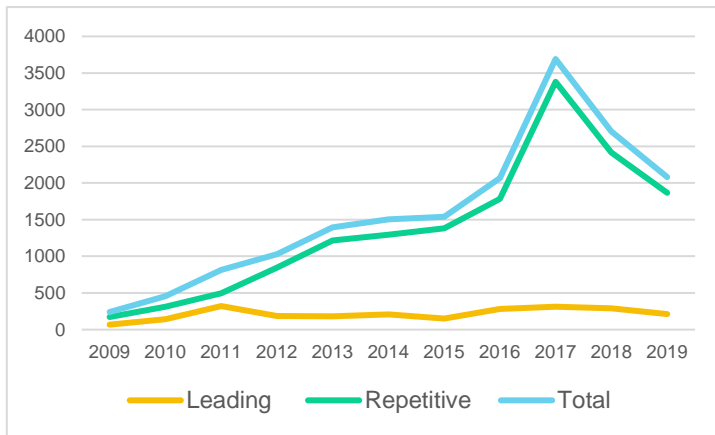


Year	Leading	Repetitive	Total
2009	234	1277	1511
2010	233	1477	1710
2011	252	1354	1606
2012	251	1187	1438
2013	228	1100	1328
2014	211	1178	1389
2015	186	1099	1285
2016	206	1146	1352
2017	179	1154	1333
2018	196	1076	1272
2019	178	982	1160

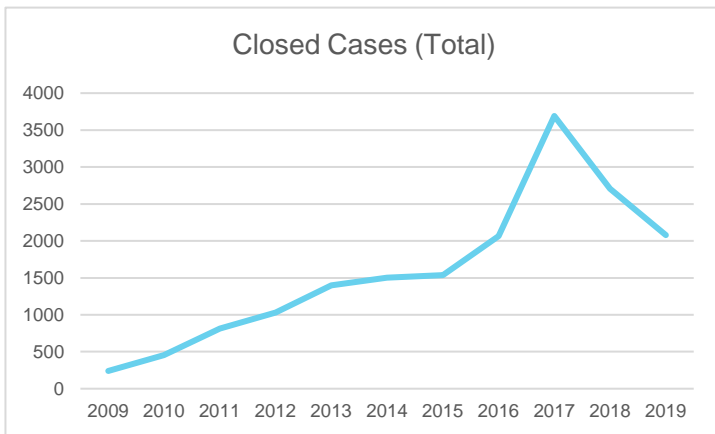


Source: Council of Europe Statistics,
[https://www.coe.int/en/web/execution/statistics#{%2234782408%22:\[\]}\]](https://www.coe.int/en/web/execution/statistics#{%2234782408%22:[]}])

Table 2: Closed cases



Year	Leading	Repetitive	Total
2009	68	172	240
2010	142	313	455
2011	321	494	815
2012	185	844	1029
2013	182	1215	1397
2014	208	1294	1502
2015	153	1384	1537
2016	282	1784	2066
2017	311	3380	3691
2018	289	2416	2705
2019	214	1866	2080

