

OPEN SOCIETY JUSTICE INITIATIVE

From  
Judgment  
to Justice

Implementing International and  
Regional Human Rights Decisions



OPEN SOCIETY  
FOUNDATIONS



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Implementing International and Regional  
Human Rights Decisions



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**Open Society Justice Initiative**



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For more information contact:  
Rupert Skilbeck  
Litigation Director  
Open Society Justice Initiative  
[rskilbeck@justiceinitiative.org](mailto:rskilbeck@justiceinitiative.org)

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The Open Society Justice Initiative bears sole responsibility for any errors or misrepresentations.



# Introduction

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 the notion of public interest 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 these systems 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 (including the African Commission on Human and Peoples’ Rights and the nascent African Court of Human and Peoples’ Rights); American (composed of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights); and European (including the European Court of Human Rights and the Committee of Ministers)—and the United Nations treaty bodies, with a particular focus on the Human Rights Committee. These procedures, established as part of the protective mandates of both the United Nations treaty body system and the regional human rights regimes, have been fueled by the hope that, where a person is unable to obtain redress at the national level, recourse to an international or supranational legal body would compel a state to make good on its human rights obligations.

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.

In 2007, the Grand Chamber of the European Court of Human Rights issued a groundbreaking ruling in *D.H. and Others v. Czech Republic*, finding that the segregation of Roma within Czech schools violated the European Convention on Human Rights.<sup>1</sup> The Grand Chamber ordered the Czech government to end its discriminatory education practices and provide redress to those affected. Yet nearly four years later, the situation for Roma schoolchildren remains largely unchanged: the “special schools” into which they are shunted have been renamed, but the segregation persists.

In 2005, the Inter-American Court of Human Rights, in *Yean and Bosico v. Dominican Republic*, found the Dominican government responsible for racial discrimination in its citizenship policy, in violation of the American Convention on Human Rights.<sup>2</sup> The court ordered the Dominican citizenship law changed. But since that judgment, the Dominican Republic’s citizenship laws and policies have become more—not less—restrictive, including a constitutional amendment that directly undermines the Inter-American Court’s ruling.

In *Marques v. Republic of Angola*, the United Nations Human Rights Committee determined, in 2005, that Angola had violated the petitioner’s freedom of speech by holding him incommunicado and imprisoning him for writing articles critical of the Angolan president.<sup>3</sup> In March 2005, the committee found that Angola had violated Marques’ rights under the International Covenant on Civil and Political Rights, and that Marques’ arrest and detention violated his due process rights. Yet, five years later, the committee’s opinion remains substantially unenforced: many colonial-era provisions restricting free speech and media freedom remain on the books.

In 2000, the African Commission on Human and People’s Rights found the government of Mauritania responsible for massive human rights violations in *Malawi African Association et al. v. Mauritania*.<sup>4</sup> The commission found numerous violations of the African Convention on Human and Peoples’ Rights arising from a wave of ethnic violence that involved widespread detentions and killings as well as the forced expulsion of approximately 70,000 black Mauritians into Senegal and Mali. Six years after the ACHPR’s ruling, Mauritania agreed to repatriate and reintegrate the expellees, but to date only a small percentage of these refugees have been permitted to return, and scores of grave human rights violations have gone unaddressed.

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.

As the cases summarized above demonstrate, an implementation crisis currently afflicts the regional and international legal bodies charged with protecting human rights. The goal of this 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.<sup>5</sup>

Despite the struggles over implementation cited in this report, it is important to note the successes that regional and international human rights bodies have recorded, and the broadly positive arc that bends toward greater rights protection. Since their founding, the treaty bodies and the regional systems have played an essential role in defining and protecting human rights, thus providing the impetus for significant improvements in the rule of law. The European Court of Human Rights has issued thousands of binding judgments that have touched nearly every aspect of legislation on the European continent, ranging from reformed pretrial detention procedures to the treatment of the mentally ill and improved fair trial guarantees. The Inter-American Commission and the Inter-American Court of Human Rights have achieved regional consensus on the illegality of amnesty provisions for members of authoritarian regimes that perpetrated grave human rights violations, developed a progressive framework for the protection of indigenous lands, and advanced the issue of freedom of expression throughout the region. On the African continent, dozens of political prisoners have been freed, and expelled persons returned to their homes, at the recommendation of the African Commission on Human and Peoples' Rights. Similarly, the United Nations treaty bodies have spurred change in national anti-discrimination laws, gender equality, and the rights of non-citizens.

There can be no question that these procedures matter. They represent not only the last, best hope for many people whose national laws have failed them but, more fundamentally, they manifest "a shift of emphasis towards the more effective implementation and enforcement of existing human rights standards."<sup>6</sup>

Yet despite such successes, genuine and complete implementation is one of the most nettlesome problems that the international human rights system confronts. Indeed, "[h]uman rights is the subject matter area in international affairs where the largest enforcement deficit exists, inasmuch as the costs of enforcement appear high and the benefits seem low by traditional state interest calculations."<sup>7</sup> As proof of this deficit, critics cite implementation rates as low as 10 percent for some of these legal

bodies, and point to the persistence of human rights violators who remain apparently unfazed by the threat of international judicial scrutiny.

The commitment to abide by a judicial (or quasi-judicial) judgment is crucial to the integrity of any legal system, domestic or international. Experts writing in the context of the European Court have noted that implementation of judgments is the “acid test of any judicial system,” important for “enhancing the interpretive authority and impact of the Court’s case law,” as well as the system’s authority and credibility.<sup>8</sup> Furthermore, just as research has shown that states with poor human rights records are often unwilling to ratify human rights treaties, “a sorry record of compliance with the judgments of regional and international courts correlates with poor human rights performance generally.”<sup>9</sup>

Implementation also underscores the distinctiveness of regional and international human rights bodies, highlighting the dichotomy between the unique hope that they represent for those within their jurisdiction and the bodies’ lack of enforcement authority. These institutions are notable in our international order precisely because they have the authority to regulate national sovereigns but, at the same time, they generally lack recourse to an international sovereign power to enforce those orders. Consequently, international human rights law, more than any other field of international law, must rely heavily on the cooperation of states, buttressed, as one commentator has noted, “by such moral and other influence as countries are prepared to exert.”<sup>10</sup>

Fortunately, efforts by scholars and advocates to examine state compliance with the broader mandates of international human rights conventions have grown in sophistication and scale over the past decade, as part of an emerging wave of empirical scholarship in international law and international relations. Yet, to date, relatively little attention has been paid to the degree to which, and under what conditions, states implement the judgments of the legal bodies designed to interpret and enforce those conventions. This oversight is regrettable because, as two commentators have noted in the context of the Inter-American Court, a disproportionate focus on the mere fact of these institutions’ existence “may lead us to overlook the actual degree of success that such tribunals have had in the countries subject to their jurisdiction.”<sup>11</sup>

The four human rights systems explored in this report are significant because they frequently serve as examples to other human rights institutions, and their decisions often have the broadest jurisprudential impact. Furthermore, while these systems are appreciably different in many ways, they share a number of similar characteristics that bear on the question of implementation and lend themselves to cross-system analysis. With these considerations in mind, this report aims to consolidate existing information on implementation, identify trends where they exist, explore certain successes and challenges, and formulate strategic recommendations for how interested actors—civil

society organizations, government agents, and officials of the supranational institutions themselves—might work together towards the more expeditious and complete implementation of international legal and quasi-legal decisions.

It should be noted that, although this report occasionally uses the terms “compliance” and “implementation” interchangeably, our emphasis is on the latter. While these terms are closely related, implementation, as two commentators have noted, is “the process of putting international commitments into practice,” whereas compliance is a “state of conformity or identity between an actor’s behavior and a specified rule.”<sup>12</sup> Thus, states may implement judgments in order to achieve compliance; however, compliance can also exist without implementation. This can occur, for instance, when an international commitment already matches current practice, rendering implementation unnecessary, or where, as Harold Koh notes, “no causal relationship exists between a ruling and subsequent implementation by a state.”<sup>13</sup> Indeed, as this report details, states have often (partially) satisfied court judgments while making clear that they are only doing so on an *ex gratia* basis,<sup>14</sup> or have come into compliance with a human rights judgment for reasons unrelated to that decision.<sup>15</sup> Implementation, on the other hand, occurs in response to international obligations, and when those obligations are articulated in human rights judgments, implementation is observable and measurable. Thus, because implementation more fully captures the impact (or lack thereof) of human rights judgments on state behavior, we employ that term here to capture the deliberate process of adopting specific remedial measures in order to give substantial effect to a judgment.

It in no way undercuts the importance of implementation to note that international human rights judgments can have significant intangible impacts, even where they are not implemented. Many of these decisions, for instance, can trigger vital policy discussions at the national level, both in and outside of the government, despite the fact that domestic implementation remains lacking. Likewise, many decisions, even if not enforced at the level of the individual litigant, serve an important function insofar as they contribute to an international jurisprudence that may deter (or punish) future violations or from which domestic courts can develop their own rights jurisprudence. Thus, implementation, though the most important indicator of an effective system of human rights protection, is not the only one. Nor is this report’s emphasis on implementation and its highlighting of the four systems’ implementation failures meant to suggest that these bodies are necessarily weak or ineffectual. To the contrary, they are essential pillars of the international human rights regime. The intent is thus to focus an honest light on one aspect of their performance, in the hopes that they may be made stronger still.

