

**From Judgment to Justice – Implementing the Views of the United Nations Human Rights
Committee**

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Public interest litigation is generally aimed at securing concrete remedies for individual complainants, as well as more general reforms of policy and institutional practice. Such changes are not easily won in even the most developed domestic jurisdictions, so pursuing such litigation in international and regional human rights systems may strike some as fanciful. After all, these systems are relatively new, have fewer resources, and rest on less-settled juridical foundations than their domestic counterparts. And yet, the number of cases filed with, and judgments delivered by, such bodies steadily increases. To what end? What is the record of implementation of these decisions? What procedures exist to monitor and promote implementation? And how can they be improved?

These questions prompted the Open Society Justice Initiative to embark on an extensive study of judicial decisions in the three major regional human rights systems—African; American; and European - and the United Nations treaty bodies, with a particular focus on the Human Rights Committee.

The Justice Initiative engages in litigation around the world: representing applicants, intervening as a third party, and providing technical assistance to local counsel. We have a specific interest in learning how to make our own litigation more effective, including through full and expeditious implementation of court judgments. And as advocates promoting the rule of law, we have a more general interest in fostering well-functioning regional and international courts as essential elements of a global open society.

¹ This text is based on Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2010).

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.

An implementation crisis currently afflicts the regional and international legal bodies charged with protecting human rights. The goal of our report is to help address that crisis by exploring implementation: the conditions under which states implement the decisions of the various human rights systems, the extent to which procedures to monitor and promote implementation exist, and how they can be improved.

As you all know better than I, in addition to the Human Rights committee, four other UN treaty bodies can currently receive individual communications: the Committee Against Torture (CAT), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), and the Committee on the Rights of Persons with Disabilities. Because the HRC has adjudicated the greatest number of communications thus far, and because the other committees have largely modeled their follow-up procedures on the HRC's, its practice is examined in the greatest detail in the report.

In 1990, the HRC became the first treaty body to create the position of Special Rapporteur for Follow-up on Views, with a two-year renewable mandate to monitor a state's implementation of the decisions, or "Views," of the committee. Once the HRC's decisions are published, states are *expected* to reply within six months, explaining how they intend to implement the committee's proposed remedial scheme. However, many states do not reply, and those that do often simply contest the factual basis of the Committee's decision or challenge its interpretation of the covenant. When a state's reply is received, it is transmitted to the member(s) of the committee who authored the decision and to the victim or his/her representative, who may respond to the state's submission.

A summary of the state's response and the HRC's comments are subsequently published in the committee's annual report to the UN General Assembly. In addition, as of February 2009, the Committee has started issuing periodic progress reports – three have been made publicly available to date – on follow-up to certain individual communications. Where the state's reply is deemed inadequate, the committee will typically state in the report that it regards the dialogue as “ongoing.” Thereafter, the special rapporteur may conduct follow-up consultations with diplomatic representatives to facilitate implementation. However, because the special rapporteur has no independent budget, such consultations are effectively limited to the three sessions during the year when the Committee is in session.

According to data compiled by OHCHR's Petitions Section (the division that provides administrative support to the treaty bodies), compliance with the decisions of the treaty bodies is generally quite poor. Based on data submitted in its 2009 annual report, of the 546 cases in which the HRC found violations of the International Covenant on Civil and Political Rights, only 67 cases—approximately twelve percent—have received what the Committee considered to be a “satisfactory” response. Of the remaining cases, the state's response was either “unsatisfactory,” in that it failed to address the merits of the committee's findings, or the state never responded at all.²

Indeed, implementation of HRC decisions appears to have actually deteriorated over time. Although compliance at present presently hovers between 12 to 15 percent, the committee's 1999 report to the General Assembly noted that, “roughly 30 percent of the replies received could be considered satisfactory.” In her 2001 report on the UN human rights treaty system, Anne Bayefsky observed that remedies were forthcoming by states parties in only 21 percent of the cases. This downward trend is, to some extent, explained by the fact that the HRC's individual communications workload (in addition to its state reporting workload), has increased in absolute terms during this time.

² Currently, the committee considers dialogue with states parties to be “ongoing” in just over half of the 546 cases, with some of these dating back to the mid-1980s. In another 35 percent of the cases currently being monitored the state of follow-up is unclear.