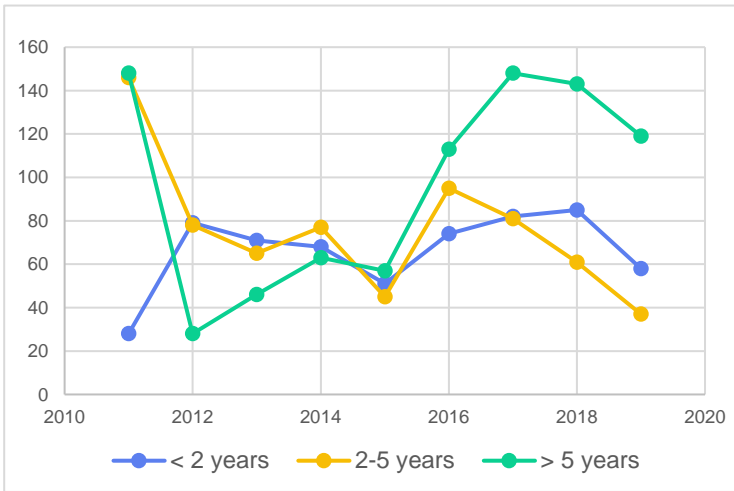


Source: Council of Europe
Statistics,

<https://www.coe.int/en/web/execution/statistics#%7B%2234782408%22%3A%5B%5D%7D>

Data provided by the Department for the Execution of Judgments also suggests that cases are being implemented more quickly, based on how long they remain under the Committee’s review. For example, there is an increase of ~107 percent of “leading” cases closed in less than 2 years (compared to the 2011 numbers). There is also a decline in the number of the leading cases closed in 2-5 years and 5+ years (a decline of ~75 percent and 19.5 percent respectively, again compared to the 2011 numbers).

Table 3: Leading cases closed



Year	< 2 years	2-5 years	> 5 years
2011	28	146	148
2012	79	78	28
2013	71	65	46
2014	68	77	63
2015	51	45	57
2016	74	95	113
2017	82	81	148
2018	85	61	143
2019	58	37	119

Source: Council of Europe, Department for the Execution of Judgements Statistics, [https://www.coe.int/en/web/execution/statistics#%2234782408%22:\[\]](https://www.coe.int/en/web/execution/statistics#%2234782408%22:[])

13.1.2 Compliance and Monitoring

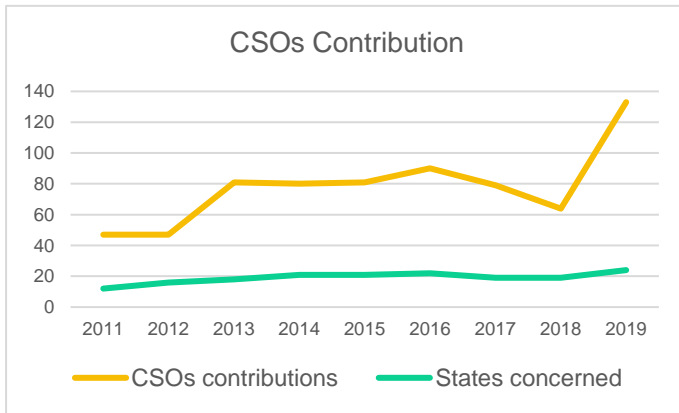
Data suggests an overall increase in the numbers of actions plans and reports submitted by states (see Table 4). In 2019, the number of reminder letters sent by the Department for the Execution of Judgments had increased by ~69 percent (compared to 2011), and the total cases examined by the Committee of Ministers increased by ~88.5% (from 52 cases in 2011 to 98 cases in 2019). In parallel, CSOs’ interventions/ contributions have also risen significantly in more countries over the years (see Table 5).

Table 4: Actions Plans, Action Reports, and Reminder Letters

Year	Actions Plans received	Action Reports received	Reminder Letters
2011	114	236	32
2012	158	262	62
2013	229	349	82
2014	266	481	60
2015	236	350	56
2016	252	504	69
2017	249	570	75
2018	187	462	53
2019	172	438	54

Source: Council of Europe, Department for the Execution of Judgements Statistics, [https://www.coe.int/en/web/execution/statistics#{%2234782408%22:\[\]}\]](https://www.coe.int/en/web/execution/statistics#{%2234782408%22:[]}])