With this goal in mind, each of the four chapters below explores issues pertaining to the implementation of decisions of human rights bodies in the European, Inter-American, African, and UN treaty body systems. While each discussion is framed in a

way that best highlights the relevant implementation issues in each of the systems, the chapters were developed around common questions so as to provide consistent development of certain issues and enhance the basis for comparative analysis. Each chapter is intended to provide an overview of the current state of the implementation of judgments in a particular system, and offer some measure of historical perspective on how implementation has developed over time. Each chapter also endeavors to examine some of the factors that influence implementation, consistently addressing the relationship between implementation and the remedial framework utilized by each system, and in some circumstances exploring other issues such as the relationship between implementation and the rights at issue in a decision. The procedures in place in each system to monitor implementation and follow-up with states are also a centerpiece of this report, as are past and current initiatives to improve implementation, and the lessons that can be learned from successfully implemented decisions. At the end of each chapter, the report includes conclusions and recommendations to improve implementation in that particular system. The concluding chapter attempts to pull together those points of common concern for all of the systems discussed and calls for continued cross-system dialogue on implementation.

# Executive Summary

## The European System of Human Rights

An incredibly dynamic body, the European Court of Human Rights is the judicial organ responsible for interpreting the European Convention for the Protection of Human Rights, to which the 47 states of the Council of Europe are party. In the past thirty years, the court's individual petitions procedure has expanded from a modest, discretionary system to one that is now struggling under the weight of its own success: the court currently faces a backlog of almost 120,000 cases. As its caseload has grown, the implementation of the court's judgments has slowed. In January 2007, the year that execution of the court's judgments began to be monitored and made public, over 5,000 judgments were still listed as pending before the Committee of Ministers, the political branch of the Council of Europe responsible for supervising the court's judgments. By the end of 2009, that figure had risen to 7,887. In the past two years alone, the number of pending cases has risen at an annual rate of 18 percent, far outpacing the number of cases that have been closed. It has also become clear that certain states—Russia, Italy, Turkey, Bulgaria, Ukraine, in particular—pose problems for the European system because they lack the capacity or political will to implement judgments. As a result, a number of those cases where implementation remains pending are, in fact, “repetitive” cases—the result of states having failed to comply with their earlier implementation obligations.

## **Rights, Remedies, and the Court's Evolving Remedial Framework**

Where the court awards money damages, or “just satisfaction,” compliance with the court’s decision remains quite high; with few exceptions, states continue to pay the ordered sums on time and without controversy. Likewise, compliance with interim measures ordered by the court is quite high. Few of the court’s judgments, however, are limited entirely to damage awards; rather, they include individual and general measures as well. Individual measures are designed to restore the applicant to the position he or she enjoyed prior to the violation, while general measures are designed to prevent the same abuse(s) from happening again. In these cases, implementation is harder to monitor and often more protracted because general measures typically require wide-ranging reforms, such as changes to a state’s legal code, which can challenge institutional power or run contrary to public opinion.

In the face of such intransigence, the court has at times adopted a more prescriptive approach to remedies, which has assisted the Committee of Ministers and occasionally resulted in more effective execution. Most representative of this shift is the court’s application of the pilot judgment procedure, used as a way to dispose of a large class of similarly situated cases. States have also begun to respond to calls by the Committee of Ministers and other Council of Europe organs to better address implementation of judgments at the local level. The United Kingdom’s Joint Committee on Human Rights has been a model institution in this regard and, more recently, Italy and Ukraine have passed laws that seek to strengthen parliamentary oversight of implementation.

Overall, however, general measures present the greatest challenge for the European system, and there are numerous instances in which full implementation has not been achieved. Another worrisome trend is the widespread failure by states to implement orders to investigate and prosecute gross human rights violations—an area the court has addressed more often since the accession of post-Soviet states. Other problem areas for the Committee of Ministers have been the satisfactory resolution of cases involving the unreasonable length of proceedings and the failure to execute domestic judgments, which collectively comprise the vast majority of cases pending before the committee. As a result, implementation continues to lag where there is political resistance to, or a lack of public support for, the measures ordered by the court. Moreover, because general measures are time consuming and frequently complicated, states often treat them as a lower priority, choosing instead to pay just satisfaction and then delay. For instance, in 115 cases involving human rights violations in Chechnya, Russia has paid damages to the applicants in the vast majority, but failed to undertake any public investigations and prosecutions despite the court’s ordering that it do so. In such cases, Strasbourg’s pressure is not enough; active participation from local civil society is needed to overcome political resistance and move public opinion.

## Implementation Monitoring in the Council of Europe

As set forth by Article 46 of the European Convention, the Committee of Ministers is the statutory body tasked with monitoring the court's judgments. The committee, whose supervision is based on "constructive and co-operative dialogue between states," meets four times a year and is assisted in its oversight duties by the Department for the Execution of Judgments. Another important monitoring body is the Parliamentary Assembly of the Council of Europe, whose Committee on Legal Affairs and Human Rights reports regularly to the assembly on compliance-related matters. Notably, the Committee of Ministers has recently emphasized the importance of developing synergies in the implementation monitoring process among the committee, the Parliamentary Assembly, and the European Commissioner for Human Rights, whose mandate it is to promote awareness and respect for human rights throughout the Council's member states.

In response to the challenges of implementation, the Committee of Ministers has adopted an increasingly rigorous approach to implementation and its own monitoring powers. Rules of procedure, amended as of 2006, require that states against which a judgment is pending submit a plan for implementation to the Committee of Ministers within six months of the court's decision, although this timeframe may be reduced in urgent cases, systemic cases, or cases of very serious violations. Cases are then placed on the agenda of the committee's subsequent meetings and reviewed regularly until a final resolution closing the case is adopted. The committee's deliberations are not open to the public (unless it decides otherwise), although victims are now entitled to communicate in writing with the committee about the implementation of individual measures, and non-governmental organizations and national human rights institutions are entitled to make written submissions on both individual and general measures. New working methods adopted in 2004 by the committee also include the use of publicly accessible "status sheets" summarizing the status of implementation, as well as more frequent meetings between the committee's secretariat and state representatives.

While compliance is pending, the Committee of Ministers may adopt interim resolutions, in order to provide information on the progress of implementation, or to express concern or make suggestions; on occasion, the committee also issues public memoranda explaining what steps a state should undertake in cases raising structural violations. Where necessary, the committee may seek to put more pressure on a respondent state through compliance meetings, undertake more frequent examinations of a case, or adopt public interim resolutions condemning the failure to implement. Notably, Protocol 14, effective as of June 2010, also expands the Committee of Ministers' monitoring powers in two important ways. First, it permits a two-thirds majority of the committee to seek interpretive rulings from the court if the meaning of a judgment is unclear; second, it provides that a two-thirds majority may bring "infringement proceed-

ings” before the court in cases where a state has failed to comply. In exceptional cases of persistent non-implementation, the committee may sanction states by ultimately suspending or expelling them from the Council of Europe. However, suspension has been an exceedingly rare occurrence and, to date, no member state has ever been expelled from the Council.

### **Conclusions and Recommendations**

Protocol 14 and the reforms being put into place by the European Court of Human Rights to secure its long-term effectiveness are important steps. But the growing challenges of implementing the court’s judgments remain of primary concern. To address these challenges, the following conclusions and recommendations are offered:

- The Committee of Ministers, Parliamentary Assembly, and the European Commissioner of Human Rights should continue to improve their respective working methods, in addition to developing increasingly formalized synergies in their monitoring rules. The Committee of Ministers, in particular, should prioritize and agglomerate cases against those states that contribute most to the implementation backlog. Greater clarification about the pilot judgment procedure, especially regarding the respective role of the court and the committee in evaluating compliance at the national level is also needed. The Parliamentary Assembly’s Committee on Legal Affairs should continue to develop its reporting work on implementation and capitalize on its status as a parliamentary body, one that permits greater possibilities for dialogue with national legislators. The commissioner should conduct on-site visits to countries against which cases have been brought, and provide the court with information about alleged violations and proposed remedies.
- Further training on communicating with the Committee of Ministers is needed, particularly in states where civil society is less active and states that have the lowest implementation rates. Litigants and interveners alike can also play a role in urging the court to identify cases that pose an underlying systemic problem.
- The court should continue to seek to supplement the committee’s monitoring and enforcement role, by continuing its cautious trend towards greater specificity in its approach to remedies. Further application and refinement of the pilot judgment procedure is important in this regard; likewise, proposals for adding collective redress mechanisms, such as a class action procedure, should be considered anew.
- Consistent with the principle of subsidiarity, states must enhance their ability to effectively implement court judgments. All Council member states should have a system in place for responding to court judgments, in addition to establishing

greater parliamentary scrutiny of legislation to ensure it is consistent with court jurisprudence. Where such systems are already in place, more research is also needed on their impact and effectiveness. The establishment of robust national human rights institutions in each member state should be required by the Council of Europe as a way to develop effective mechanisms of reception at the national level; likewise, the establishment of a standing judicial training institute should be considered, in order to improve application of the convention at the national level.

## The Inter-American Human Rights System

While the Inter-American human rights system has had a tremendous and positive impact on the legal and socio-political development of the region over the past quarter century, the Inter-American Commission and Inter-American Court have nevertheless struggled with low levels of implementation of their final recommendations and orders. As the effort to promote broader and more consistent implementation of decisions has evolved, so have procedures and mechanisms to monitor and promote implementation. Such procedures and mechanisms have provided a means to identify the most problematic areas of implementation and to support the design of strategies to address these problems. While the design of these procedures and mechanisms is imperfect, their utility is unquestionable, and efforts to perfect them—driven by an honest understanding of the implementation problem—should be central to the regional human rights agenda.

### **Implementation, Inter-American Remedies, and Success Stories**

In reviewing the implementation crisis in the Inter-American system, a recent study found a 29 percent rate of total implementation of the remedies ordered by the Inter-American human rights bodies, a 12 percent rate of partial implementation, and a 59 percent rate of non-implementation. The Inter-American remedial framework can be roughly divided into three: pecuniary damages and other individual remedies, orders to investigate human rights violations and punish the perpetrators, and general measures of non-repetition for purposes of analysis. It is important to consider the rates of implementation for each category.