Why you may ask have we used the data in the 2009 report and nothing more recent? Because that is the most recent data available. For some reason – and perhaps someone here is in a position to elaborate - the data was NOT included in the most recent – 2010 – report – the first time in five years such data has not been included. Though the data in the prior reports was incomplete, the failure to include any data at all on implementation represents a major step backward.

I should note that the situation is less grim for the CAT, which has a nearly 50 percent rate of compliance and is the only other treaty body to have adjudicated a comparatively large number of communications. CEDAW has registered only 24 communications to date, although it has had a few successes with implementation. The CERD has heard ten cases that resulted in findings of a violation, three of which the committee considers to have been satisfactorily implemented.

One enduring challenge to the implementation of UN treaty body decisions is that they are **not legally binding**, although a number of commentators have argued that states, having accepted the jurisdiction of the communications procedure, remain duty-bound to respect their treaty obligations. At the same time, compliance with the committee need not be tethered to the fact that a state considers itself legally bound to implementation. In a number of cases, for instance, states that have expressed disagreement with the committee, or been negligent in follow-up procedures, nevertheless compensated claimants on an *ex gratia* basis or issued a financial remedy which, while not correcting the policy or practice that gave rise to the violation, offered some measure of compensation to the individual grievant.

Generally, **successful implementation** has occurred in cases with high political visibility and cases brought against states with a sophisticated rule of law tradition. Where implementation has taken place, it is frequently due to a strong civil society presence capable of complementing the committee's follow-up efforts and applying other domestic pressures. Even where states have not strictly complied with the committee's Views, there are examples of successful dialogue

between the state party and the committee, suggesting that the treaty body system serves an important persuasive function that can build momentum for larger reforms.

Despite these qualified successes, the **failures of implementation** are many. While the special rapporteur can play an important role in pressuring states, it is clear that the office has **inadequate time and resources** to monitor its entire follow-up docket.

Reform of the treaty monitoring bodies has been a topic of debate for many years. Many issues are involved, and to be sure, they will continue to be discussed for some time.

But there are a number of steps, several of which the Inter-Committee Working Group on Follow-Up has also endorsed, that can be taken by respective parties to the process specifically to improve implementation of the treaty bodies' decisions. Let me address first the UN system, then the users of the system – or those who bring communications – and finally states:

A. For the UN system:

1. First, **greater resources are needed** to support the Follow-up Rapporteur. The current resource commitment is insufficient to the scale of implementation monitoring required.

- In this regard, it may be advisable to consider the appointment of several follow-up rapporteurs who could each handle a smaller portfolio of cases, perhaps on a country – or theme-specific basis. The CEDAW committee has followed this approach with some success.
- Inter-sessional follow-up meetings and follow-up missions in countries that have particularly poor records of implementation should be a priority. The Committee has conducted only one country visit to date and it was over fifteen years ago. Such

consultations could be undertaken either by the follow-up rapporteur or other Committee members, perhaps in conjunction with UN country teams.

2. Second, it is essential to **improve the visibility, accessibility and accuracy of information** pertinent to implementation. Statistical data presented in the Human Rights Committee's annual report – **which was not included in the 2010 report** – needs updating and revising, including more accurate classification of the character of state replies, and clearer criteria for what constitutes satisfactory implementation.

For example, the Committee recently decided to close the follow-up procedure for *Williams v. Spain*, a case concerning racial discrimination that the Justice Initiative had helped litigate, despite manifest deficiencies in the state's response outlined in letters to the Committee. Those letters received no substantive reply. And thus it was with some surprise that we learned – only by reading the most recent newsletter of OHCHR's Treaties Division - that the case was closed and was an example of successful implementation.

There have been some creative efforts to present data on implementation more systematically within the UN system. During his tenure as Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston devised a scheme which included all communications received in the year against various states, highlighting

- The specific rights violations that were alleged (something the treaty body data does not do),
- the number and category of individuals concerned,
- whether or not (and how many) responses were received by the government in question, and
- the character of those replies; of the latter, Alston created the following five-point typology: "no response," "receipt acknowledged," "allegations rejected but without adequate substantiation," "cooperative but incomplete response," and "largely satisfactory response."

A similar typology could be devised to assess state implementation of treaty body Views – that is, if the decision not to include any data on implementation in the 2010 report does not represent a new approach.

3. Third, the inclusion of data as to whether states have complied with **interim measures** ordered by the Committee (such as moratoriums imposed on the carrying out of capital sentences) would be useful, as would a **digest** of the treaty bodies' remedies jurisprudence.