Table 5: Civil society contributions and states concerned

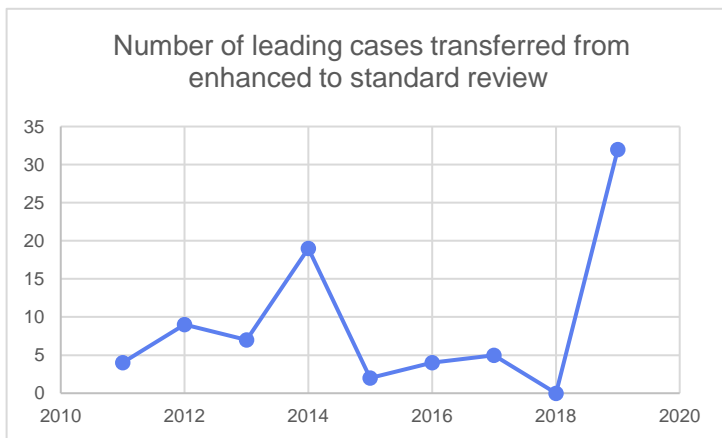


Year	CSOs contributions	States concerned
2011	47	12
2012	47	16
2013	81	18
2014	80	21
2015	81	21
2016	90	22
2017	79	19
2018	64	19
2019	133	24

Council of Europe, Department for the Execution of Judgements Statistics,
[https://www.coe.int/en/web/execution/statistics#%2234782408%22:\[\]](https://www.coe.int/en/web/execution/statistics#%2234782408%22:[])

Finally, Table 6 shows an increase in the transfer of leading cases from enhanced to standard supervision, indicating positive steps taken towards implementation. The states with the largest number of transferred cases were Germany, Russia, Poland, and Greece.

Table 6: Number of leading cases transferred from enhanced to standard review



Year	Number
2011	4
2012	9
2013	7
2014	19
2015	2
2016	4
2017	5
2018	0
2019	32

Source: Council of Europe, Committee of Ministers, 2019 Annual Report
<https://rm.coe.int/annual-report-2019/16809ec315>

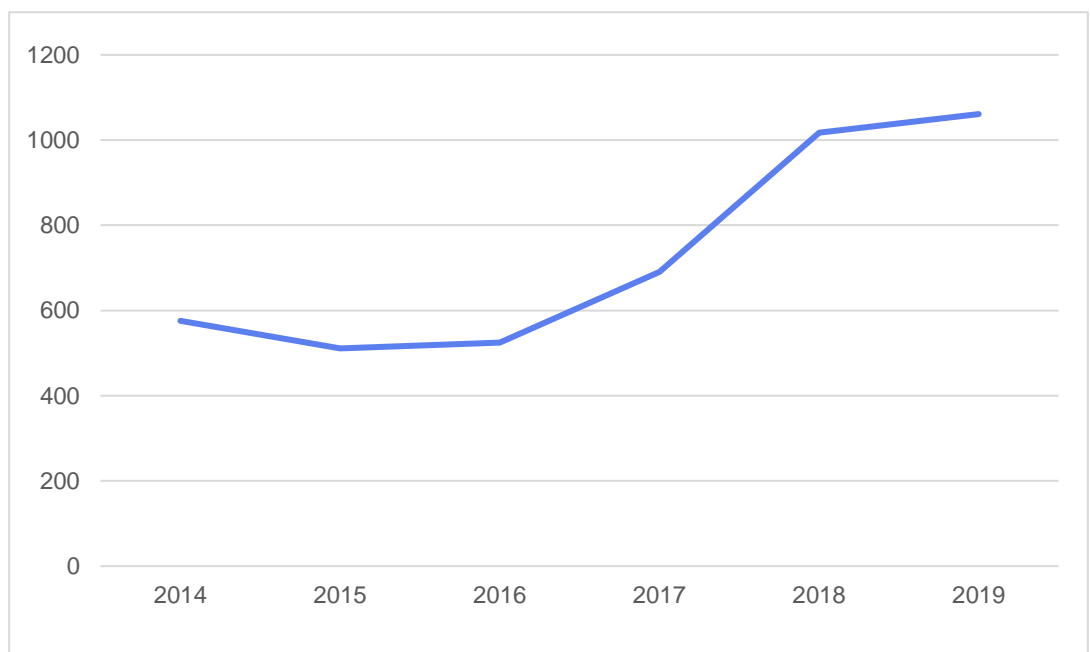
13.2 Inter-American System: Inter-American Court of Human Rights (IACtHR)

13.2.1 Number of cases and case processing

Overall, the number of cases at the merit stage has increased over the past five years (see Table 7). In 2019, the number of cases had risen ~84 percent since 2014 (from 576 to 1061). Argentina, Colombia, Mexico, and Peru have seen the largest rise in cases against them.