With regard to pecuniary damages, the rates of implementation are quite high, and there are impressive examples of states such as Guatemala and Colombia implementing orders to pay hundreds of thousands of dollars for grave violations of human rights, payments by Panama and Peru for labor and property rights violations, and payments by Honduras and the Dominican Republic to discriminated minorities. In the

late 1990s, the Inter-American Court began to develop a much more complex remedial framework and ordered a wide range of symbolic and equitable remedies. For example, the court will now order the erection of memorials and other measures to commemorate victims of human rights abuse, and such remedies are implemented approximately 50 percent of the time. Implementation of equitable remedies restitution and rehabilitation has also been relatively good, where orders to release detainees, reverse arbitrary firings, or grant certain security measures are implemented almost 40 percent of the time.

Orders to investigate the circumstances of human rights violations and prosecute and punish those found responsible, known as “justice” measures, present the biggest challenge for implementation. Indeed, in all of the cases in which the Inter-American Court has issued an order to investigate and punish, only one has been fully implemented. Similarly disappointing are the rates of implementation associated with general measures of non-repetition, which are implemented at a rate of approximately 25 percent. Inter-American bodies will order legal reforms and training of state officials in those cases where systematic abuses have been detected and it is determined that such violations result from widespread *ultra vires* activity, or routine abusive discretionary decisions. Rates of implementation, however, are also low. Finally, the court has ordered creative general measures designed to address human rights violations suffered by certain communities, often indigenous, and while compliance has generally been low in this regard, there have been some notable successes.

*Mayagna (Sumo) Awas Tingni Community v. Nicaragua* is remarkable both because it was the first time a regional tribunal recognized indigenous peoples’ communal right to their ancestral land and because the reparations were implemented despite the technical and political complexity of demarcating and titling indigenous lands. Ultimately, it took the passage of a law on land demarcation in January 2003, and the election of President Daniel Ortega, who is sympathetic to the plight of the country’s indigenous communities, to effect the conveyance of more than 70,000 hectares to the Awas Tingni community in December 2008. This resonates with another exceptional case decided by the court in 2006, *Claude Reyes et al. v. Chile*, which established the right of access to information as a fundamental right. In 2008, Chile promulgated a law on access to information, with the support of President Michelle Bachelet, which was the culmination of years of work by the transparency movement in Chile.

Initially, *Awes Tingni* and *Claude Reyes et al.* appear to have little in common other than their status as landmark cases that advanced novel legal propositions and, ultimately, reached full implementation. However, these exceptional cases do provide some lessons for further efforts to promote implementation generally. First, each decision is important because it employed an international law framework to remedy a domestic struggle. Second, in each case the international law framework was translated into

the national legal regime. In the case of *Awes Tingni*, implementation was contingent on the formation of inter-agency commissions and, ultimately, a national law on land demarcation. In the case of *Claude Reyes et al.*, the law on access to information both represented the necessary normative shift for implementation to occur, and provided for the establishment of an office to train public officials. Finally, each case relied on the support of the presidents in power. Undue emphasis should not be placed on this last element, however, which is often the tendency. Had there been no domestic regime for implementation, based on the international framework provided by the Inter-American Court decisions, there would have been no way to channel the support of either state. Accordingly, mechanisms and procedures should always exist to capitalize on the political will to implement the decisions of the human rights bodies, particularly because it is often unclear when the will might manifest, and how long it will last.

### **Initiatives to Promote Implementation Mechanisms**

For the past decade, the crisis of implementation in the Inter-American system has steadily received more attention. Efforts by the court and the commission to collect data about implementation, coupled with initiatives of civil society organizations and academics to systematize and analyze that information, provide a relatively accurate picture of the implementation problem in the Inter-American system, and a few key strategies to address that problem. Four types of initiatives in particular are worthy of note: (1) efforts to establish a working group on implementation in the political bodies of the OAS; (2) the establishment of an implementation reporting mechanism by the Inter-American Commission; (3) the development of an implementation phase to litigation before the Inter-American Court; and (4) the promulgation of national laws on implementation.

During his tenure with the Inter-American Court, Judge Cançado Trindade consistently urged the OAS to establish a permanent political body to monitor and promote implementation. The General Assembly of the OAS has never taken up this proposal in a serious way, nor has it done more to advance implementation, other than issuing annual resolutions highlighting its importance.

In 2001, the Inter-American Commission established a mechanism to monitor state implementation of final merits decisions and friendly settlement agreements. While this mechanism is merely a system of data collection, it has provided a fairly substantial pool of data that facilitates an understanding of both rates of implementation as well as what types of initiatives have been successful in promoting compliance. For its part, the Inter-American Court has steadily developed what is now a fairly robust approach to implementation litigation, where it orders the victim's representatives, the state, and the commission to submit regular reports on implementation; calls the par-

ties to private and public hearings; and issues resolutions articulating certain actions that the state should take to effectively implement its decisions. The court has recently developed certain innovations in this phase of litigation such as ordering the state to identify specific actors to answer for implementation responsibilities, and considering the consolidation of cases against a single country.

Arguably the Inter American system's most significant implementation-related development is the promulgation of legal and legislative mechanisms at the national level to facilitate the implementation of decisions by the commission and court. Peru has articulated perhaps the best example of such legislation, which establishes the specific steps that should be taken in order to give effect to the decisions of supranational courts that order pecuniary damages or declaratory relief. Similarly, in Colombia, national legislation provides a process for the payment of pecuniary damages ordered by international human rights bodies. Further processes to develop comprehensive implementation legislation are ongoing in Argentina and Brazil.

### **Conclusions and Recommendations**

Despite recent initiatives to promote implementation, there is an implementation crisis in the Inter-American system that threatens its legitimacy and its viability as a method of obtaining redress for violations of human rights. The following conclusions and recommendations are formulated to support initiatives that enhance the likelihood states will implement the decisions of the Inter-American bodies:

- The resolution issued by the General Assembly every year on the Inter-American system is a prime opportunity for advocacy to involve the political bodies of the OAS in promoting implementation. Interested parties should promote the idea of an annual conference on implementation convened by the Permanent Council, a study on implementation by the Department of Legal Services, and the establishment of an implementation-working group in the Committee on Juridical and Political Affairs.
- While the commission established an important mechanism for the passive collection of implementation data around the time of its 2001 rules reform, it has done little to develop its implementation activities since then. Interested parties should urge the commission to develop an implementation monitoring process, including reporting requirements for all parties, public and private hearings, and the issuance of resolutions.
- The court's effort to develop an implementation stage of litigation over the last decade is a substantial accomplishment and should be applauded. Interested parties should continue to test the court's willingness to include state implementa-

tion objectives in its compliance orders, and to hold public and private hearings as a means to promote implementation of its decisions.

- National legal regimes governing implementation constitute the best hope for addressing the implementation problem in the Inter-American system. Interested parties should strategize and collaborate at the regional level to develop models or guiding principles for the establishment of such regimes, and at the national level to improve existing laws, support ongoing legislative processes, or foster them where they have yet to take hold.

## The African System on Human and Peoples' Rights

The African System is the youngest of the regional human rights systems, and it continues to struggle to boost its exposure and promote access of those who most need the system's protection. Since its establishment, the African Commission on Human and Peoples' Rights has experienced low levels of implementation of its recommendations. While explanations for this vary, many cite the commission's lack of an institutionalized follow-up mechanism and the non-binding character of its recommendations as principal reasons. The African Court of Human and Peoples' Rights was established with the hope of reinforcing the regional system of human rights protection. However, the commission has yet to refer a case to the court, which is virtually inactive at present. Significantly, these issues are addressed in new rules of procedure for the commission and court. As those invested in the success of the African system strategize about how best to support its development, it is important to look back on the 25 years of the commission's work to identify important trends, and articulate how those trends can inform litigation and implementation strategies under the new procedural rules.

### **Implementation Successes, Rights, Remedies and Follow-Up Activities**

Because the African System's work has, until now, been fairly limited, there has been little effort to systematize information on implementation. Nevertheless, scholars have cited seven African Commission cases as examples of implementation success: *Pagnouille v Cameroon*; *Constitutional Rights Project v Nigeria*; *Centre for Free Speech v Nigeria*; *Forum of Conscience v Sierra Leone*; *Modise v Botswana*, *Amnesty International v Zambia*; and *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria*. Considering the commission has only issued approximately 60 decisions finding states in violation of their obligations under the African Charter on Human and Peoples' Rights, these seven cases represent an implementation rate of 12 per cent. A review of

these implementation successes sheds light on the relationships among rights, implementation and follow-up activities.<sup>16</sup>

Of the cases in which the commission found a violation of the charter, 50 percent involve civil and political rights, such as the rights to free expression and association; 25 percent involve economic, social, and cultural rights; and only five percent involve group rights. In the implementation successes cited above, the remedies have addressed the violations of basic civil and political rights, while violations of group economic, social, and cultural rights have been largely incidental in the outcome. It is therefore fair to say that cases principally involving traditional civil and political rights have a better chance of being implemented than those involving economic, social, cultural, or group rights.

With regard to remedies, an analysis of the 60 cases indicates that the commission applies no consistent remedial framework. Indeed, the commission has issued a wide variety of rulings, ranging from no recommendations at all to a wide array of individual and general measures. Arguably, in those cases where the commission finds a violation but makes no specific recommendation, the remedy is implicit under generally accepted norms of international human rights law. This, however, is only true of a limited set of individual remedies, the implementation of which is much less complex than systemic reform. Indeed, this is reflective of the African system generally, where implementation successes are limited to those cases in which the commission has either not specified a remedy, or the remedy has been very limited and full implementation has required a single executive act, such as releasing a detainee or permitting repatriation. This speaks to the difficulty of implementing the much rarer instances in which the commission recommends that a state amend its legislative framework, not to mention the cases that implicate a broad set of remedies to address systematic or generalized human rights violations.