4. Fourth, the treaty bodies should endeavor to **provide more thorough and comprehensive reasoning** in their decisions, which would help provide a sounder intellectual foundation for any follow-up measures.

Relatedly, more attention must be given to what is specifically requested of states where a violation is determined to have occurred. The more specific and practical guidance treaty bodies can give, the better.

By way of illustration, several cases that had been decided against Colombia were never implemented because, according to the Colombian Ministerial Committee (the body established to ensure implementation of Human Rights Committee and Inter-American Court decisions), the “absence of a specific remedy” in the Views led it to recommend that compensation not be paid to the victims in question.

In the *Williams* case, the Committee stated that, in addition to a public apology, Spain must “take all necessary steps to ensure that its officials do not repeat the kinds of acts observed in this case,” without any further elaboration.

5. Finally, there needs to be a more sustained, mainstreamed approach to follow-up **throughout the UN protection system.**

- The High Commissioner for HR should continue to raise the non-implementation of treaty body views in her **meetings with state representatives.**

- OHCHR should, in the context of the **Universal Periodic Review**, more systematically provide information about implementation of treaty body Views as part of its compilation reports.
 - While the Office has included information about the implementation and follow-up of treaty body and Special Procedures recommendations in these reports, it has only recently begun to do so for treaty body Views.
 - Moreover, it does not appear that this information is being consistently included. For instance, a review of compilation reports submitted to the tenth UPR session shows that some of Australia's individual communications were discussed, while there was no mention of Austria's six cases, even though none of these decisions have yet to be satisfactorily implemented.

If consistently provided within the context of the UPR process, this kind of information can serve as the basis for questions posed to the state under review, and for recommendations by the Human Rights Council.

- More generally, greater consideration should be given to collaboration between the UN's treaty-based and Charter-based bodies. Presently, treaty body observations and Views barely figure on the **UN Human Rights Council's** agenda. Legitimate concerns have been raised as to the risks of treaty body engagement with the Council; at the same time, the Council is a political body capable of exerting pressure on other states and, in certain cases, may be a useful tool to press for implementation. In this respect, the Council might serve a function not unlike the Council of Europe's Committee of Ministers, the political body charged with monitoring the execution of judgments issued by the European Court of Human Rights.
- Finally, there should be more systematic coordination between the treaty bodies and the UN Special Procedures mandate-holders so that they may address, where appropriate, the issue of implementation in the course of their duties. Other UN specialized agencies,

including UN country teams, might also be in a position to raise implementation of treaty body decisions in the course of their duties.

These recommendations speak to the UN system.

2. Representatives of petitioners and associated NGOs can also contribute to implementation –

- First by being more strategic and thoughtful in considering which treaty body is the best forum, and even whether other UN mechanisms, such as the Special Procedures, might be more effective;
- Second, by crafting with care requested remedies for the treaty bodies to consider asking of states;
- Third, by giving more priority to follow-up at the domestic level after a decision is issued, including by citing to treaty body decisions in advocacy before domestic courts and other institutions.

3. Finally, **States can make implementation more possible** by creating an institutional locus of responsibility for monitoring compliance with individual decisions, and ensuring adequate measures are taken by the appropriate agencies of government.

The decisions of treaty bodies often require action by the executive, legislative and/or judicial branches. Ensuring formalized channels of communication among these branches in matters relating to implementation is essential if implementation is to improve. Discussion about these communication challenges may present a more productive way to unpack the elusive concept of “political will” in manner that leads to action.

While the precise nature of institutional form may vary, a number of positive examples already exist.

- The UK's Joint Committee on Human Rights is a rare example of a special parliamentary body with a specific mandate to verify and monitor the compatibility of a country's law and practice with the jurisprudence of regional and international human rights mechanisms. Only five other national parliaments within the Council of Europe currently have a similar body.
- Peru's implementation law establishes a process by which the Foreign Ministry communicates the decisions of regional and international bodies to the Supreme Court, which is then responsible for transmitting the decisions to the courts that have jurisdiction over the matters at issue.
- A different model exists in Colombia, where an implementation law provides a process for the consideration and payment of orders of compensation issued by the Human Rights Committee and other bodies. As noted, however, this model has failed treaty body plaintiffs in cases where the Human Rights Committee did not recommend a specific remedy.
- Finally, in a number of countries national human rights institutions and ombudspersons play a constructive role in ensuring implementation of international decisions.