Table 7: Number of cases at the merits stage

Year	2014	2015	2016	2017	2018	2019
Number of cases	576	511	525	691	1017	1061

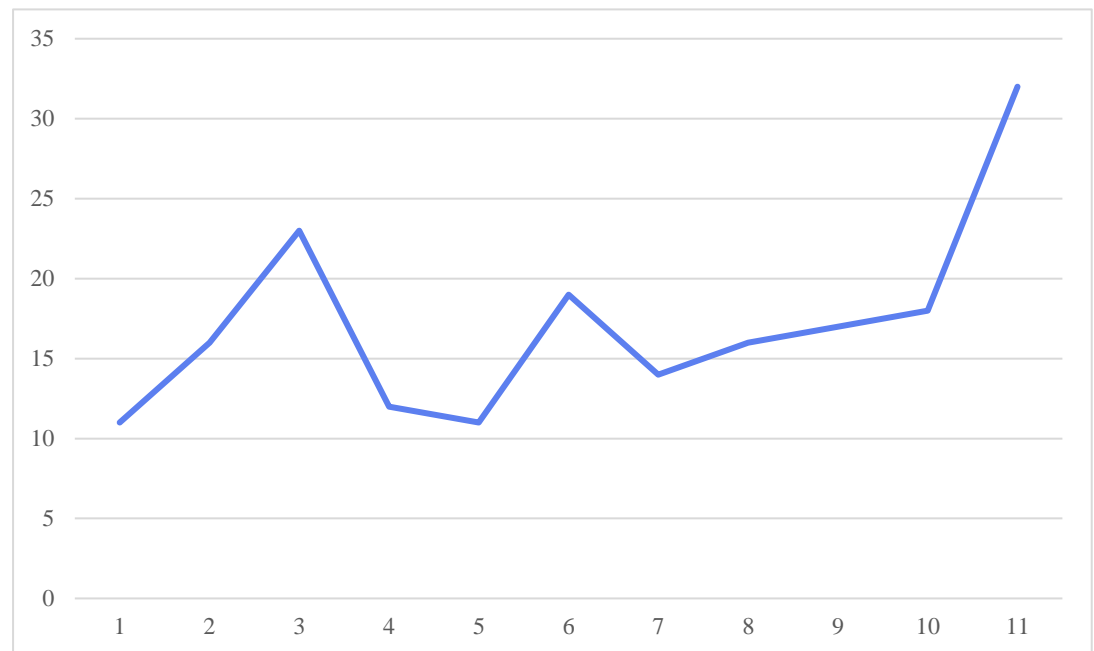


Source: OAS, IACHR Statistics,
<http://www.oas.org/en/iachr/multimedia/statistics/statistics.html>

Upon the issuance of the merit reports, and in case of an absence of action from the state, the Inter-American Commission sends the case to the IACtHR. The cases sent to the Court have been rising steadily rising, with an overall increase of 191 percent from between 2009 and 2019 (see Table 8).

Table 8: Number of cases sent to Court

Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Number	11	16	23	12	11	19	14	16	17	18	32