A review of the African Commission's work shows that while rights and remedies are certainly important aspects of the implementation calculus, it is the follow-up activities of civil society organizations, the African Commission, state officials, and other concerned parties, that are most determinative of implementation. Professor Obiora Chinedu Okafor writes of the importance of "activist forces" in bringing about compliance with charter obligations in Nigeria under General Sani Abacha. Similarly, intense advocacy led the commission to reopen *Modise v Botswana* in 1993, and Mr. Modise's lawyers were able to secure his right to nationality after years of negotiations with officials in the Justice and Foreign Affairs Ministries of Botswana. In *Forum of Conscience v. Sierra Leone* and *Amnesty International v. Zambia*, cases in which the commission articulated no specific remedy, implementation advanced as a result of promotional visits made by the commission to Sierra Leone and Zambia. Finally, the importance of follow-up activities is apparent in *Malawi African Association et al. v. Mauritania*, a case in which the commission did provide a robust set of remedies that have not yet been

fully implemented, but which provided an excellent framework for civil society and the commission to work with the Mauritanian government on implementation.

### **The 2010 Rules of Procedure and a New Follow-Up Framework**

In 2010, the commission adopted new rules of procedure that provide both a comprehensive follow-up process for the recommendations it makes, and establish a process to refer cases to the African Court where implementation does not result. Under Rule 115 of the commission's new rules, there are specific timelines for states to respond to the commission on matters of implementation. Further, matters are to be assigned to specific commissioners, who will then become the Rapporteur for Follow-Up in a particular case and who will be responsible for advancing issues of implementation and reporting on them both orally and in writing. While it remains to be seen how this new follow-up framework will be put into practice with no apparent increase in the commission's budget to support these activities, the new rules represent a significant opportunity to improve the commission's poor implementation record.

Perhaps even more important is the prospect for the submission of cases to the jurisdiction of the African Court. The new rules provide the impetus for the court and commission to work together to advance the protective mandate of the African system; they also promotes a fluid working relationship that has historically been absent. The rules further establish that the exhaustion of the Rule 115 follow-up procedures in a given case may result in referral to the court, providing both an incentive for states to implement the decisions and a significant recourse for litigants when they do not. This shift will thereby address the criticism that the commission has no follow-up framework, as well as the concern that its decisions are not binding. Moreover, there is an indication that the African Court will aspire towards an enforcement mechanism like that used in the European system, where the political body of the African Union would oversee implementation of the court's judgments.

### **Conclusions and Recommendations**

The commission and court's new rules of procedure provide an opportunity for interested parties to push for a more rigorous implementation regime. The following conclusions and recommendations are offered to aid the process of improving implementation in the African system:

- The commission's new rules provide a basic framework for an implementation reporting mechanism that could be important in recording implementation successes and challenges, as well as in generating pressure for states to implement decisions. The reporting mechanism should be used to facilitate comparative analysis and pressure states to improve implementation.

- The establishment of a system of case-specific implementation rapporteurs is significant, but there is a concern that it will not provide the opportunity to centralize information about best practices. Interested parties should address this by encouraging the sharing of experiences during commission sessions and the collection of implementation-related information and reporting. Advocates should also request implementation hearings.
- The first referrals to the court present a tremendous opportunity to improve the implementation of decisions in the African system, both because states may engage in the implementation of commission decisions in order to avoid referral, and because they will feel more compelled to implement court decisions, which are legally binding. Interested parties should watch these first cases very closely, as they will define many aspects of court litigation in the near future, and litigants should develop implementation strategies in tandem with their litigation strategies.
- The commission is currently undecided about whether it will apply its new implementation procedures retroactively, but it has decided as a matter of internal policy that it will only refer cases to the court that have been decided under the new rules. Advocates should encourage the commission to apply its implementation procedures to previously decided cases and to refer certain unimplemented cases to the court.

## United Nations Treaty Bodies: The Human Rights Committee

The individual communications procedure allows the United Nations treaty bodies to consider, in a quasi-judicial manner, complaints of human rights violations by any individual within the jurisdiction of those states that have consented to the procedure. Currently, five UN treaty bodies can receive such communications: the Human Rights Committee (HRC), 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 here.

### **Follow-Up Monitoring and Implementation of “Views”**

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. 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. 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. As a general matter, those states most targeted for follow up have several communications registered against them that they have failed to address. Although the special rapporteur is the one who conducts these discussions, the Treaty Bodies Division of the Office of the High Commissioner Human Rights (OHCHR) determines which states should receive follow-up and coordinates the rapporteur’s agenda during one of the committee’s three yearly sessions.

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 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. Currently, the committee considers dialogue with states parties to be “ongoing” in just over half of the 546 cases, with some of these open cases dating back to the mid-1980s. In another 35 percent of the cases currently being monitored by the committee, the state of follow-up is unclear. 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, while the CERD has heard ten cases that resulted in findings of a violation, three of which have been satisfactorily implemented.

## Factors Affecting Implementation

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. This has often occurred in cases of gross violations of human rights, where states have paid damages but not undertaken public investigations or prosecutions. It has also occurred in the area of immigration law, where detainees who were otherwise facing deportation have been granted permanent resident visas.

There is not a clear relationship between the committee's approach to remedies and implementation. In certain cases, the committee's reluctance to propose specific, pragmatic remedies has abetted negligent implementation; yet in other cases, more detailed recommendations have been ignored. And in still other examples, successful (if partial) implementation has resulted from the committee's saying little to nothing in its decision about remedies.

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 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. Some of the more particularized treaty bodies, such as CAT and CEDAW, have been comparatively more successful with implementation. CEDAW's more rigorous approach to follow-up, and its highly prescriptive approach remedies, is particularly notable in this regard.

Despite these qualified successes, the failures of implementation are many. A review of the committee's recent annual reports reveals that several states have failed to respond at all to the committee's decisions. Still other states have responded to the committee only belatedly, and have merely used the opportunity to contest anew the basis for the individual communication, or raise objections they did not make when the case was first under the committee's consideration. These failures are perhaps the most troubling, because they represent the state's fundamental unwillingness to engage in the review and follow-up process. Even in some states, such as Spain and Colombia,

where domestic procedures have been established as a means to implement international court decisions, the procedures have had a limited effect on implementation. Finally, despite some modest successes by the special rapporteur regarding follow-up, many states have failed to implement the HRC's Views, or else have taken years to do so. Thus, 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. Indeed, in spite of the committee's repeated requests for greater funding to support the special rapporteur's mandate there remains far too little financial commitment to both the follow-up role and the treaty body system in general.

### **Conclusions and Recommendations**

Like the regional human rights systems, the UN treaty bodies suffer from an implementation deficit. Due in part to this fact, reform of the treaty monitoring bodies has been a topic of debate for many years, with much discussion focused on greater integration, and possible unification, of the treaty bodies' procedure. As these proposals continue to be debated, there are a number of other steps that can be undertaken to improve implementation of the treaty bodies' decisions:

- Greater resources must be allocated to support the Follow-Up Rapporteur; the current commitment is insufficient to the scale of implementation monitoring required. Improving the visibility, accessibility, and accuracy of information pertinent to implementation is also essential.
- In addition to developing a more sustained approach to follow-up within OHCHR, there should be greater collaboration between the UN's treaty-based bodies and charter-based bodies, particularly the UN Human Rights Council. Similarly, there should be systematic coordination between the treaty bodies and the UN Special Procedures mandate-holders so that they may address, where appropriate, the issue of implementation.
- Because there are numerous means by which individual complaints may be registered with the UN systems, advocates should carefully consider which treaty body is the best forum for litigation. Depending on the nature of the violation in question, advocates should also consider whether other UN mechanisms, such as the Special Procedures, might be more effective. Follow-up in these other systems should also receive greater priority.
- Where possible, advocates should plead treaty body decisions before domestic judiciaries, in order to press more aggressively for implementation at the national level. At the same time, treaty bodies should endeavor to ensure thorough and comprehensive reasoning in their decisions and, where appropriate, rely on

pertinent national jurisprudence. Furthermore, states must concentrate resources at the national level in order to give greater effect to international human rights norms at the domestic level.

## Conclusion: Improving Implementation through Cross-System Dialogue

Europe, the Americas, and Africa, while appreciably different, have all struggled to create regional systems of human rights protection. Fortunately, the last decade has seen an increase in dialogue among the human rights systems on a range of issues. Implementation should be an integral part of this conversation. The findings of this report suggest three specific areas that could be the focus of a cross-system dialogue on implementation.

First, the structure and resourcing of the three regional human rights systems informs the implementation of judgments. While Europe decided to replace its two-tier, commission-court model for adjudicating human rights complaints with a permanent human rights court and the Inter-American system is working to make communications between its commission and court more efficient, both systems are wrestling with unmanageable caseloads. Meanwhile, the African Union recently established a human rights court that can receive petitions from the African Commission and in some cases from individuals. But its future is unclear and the African system could certainly benefit from a cross-system dialogue to exchange experiences, examine challenges, and share best practices. For its part, the UN treaty body system differs substantially from the regional systems in structure but, like the other systems, the Human Rights Committee shares the problem of an overwhelming caseload that affects its ability to effectively follow-up on the implementation of its decisions.

A second important topic for cross-system dialogue is the design of implementation mechanisms and procedures. Many experts agree that the Council of Europe has designed one of the most effective enforcement mechanisms operating to date, and it notably stands alone as the only system that relies on its political body to monitor the implementation of judicial decisions. Proposals to do something similar in the Inter-American system have thus far been ignored, but the Protocol of the African Court seems to indicate that it will follow the European model when it begins the fundamental work of deciding cases on the merits. Similarly, there have been proposals, which this report supports, that the UN treaty bodies refer information on unimplemented decisions to the Human Rights Council. Additionally, while the extent of victim participation in the process of implementation varies across systems, each system has a comparable

method of communicating with states, which are ultimately responsible implementation. The systems would certainly benefit from an exchange of best practices in this area. Additionally, while the European and Inter-American systems are largely consistent in the remedies they order, the African and UN systems are not, which begs a conversation about which practices best promote implementation. Finally, the Human Rights Committee and African system have both struggled with using rapporteurships to support implementation of their recommendations—another potentially fruitful area for comparative analysis and discussion.

A third topic for cross-system dialogue is how different countries, as member states of the relevant regional or international systems, structure their implementation efforts once a decision is issued by a human rights body. As the decisions of human rights bodies often include recommendations or orders directed to the executive, judicial, or legislative branches of the state structure, a lack of formalized channels of communication among these different branches in matters relating to implementation often results in inaction. Perhaps the most effective model for creating a national mechanism to ensure implementation of regional decisions is the United Kingdom's Human Rights Act, which established a Joint Committee on Human Rights that is responsible for monitoring implementation and ensuring proposed legislation conforms to the European Convention. Discussing this model together with examples of legislation from civil law jurisdictions such as Peru and Colombia, as well as proposals from federated states, would generate a rich dialogue from which other countries would surely benefit. An equally important part of this discussion is the tremendous role that national human rights institutions and/or other human rights ombudspersons have to play in the implementation process.



# I. The European System of Human Rights

## Introduction

The European Court of Human Rights (“European Court” or ECHR), as judicial guardian of the European Convention on Human Rights, is generally regarded as the cornerstone of one of the most successful human rights regimes in the world today. What was once an agreement among a small group of Western European states to guarantee core civil and political liberties by means of an optional judicial review mechanism has now been supplemented by 14 protocols, which have expanded the scope of rights guaranteed by the convention and recast the court as a “permanent [body] with compulsory jurisdiction over all member states to which aggrieved individuals enjoy direct access.”<sup>17</sup> With the accession of the former Soviet bloc states to the Council of Europe and, in 1999, of Russia itself, there are now more than 800 million people with access to the court, spanning 47 states. The court’s reach is a testament to the European system’s significant achievements, but it also poses significant challenges.<sup>18</sup>

The prompt and effective execution of the court’s judgments is one such challenge. As the Committee of Ministers (the political branch of the Council of Europe responsible for supervising the court’s judgments) has noted, the “speedy and efficient execution of judgments is essential for the credibility and efficacy of the [court] as a

constitutional instrument of European public order on which the democratic stability of the Continent depends.”<sup>19</sup> Yet according to the most recent report of Christos Pourgourides, the current Rapporteur for the Parliamentary Assembly’s Committee on Legal Affairs and Human Rights, “[T]he problem of non-implementation and/or delay in the implementation of Strasbourg judgments is far graver and more widespread than previous reports have disclosed.”<sup>20</sup> Moreover, the relationship between the effective implementation of judgments and the court’s own overburdened docket underscores the larger, structural problems confronting the court. As Michael O’Boyle, the court’s deputy registrar, recently noted, “[T]he achievements of the Court are under threat by its own extraordinary popularity,” threatening “the prompt enforcement of judgments as the Council’s understaffed Execution Department struggles to keep abreast.”<sup>21</sup>

The implementation of judgments has been a growing concern of the European system for some time, and has acquired particular urgency in the past decade. Indeed, in 2001 a Reflection Group for “Guaranteeing the Long-Term Effectiveness” of the court was established to debate, over the course of three years, a variety of issues ranging from the enforcement and supervision of court judgments to improving implementation at the national level. This initiative, in turn, provided the basis for the recent, long-delayed passage of Protocol 14 to the European Convention, which, in addition to simplifying the procedures for determining the admissibility of complaints, strengthens in several important ways the committee’s and court’s involvement in the implementation process. Shortly after Russia—which had long been the only hold out—ratified Protocol 14, an international conference, also designed to ensure the “long-term effectiveness” of the court, was held in Interlaken, Switzerland in February 2010. The fruit of this conference was the Interlaken Declaration, which, like Protocol 14, “stresses that full, effective and rapid execution of the final judgments of the Court is indispensable” to its successful functioning.<sup>22</sup> To that end, the declaration calls on member states to produce specific proposals for reform by June 2012, and for a fuller implementation of the “subsidiarity principle,” which recognizes the primary role of states themselves in implementing court decisions.<sup>23</sup> Properly conceived, implementation is thus a twin strategy: not only must the mechanisms for supervising the execution of judgments be strengthened at the Council level, but national governments, too, must prioritize the domestic implementation of judgments and the European Convention more generally.

This chapter examines the prospects for improving implementation of the European Court’s judgments in the wake of Interlaken and Protocol 14. In so doing, it takes a closer look, based on the European Court’s own data, as to the nature of the implementation crisis currently confronting the system. In addition to examining the factors contributing to this problem, it seeks to examine the court’s evolving approach to remedies, explain the procedures that have evolved within the Council for monitoring the implementation of judgments, and lessons that might be learned from the implementa-

tion picture as it stands. The final section provides recommendations moving forward, emphasizing ways to strengthen enforcement mechanisms at the Council level, while also echoing the call for states to more effectively execute their own implementation obligations.

## The European Court at a Crossroads

Currently, the docket of the European Court reflects both the convention system's immediate post-World War II history—when it was largely populated by more or less securely entrenched, liberal Western European democracies—and its post-Cold War period, when the events of the early 1990s led to a rapid increase in the Council of Europe's membership. The convention, to which 22 states had previously been party, has been ratified by 25 new member states since 1990, auguring a rise in not only the number of petitions the court has received, but also the kinds of petitions that make up its docket. This rapid enlargement was coupled with the ratification of Protocol 11, which changed the institutional structure of the European system considerably, merging the European Commission (whose primary responsibility was judging the admissibility of interstate and individual applications) into the court and granting individuals standing to file cases directly.<sup>24</sup> At the same time, the Committee of Ministers, which had previously been entitled to decide, in certain cases, whether there was a violation of the convention, was tasked with the sole role of monitoring the implementation of judgments.

Thus, as Professor Ed Bates has argued, "It is only really since the mid-1990s, and the entry into force of Protocol No. 11 to the Convention, that the monitoring of the execution of Court judgments by the Committee of Ministers has become a cause for greater concern."<sup>25</sup> For much of this time, the consensus of most commentators had been that the court's judgments "[were] routinely followed by the national courts of the states parties to the Convention, their legislatures, and their national governments."<sup>26</sup> Yet such assertions of effective implementation are undermined by the fact that the court, as one scholar has noted, "has long been studied almost exclusively by legal scholars and has only recently attracted greater attention by social scientists interested in the issues of compliance with, and the effectiveness of, international legal institutions."<sup>27</sup> Similarly, Eric Posner and John Yoo recently complained that "good data" was unavailable to determine if "compliance with ECHR judgments has been high or low."<sup>28</sup>

Such data has become increasingly available in the past five years, however, and there is now compelling evidence that, aside from those cases resolved through "friendly settlements," implementation of court rulings has grown increasingly slow

and inconsistent.<sup>29</sup> Furthermore, it has become clear that certain states pose particular problems for the convention system due to their capacity or willingness to implement court judgments. By the start of 2010, there were nearly 120,000 applications pending before a decision body of the court, an enormous backlog that continues to increase.<sup>30</sup> Indeed, the court's caseload has "multiplied by a factor of ten" in the past decade, such that more than 90 percent of the court's judgments have been delivered between 1998 and 2008 alone.<sup>31</sup> Furthermore, of the pending cases, five states—Russia, Turkey, Romania, Ukraine, and Italy—account for over 60 percent (69,100 applications) of the court's workload.<sup>32</sup>

As the volume of applications reaching the court has outstripped its capacity for speedy determination, the Committee of Ministers' ability to supervise the implementation of judgments has diminished as well. In January 2007, the year that the execution of ECHR judgments began to be systematically monitored and made public by the Directorate General of Human Rights and Legal Affairs, over 5,000 judgments (including decisions rendered under the pre-1998 regime) were still listed as pending before the Committee of Ministers; by the end of 2009, that figure had risen to 7,887.<sup>33</sup> Thus, in the past two years alone, the number of pending cases has risen at an annual rate of 18 percent, far outpacing the number of cases that have been closed. This means that the Department for the Execution of Judgments was called upon to examine over 1,500 new cases decided by the court in 2009 (including 204 "leading" cases—those revealing systemic problems), and assisted the Committee of Ministers in monitoring the progress of execution measures in 7,887 cases overall.<sup>34</sup> Notably, the vast majority of these cases—nearly 90 percent—are "repetitive" or "clone" cases related to systemic problems that have already been adjudicated by the court; these cases are usually grouped together for the purposes of the committee's examination.<sup>35</sup> For example, Italy represents 31 percent of the total number of pending cases in 2009 (nearly all of which are connected to one issue—the excessive length of judicial proceedings), followed by Turkey, Russia, Poland, Ukraine, and Romania.<sup>36</sup>