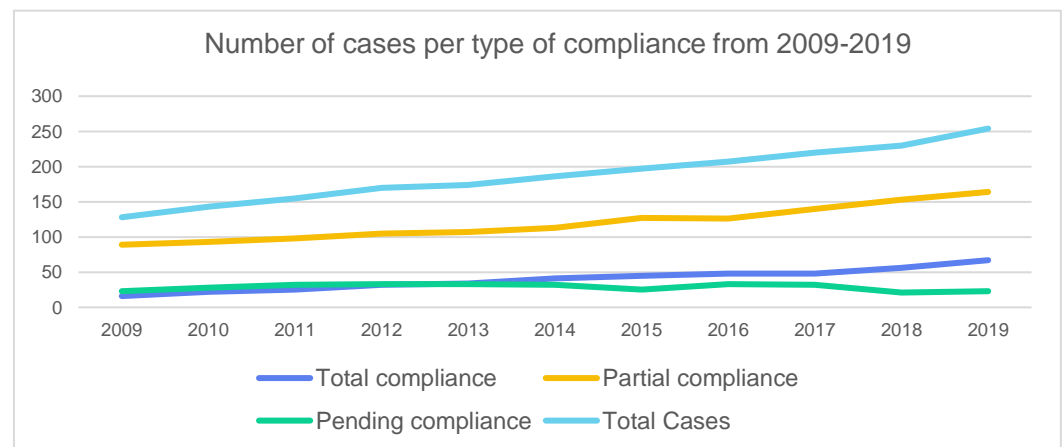
Source: OAS, IACHR Statistics,
<http://www.oas.org/en/iachr/multimedia/statistics/statistics.html>

13.2.2 Compliance and Monitoring

The state of compliance with IACtHR decisions appears to be higher than those of the Commission (see Tables 9 and 10), perhaps reflecting the binding nature of Court decisions; yet, at the Commission level, the number of cases with total and partial compliance (when the state has provided some information about its compliance efforts) has also grown since 2009 (see Table 9). “Pending compliance” indicates that the state either refuses to comply or has provided no information about its implementation efforts, if any.

Table 9: Number of Commission cases per type of compliance from 2009-2019 (merits and friendly settlements)

Type of Compliance/ Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Total compliance	16	22	25	32	34	41	45	48	48	56	67
Partial compliance	89	93	98	105	107	113	127	126	140	153	164
Pending compliance	23	28	32	33	33	32	25	33	32	21	23
Total Cases	128	143	155	170	174	186	197	207	220	230	254



Source: OAS, IACHR Annual Reports, <http://www.oas.org/en/iachr/reports/annual.asp>

Table 10: Number of IACtHR Monitoring Compliance with Judgement stage cases from 2000 onwards (excluding Article 65 cases)

Please note that “Pending Compliance” is when the State provides some information about decisions implementation. As soon as the Court approves the State’s compliance actions, it declares the Case as “Compliance Fulfilled”. In case of no action or no information received from the State, the compliance status is left blank until the State provides more information.

	Declared fulfilled	Pending compliance	No compliance status yet
Argentina	10	6	5
Barbados	1	0	0
Bolivia	4	0	0
Brazil	6	2	0
Chile	7	1	0
Colombia	18	2	1
Ecuador	10	2	0
El Salvador	6	0	0
Guatemala	20	11	1
Haiti	0	1	0
Honduras	8	2	1
Mexico	7	2	0
Nicaragua	1	2	0
Panama	3	1	0
Paraguay	6	0	1
Peru	25	10	7
Dominican Rep.	1	3	0
Suriname	2	1	0
Uruguay	1	1	0

Venezuela	0	4	4
Total cases	136	51	20

Source: OAS, IACtHR Statistics,
https://www.corteidh.or.cr/casos_en_supervision_por_pais.cfm?lang=en

13.3 African Court on Human and People’s Rights

13.3.1 Number of cases and case processing

Overall, there is a significant increase in the number of applications received by the African Court, as well as the orders and the judgements it has issued. Applications also appear to be processing more quickly (see Table 11).

Table 11: Statistics at the Court level

Year	App Received	Orders issued	Judgments / Rulings
2020	48	34	26
2019	66	33	28
2018	33	4	17
2017	37	4	8
2016	59	23	8
2015	33	2	3
2014	3	1	6
2013	7	5	6
2012	7	0	4
2011	14	2	9
2008	1	0	0
Total	308	108	115

Source: African Court, Statistics, <https://www.african-court.org/cpmt/statistic>