These figures represent a growing problem for the court, one that has compounded itself over time. Andreas Von Staden notes that a review of all judgments issued by the now defunct commission and court between 1960 and 2005 show that all judgments rendered up to 1995, save one, had been implemented.<sup>37</sup> (The 1991 case still pending, *F.C.B. v. Italy*, was closed in 1993 but later reopened.) Beginning in 1996, however, the first non-implemented judgments began to appear, and the number has increased steadily, such that they are now a relatively frequent occurrence. For example, in 1996, only 12.5 percent of cases that had been adjudicated by the court were still awaiting satisfactory implementation; however, by 2005, that figure had risen to 63 percent.<sup>38</sup> Based on these data, von Staden argues that a "bifurcated picture" emerges, in which there is "near-perfect compliance" with those judgments rendered up to 1995 (qualified by the

fact that the Committee of Ministers during that time tended to be “relatively timorous” and “more lenient and trusting in the pledges made by respondent states”), followed by a progressive downward trend in implementation from 1996-2005.<sup>39</sup> Importantly, a number of settled democracies—Italy, France, Belgium, and the United Kingdom—now have judgments pending for more than six years as well. Currently, 63 percent of the “leading” cases pending before the committee have been pending for fewer than two years, while 22 percent have been pending for two to five years and 15 percent for five years or more. This latter figure represents an increase of four percent from 2008.<sup>40</sup>

### **The Court’s Evolving Docket**

Beyond these statistics, there are a number of factors related to the court’s docket that inform the implementation debate as well. As the Directorate General of Human Rights and Legal Affairs recently remarked, the court’s “workload problem is not just a question of figures,” because it has also seen in recent years a “number of cases relating to complex and sensitive issues, which need much more time to resolve.”<sup>41</sup> Several general trends in the court’s docket exemplify these complexities.

First, procedural rights, those provided for in Articles 5 and 6 of the convention, have been most frequently invoked by applicants, particularly as they relate to the essential characteristics of a “fair hearing” and the length of judicial proceedings; as a result, these cases consume a significant portion of the Committee of Ministers’ work and, with particular respect to Article 6, “disclose an extensive array of positive obligations.”<sup>42</sup> Applications alleging excessive length of proceedings have been registered against a number of state parties but have reached “epic proportions” in Italy, where a civil case can take between 26 and 46 months to be completed. Likewise, complaints about the length of judicial proceedings is a common phenomenon in many Central and Eastern European states, as are complaints alleging Article 13 violations for the non-implementation of domestic judgments.<sup>43</sup>

Second, as many scholars have argued, prior to the 1990s the European Court’s docket dealt primarily with “lifestyle issues” and were “nonviolent, administrative in character,”<sup>44</sup> meaning the court was predominantly occupied with protecting individuals and groups from “good-faith limitations on liberty.”<sup>45</sup> These so-called negative obligations, which essentially require states not to interfere in the exercise of rights, “have always been regarded as inherent in the European Convention.” However, positive obligations have assumed an increasingly larger role in the court’s jurisprudence as well. According to Alistair Mowbray, the principal circumstances in which the court has derived positive obligations from the convention’s provisions include the duty upon states, under Article 10, to take operational measures (such as deploying police or military personnel) to protect individuals from infringement of their convention rights by other private parties; the obligation, under Article 13, to provide an effective domestic

remedial mechanism; and the obligation, under Article 3, to provide appropriate medical care for detainees.<sup>46</sup> Notably, these cases often require a significantly greater expenditure of public resources and can raise contentious political questions, making them more difficult for states to implement and for the committee to monitor.

Third, the nature of complaints that have come before the court in the past ten years has changed dramatically, involving more frequent allegations of systematic human rights abuses. In 2009, for instance, the Parliamentary Assembly's Committee on Legal Affairs and Human Rights identified cases concerning "death or ill-treatment which took place under the responsibility of state forces and lack of an effective investigation thereof" as those that raise the most prevalent implementation problems.<sup>47</sup> To this point, Christian Tomuschat notes that the "conclusion seems to be warranted that the centre of gravity of the ECHR has shifted toward Eastern Europe," resulting in both an increased workload for the court as well as a "very different membership to the Convention ... compared to just 10 or 15 years ago."<sup>48</sup> Here, Russia and Turkey, in particular, loom large, as cases against both countries have included such serious allegations as the destruction of villages, the prohibition of political parties, and the torture or disappearance of detainees in Chechnya and the southeastern Kurdish regions.<sup>49</sup> Other categories of structural violations that have filled the court's docket include overcrowding in detention facilities, delayed or inadequate compensation for expropriation, problems with remand proceedings, and State Security Court proceedings taking place in Turkey.<sup>50</sup>

Fourth, minority rights have assumed a more prominent place in the court's docket since the late 1990s, including complaints from ethnic groups alleging, *inter alia*, discrimination, lack of official recognition, and restrictions on effective participation in public and political life.<sup>51</sup> While the largest groups of such cases have been brought by Kurdish victims, litigation over Roma rights also features prominently on the court's docket. The European system, in particular, has "charted a legal revolution of sorts in recent years," recently striking down a nationwide system of racial segregation in Czech schools that left Roma children languishing in "special schools" for students who were, at the time, termed "mentally deficient."<sup>52</sup> Since then, two more decisions have struck down similar systems of racial segregation in education as Roma communities, the vast majority of whom reside in Central and Eastern Europe, have sought to "reframe and rearticulate the myriad social problems they [are] suffering as violations of their fundamental human rights."<sup>53</sup>

In view of these developments, the current situation presents a variety of challenges to the European human rights system, not least of which is the effective and prompt implementation of judgments. The following section describes in greater detail the remedial framework the court applies to cases and its relationship to implementation, before examining the mechanisms and working methods of those entities responsible for the monitoring of court judgments.

# ECHR's Remedial Framework and Its Relationship to Compliance

In *Scozzari and Giunta v. Italy*, the European Court reiterated that a judgment finding a breach “imposes on the respondent state a legal obligation not just to pay those concerned the sum awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.”<sup>54</sup> When assessing whether or not a state’s proposed measure satisfies the court’s judgments, the rules prescribe an obligation on the committee to examine three questions:

- 1) Whether any “just satisfaction” (often a combination of pecuniary losses, non-pecuniary losses, courts costs, and interest payments) awarded by the court under Article 41 of the convention has been paid;
- 2) Whether individual measures have been taken to ensure that the violation in question has ceased and *restitutio in integrum* achieved—in other words, that the injured party is restored, to the extent possible, to the same situation he or she enjoyed prior to the violation; and
- 3) Whether general measures have been adopted, so as to prevent “new violations similar to that or those found putting an end to continuing violations.”<sup>55</sup>

## *Just Satisfaction*

Just satisfaction is the only measure that the court can order a state to take under the terms of the convention itself.<sup>56</sup> As noted, the payment of sums can be ordered by the court, or provided for by a judgment that takes note of a friendly settlement between the parties; in both cases, however, payment is expected within three months after the judgment has become final. Since January 1996, the court has also included an order to states to pay simple interest, calculated on a daily basis, from the expiry of the three months until payment. Clare Ovey and Robin White, authors of an authoritative treatise on the court, further note that if a respondent state is unable to supply proof of payment, “the case will return to the agenda at every subsequent meeting until the Committee is satisfied that the money has been paid in full.”<sup>57</sup>

Professor Elizabeth Lambert-Abdelgawad contends that, as a general matter, the obligation to pay “just satisfaction raises few difficulties: it is an obligation that can be clearly and immediately fulfilled,” and, to a large degree, it is.<sup>58</sup> According to the Committee of Ministers’ 2008 annual report, payments made after the three-month deadline are the exception, making up only five percent of all payments in 2008 (although this

figure doubled to 11 percent in 2009, according to the report).<sup>59</sup> Unsurprisingly, most of those countries with the highest awards of just satisfaction—Bulgaria, Greece, Italy, Romania, Russia, and Turkey—were also those that had the highest numbers of cases in which payment was not made within the deadline set by the judgment.<sup>60</sup>

Although state compliance with the payment of just satisfaction is generally high, problems have nevertheless arisen. Most recently, in a rare case of defiance, the Turkish government objected to the court's award of compensation in the case of *Loizidou v. Turkey*, where the court found that the denial to a Greek Cypriot of access to her property in Northern Cyprus violated the right to peaceful enjoyment of property under the convention.<sup>61</sup> The court issued its decision in *Loizidou* in 1998; however, Turkey refused to pay the awarded sum, leading the Committee of Ministers to adopt an interim resolution in July 2000, stating that Turkey's refusal to satisfy the judgment "demonstrates a manifest disregard for its international obligations."<sup>62</sup> The committee issued yet another resolution—perhaps its strongest yet—in 2001, declaring its "resolve to ensure, with all the means available to [it], Turkey's compliance with its obligations."<sup>63</sup> Ultimately, Turkey complied with the ordered payment in 2003, which, although delayed, suggests that the committee's use of interim resolutions has been successful, at least regarding just satisfaction orders.

### *Individual Measures*

Where the adverse consequences of a violation are not adequately remedied by the payment of just satisfaction, the Committee of Ministers will also examine whether it is necessary to impose individual measures. The committee recently stressed the need to take such measures "considering the seriousness of the violations found and the time that has elapsed since the European Court's judgments became final."<sup>64</sup> Individual measures depend on the nature of the violation and the applicant's situation. One notable example includes the reopening of domestic judicial proceedings, which the European Court has held to be a measure as close to *restitutio in integrum* as possible. Alternately, although less common in practice, the committee may order "positive obligations" that a respondent state is obliged to undertake, such as ordering the destruction of police files that the court determined had been obtained in breach of the right to privacy,<sup>65</sup> the recognition of a church that had previously been refused official status,<sup>66</sup> or the reinstatement of an employee who was unlawfully excluded from the civil service.<sup>67</sup>

With respect to the reopening of proceedings, this measure arises primarily in connection with criminal proceedings, either as a result of the court's having determined that a procedural injustice in the applicant's original trial gave rise to a breach of Article 6, or because a criminal law of a particular state was substantively incompatible with the European Convention.<sup>68</sup> In response to certain implementation problems caused by the lack of appropriate national legislation authorizing the reopening of judi-

cial proceedings, the Committee of Ministers recommended, in 2000, that member states ensure that there exists at the national level adequate mechanisms for reopening cases.<sup>69</sup>

### *General Measures*

General measures aim to prevent the recurrence of a violation of the convention. They serve a preventive rather than remedial function, one which, in the court's words, "must be such as to remedy [a] systemic defect ... so as not to overburden the Convention system with large numbers of application deriving from the same cause."<sup>70</sup> Significantly, general measures were not initially considered to fall under the Committee of Ministers' purview; it was not until 1983 that the committee indicated that its competence to review a judgment's execution extended beyond the individual case to encompass general measures as well, although this practice has been followed ever since.<sup>71</sup> To date, member states have adopted more than 350 constitutional, legislative, or regulatory reforms, or other general measures to comply with ECHR judgments. More than 400 of these reforms are currently under the Committee of Ministers' supervision.

Ovey and White contend that over half of the general measures supervised by the committee to date involve changes to legislation, while other measures have included "administrative reforms, changes to court practice or the introduction of human rights training for the police."<sup>72</sup> As others have noted, however, what the committee regards as sufficient evidence that a state's proposed general measures are sufficient varies from cases to case "with little apparent rationale."<sup>73</sup> For instance, in certain cases, the committee has accepted a mere promise by a respondent state that the offending practice will not happen again, but on other occasions the committee has awaited actual enactment of proposed legislation before issuing a final resolution. Despite these variations, Lambert-Abdelgawad notes that there are certain measures "to which the Committee ... has been wedded from the outset," including the translation of the court's judgment and dissemination to national authorities, as well as the "translation of interim resolutions of the Committee of Ministers into the language of the country concerned."<sup>74</sup> In yet other cases, general measures undertaken by states have included the construction of new detention centers,<sup>75</sup> enhanced training of child welfare workers,<sup>76</sup> the establishment of a national commission for policing ethics,<sup>77</sup> and increased recruitment of judicial officers.<sup>78</sup>

### **An Evolving Remedial Framework**

Until recently, the European Court adhered to a modest conception of its remedial powers.<sup>79</sup> Indeed, the court "did not even consider [itself] competent to remedy the consequences of the treaty violation," other than its enumerated power to award just satisfaction.<sup>80</sup> However, there has been a shift in the court's position on this issue in

recent years, as it has “begun to develop a practice whereby it specifies in the operative part of its judgments the specific measures to be taken by the respondent State to redress the violation ... in a manner as close to *restitutio in integrum* as possible.”<sup>81</sup> This shift owes, in part, to the enormous increase in applications reaching the court, as well as the court’s perceived lack of clarity in specifying remedial measures.<sup>82</sup> Indeed, after growing criticism over this issue, the Committee of Ministers, in 2004, issued a resolution inviting the court, “as far as possible, [to] identify in its judgments ... what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.”<sup>83</sup>

The court took up the committee’s challenge one month later, in the first of what has since come to be known as the “pilot judgment” procedure. In the case of *Broniowski v. Poland*, the court held that the expropriation by the Polish government of property belonging to the applicants east of the Bug River, which Poland had ceded to the Soviet Union after World War II, constituted a violation of Article 1 of Protocol No. 1 because inadequate compensation had been paid.<sup>84</sup> Doctrinally, *Broniowski* did not represent a significant departure from the court’s restitution jurisprudence; however, in the operative part of the judgment, the court expressly stated that the violation of the applicant’s right “originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons.”<sup>85</sup> Thus, the court required the Polish government to adopt appropriate measures to secure an adequate right of compensation not only for Broniowski, but for the 67 similarly situated applicants who had pending cases, and the 80,000 potential applicants as well. Moreover, in the ensuing judgment, the court further assessed not only the settlement between the applicant and Poland, but also the general measures taken by Poland to remedy the systemic defect.<sup>86</sup> In so doing, the court stated that “it is evidently desirable for the effective functioning of the Convention system that individual and general redress should go hand in hand.”

In effect, *Broniowski* stands as the court’s “creation of international law’s first class action mechanism,” one which has been largely welcomed for its time and labor-saving effects.<sup>87</sup> According to Professor Steven Greer, there are three distinct advantages to the court’s increased specificity about the kind of systemic action required by national authorities: (1) implementation is “less open to political negotiation” in the Committee of Ministers; (2) it is easier for the committee (as well as other NGOs and human rights bodies) to monitor objectively; and (3) a state’s failure to implement is easier to enforce by the original litigant, and others, “through the national legal process as an authoritatively confirmed Convention violation.”<sup>88</sup>

However, in addition to criticisms over the legal basis of the pilot judgment procedure, commentators have also pointed to the practical problems that this approach might pose during the execution phase, as it would “entail stringent remedial measures to address the structural problems of domestic legal systems which may prove very difficult for the Committee of Ministers to monitor.”<sup>89</sup> Critics have also expressed concern that, unlike *Broniowski*, where the court passed judgment on the effectiveness of the Polish government’s legislative scheme, more recent applications of the procedure have been subject to less scrutiny. For instance, in two recent cases, the court evaluated the respondent government’s compliance with the procedure by reviewing only the proposed text of new legislation, and relying on the contention that the proposed remedies were “in principle” capable of providing redress and avoiding future violations.<sup>90</sup> It should also be noted that the success of *Broniowski* was due, in part, to the Polish government’s “constructive attitude” to the court’s remedial scheme, which may not be the case in other circumstances. Indeed, in a subsequent pilot judgment concerning the inadequacies of housing legislation, the Polish government challenged the application of the procedure before the Grand Chamber of the court on the grounds that the applicant’s circumstances were not those of a typical landlord.<sup>91</sup> Finally, the timeliness of a state’s response to a pilot judgment is critical, a fact that the court acknowledged when it laid down a specific timetable for implementation in its most recent pilot judgment, *Burdov v. Russia (No. 2)*, concerning Russia’s failure to honor judgment debts to applicants who had suffered from radioactive emissions in the wake of the Chernobyl disaster.<sup>92</sup>

The court has subsequently, if cautiously, applied the pilot judgment procedure to civil and political rights violations in other member states,<sup>93</sup> although its applicability to different situations is unclear. Still, as Laurence Helfer argues, the pilot judgment procedure represents a significant shift in the ECHR’s own powers, in that the court has claimed the authority to scrutinize the legislative and administrative regulations that national governments adopt to comply with its remedial orders and recommendations. In other words, the court has “arrogated to itself the power to monitor compliance with its most far-reaching judgments, a power that was previously the exclusive province of the Council of Europe’s political bodies.”<sup>94</sup> While more research and experience with this process is clearly needed, this shift in the court’s orientation is a welcome step, one that, as one commentator has noted, “Is a promising way to channel the cooperation between national and Strasbourg institutions to improve compliance with the ECHR.”<sup>95</sup>

Finally, in certain areas of rights—particularly those related to property restitution and unlawful detention—the court has taken a more prescriptive approach to remedies, one that has been welcomed by a number of advocates as an important step towards more effective implementation.<sup>96</sup> The earliest such case, *Papamichalopoulos and Others v. Greece*, came in 1995, where the applicants established a violation of their rights as

a result of the Greek Navy's occupation of their land.<sup>97</sup> In its judgment, the court held that the Greek state must return the land in question or pay compensation equal to its current value, in order to "put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach [of the Convention]."<sup>98</sup> The court has shown a similarly proactive approach in ordering remedies for violations of the right to a fair trial. For example, whereas the court historically refused to find that an Article 6 violation should lead to an automatic annulment of the penalties imposed by the domestic proceedings, more recent judgments confirm that the court now considers the reopening of those proceedings to be the most appropriate form of redress.<sup>99</sup>

Furthermore, in two cases in 2004, the court's Grand Chamber ordered the respondent states to release applicants who had remained in custody in circumstances that the court deemed unlawful under Articles 5 and 6. In the first case, *Assanidze v. Georgia*, the petitioner was arrested on suspicion of illegal financial dealings and remained in detention for three years after the Georgian Supreme Court had acquitted him and ordered his release. The Grand Chamber found that Assanidze's continuing detention was arbitrary and, in view of the need to end the continuing convention violations, ordered Georgia to "secure the applicant's release at the earliest possible date."<sup>100</sup> In doing so, the court reasoned, "by its very nature, [that] the violation found in the instant case does not leave any real choice as to the measures required to remedy it."<sup>101</sup> The court came to a similar conclusion in *Ilascu, Ivantoc, Lesco and Petrov-Popa v. Moldova*, when it found that the four applicants had been, and continued to be, unlawfully detained in the Moldovan Republic of Transdnistria. Here, the court went further than it did in *Assanidze*, stating that the sentence could not "be regarded as 'lawful detention'" and ordered the respondent states to "take every measure to put an end to the arbitrary detention of the applicants still detained and to ensure their immediate release."<sup>102</sup>

As Professor Philip Leach, director of the European Human Rights Advocacy Centre, and several other commentators have argued, the court's judgments in both *Assanidze* and *Ilascu* were important not only because of the nature of the redress stipulated by the court, "but also because the respondent states were not given a choice as to the means of complying with the judgments; the requirement to release the applicants was in addition to an obligation to pay compensation."<sup>103</sup> In *Assanidze*, the approach worked; Georgia fulfilled its obligation and released Assanidze four days after the court delivered its judgments.<sup>104</sup> In *Ilascu*, however, only one applicant was released in the wake of the court's judgment. Lesco was not released until 2001, at the expiry of his sentence, while Ivantoc and Petrov-Popa remained in custody until 2007.<sup>105</sup>

Despite this disregard for the court's order, the court's willingness to move towards a more prescriptive approach is notable, particularly as the cases in which it has done so the most often—expropriation, unlawful detention—often pertain to viola-

tions of a continuing character, such that the remedial duty is unambiguous and aimed at securing immediate cessation of the wrongful act; in the court's words, "the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it."<sup>106</sup> The court's inclusion of the release of the applicants in the operative parts of its *Ilascu* judgment (and elsewhere) is also significant insofar as it means that the remedy itself is legally binding; indeed, Petrov-Popa and Ivantoc, while still in detention, filed a new application before the court, alleging that Russia and Moldova's failures to comply constituted a violation of their duty under Article 46 of the European Convention.<sup>107</sup> This is the first such application to reach the European Court and may well pave the way for future enforcement litigation, in addition to the anticipated infringement proceedings under Protocol 14, which are discussed further below.

## Implementation Monitoring in the Council of Europe

Because the European Convention system is founded on the principle of subsidiarity, decisions of the court are declaratory in nature, meaning that it is for the contracting states, in the first instance, "to decide how best to secure the substance of the Convention rights in their domestic legal system, and also to choose the means by which they comply with judgments of the Court."<sup>108</sup> At the same time, Article 46(1) of the convention requires that states "undertake to abide by the final judgment of the court in any case to which they are parties" and to amend, if necessary, domestic law or practice should a judgment of the court so require.<sup>109</sup> The court itself is not empowered to overrule national decisions or annul national laws; rather, "states must work backwards from the violation to understand what must be changed to remedy the violation in the specific case and to avoid what future cases might also arise."<sup>110</sup>

### **The Committee of Ministers and the Department for the Execution of Judgments**

As set forth by Article 46(2) of the convention, the Committee of Ministers is the statutory body tasked with monitoring state compliance with judgments of the court.<sup>111</sup> The committee currently meets four times a year, usually once at the ministerial level but otherwise at the level of deputies—the permanent representatives of member states of the Council of Europe.<sup>112</sup> As Steven Greer notes, "[v]irtually all the Committee of Ministers' responsibilities with respect to the supervision of the execution of judgments are discharged by Deputies and the ministers themselves are likely to intervene only in particularly sensitive inter-state cases."<sup>113</sup> (Notably, this applies to the general composition of the Committee of Ministers; deputies themselves meet three times monthly in working sessions, in addition to the quarterly meetings.) While the Committee of Min-

isters is a political body that sees the supervision of the implementation of the court's judgments as "essentially—and successfully—based on constructive and co-operative dialogue between states," the supervision process is itself a legal mechanism relating to, in Philip Leach's words, "the enforcement of a legally binding judgment."<sup>114</sup> To that end, the committee, in addition to having its own Secretariat, is assisted in its duties by the Council of Europe Directorate General of Human Rights and Legal Affairs (one of five Directorates General), and, since the late 1990s, by the specialized Department for the Execution of Judgments, which is housed within the Human Rights and Legal Affairs Directorate.

According to Andrew Drzemczewski, the responsibility of the Human Rights and Legal Affairs Directorate is "to provide the Committee of Ministers [with] logistic and secretarial assistance [...], liaising with State authorities via their delegations in Strasbourg, analyzing national legislative texts in order to verify their conformity with the Court's findings, and helping, where necessary, to draft proposals for adoption by the Committee."<sup>115</sup> Significantly, the Department for the Execution of Judgments is typically the first point of contact for information concerning the execution of judgments. Furthermore, unlike the committee, the Department for the Execution of Judgments is staffed with legally trained professionals, thus assuring that the cases are legally evaluated before the committee makes a decision as to whether or not to close them.

While the European Convention is silent as to how implementation of the court's judgments should be supervised, rules adopted by the Committee of Ministers in 2001 (and amended in 2006) set forth its procedures for monitoring compliance.<sup>116</sup> Within six months of the court's judgment becoming final, the respondent state is required to provide information about the implementation measures taken, or that it intends to take, and to provide an "action plan" with a specified time frame for its envisaged compliance.<sup>117</sup> The case is then, in principle, placed on the agenda of the committee's next meeting, or of a meeting to take place no more than six months later, until such time as a final resolution is adopted. A judgment is deemed "executed," or fully implemented, when a final resolution issues.

While regarded as one of the most effective enforcement mechanisms within the Council of Europe, much of the Committee of Ministers' work remains confidential. Fortunately, the committee's operating rules have become significantly more transparent in recent years.<sup>118</sup> To that end, the agenda and information provided to the committee "by the state concerned, together with the accompanying documents, are made public, as are the agenda and annotated proceedings of each meeting containing information about progress recorded in executing judgments."<sup>119</sup> However, under Article 21 of the Statute of the Council of Europe, the deliberations of the committee itself are private, unless it decides otherwise.<sup>120</sup> Furthermore, in 2007 the committee began publishing an annual report on supervision of the implementation of judgments, which details the

number of cases that have been closed and those still pending review. A user-friendly website now presents information on the status of implementation in most cases.<sup>121</sup>

Significantly, victims and their advocates play only a limited role in the implementation monitoring process and, until 2006, they played no role at all. Now, however, under Rule 9 of the Committee of Ministers' amended rules of procedure, victims and/or their representatives are entitled to communicate with the committee about the implementation of individual measures, including the payment of just satisfaction.<sup>122</sup> Furthermore, non-governmental organizations and national institutions for human rights (NHRIs) may make written submissions regarding individual and general measures, which the Secretariat "shall bring, in an appropriate way... to the attention of the Committee of Ministers."<sup>123</sup> Unfortunately, as several commentators have noted, these expanded participatory rights have yet to be used to their full effect, as "NGOs and [NHRIs] across Europe are not fully aware of the possibilities, nor of the mechanics, of engaging in this process."<sup>124</sup>

Where a case is pending before the Committee of Ministers, the committee may adopt interim resolutions, "in order to provide information on the state of progress of the execution" or "to express concern and/or to make suggestions with respect to the execution."<sup>125</sup> (The committee adopted nine such resolutions in 2009.<sup>126</sup>) Interim resolutions may be adopted with various objectives, including, *inter alia*, urging authorities within a particular state to conclude ongoing reforms; to express concerns about any perceived negligence or delay in implementing the court's judgment; or to provide an indication of what execution measures the committee expects to be implemented.<sup>127</sup> The latter is known as an "informative" resolution, and, as Murray Hunt notes, the committee is "increasingly adopting" such resolutions in order to "insist on specific individual measures ... to remove as far as possible the effects of violations."<sup>128</sup> Similarly, the committee has also undertaken the relatively new process of issuing memoranda, which are meant to explain the steps the committee considers a state should undertake in cases related to structural violations.<sup>129</sup> These documents may either precede or follow the committee's adoption of an interim resolution or, as Lambert-Abdelgawad has noted, as "a way of avoiding interim resolutions which might not be followed by concrete measures."<sup>130</sup>

Beyond these measures, new working methods aimed at improving compliance were prepared under the responsibility of the Norwegian delegation, adopted by the Committee of Ministers' deputies in 2004, and subsequently built upon.<sup>131</sup> One such reform was to establish implementation timetables early in the supervision process, accompanied by the use of publicly accessible "status sheets" that would include information about the status of implementation and whether the committee had proposed any particular action.<sup>132</sup> Furthermore, where the measures required for the execution of a judgment are not self-evident, the committee's secretariat has begun to send let-

ters to respondent states proposing measures to be undertaken. Meetings between the Execution Department and the states' representatives based in Strasbourg and, occasionally, with representatives of the applicants, have also become more frequent. They aim to establish, as early as possible in the execution process, the plan to be followed in individual cases, as well as planning the execution of the country's docket of cases.<sup>133</sup>

Taken together, these reforms reflect a recognition of "competing needs," including a need for flexibility in establishing a compliance timeline, "as against 'the interests at stake for the individuals' and the imperative of preventing new applications to the Court following judgments concerning systematic violations."<sup>134</sup> For instance, while the initial phase of supervision usually lasts six months, the committee determined that such timeframes may be reduced in urgent cases, systemic cases, or cases of "very serious violations."<sup>135</sup> Furthermore, if all the requisite general measures will not be carried out in six months to one year, the committee has resolved to consider adopting "a more robust framework for execution."<sup>136</sup> To that end, the committee has developed a non-exhaustive list of criteria for the purposes of highlighting cases in which debate is warranted, including, *inter alia*: whether or not an applicant's situation warranted special supervision, whether a judgment reflected a new departure in case law, if a potential systemic problem was at stake, where the committee and state "are not agreed about the measures required," or if debate had been requested by another state delegation.<sup>137</sup>

Where implementation is delayed, the committee may seek to put additional pressure on a respondent state by undertaking more frequent examinations of the case, increasing communications between the committee chair and the minister of foreign affairs of the state in question, and by adopting a public interim resolution. Where there is persistent failure to implement, the committee may adopt successively more strongly worded interim resolutions—as it has most notably done in the cases of Italy and Turkey—and issue appeals to other member states, urging them to take appropriate action to ensure compliance. Ultimately, the Statute of the Council of Europe empowers the Committee of Ministers to sanction non-compliant states by suspending or expelling them under Articles 3 and 8; however, the committee has rarely resorted to these measures and many have argued that such extreme measures "would prove counter-productive in most cases."<sup>138</sup> Thus, as Lambert-Abdelgawad notes, there are "no immediate measures between light weapons (such as interim resolutions) and the heavy artillery of [suspension and expulsion]."<sup>139</sup>

Importantly, the ratification of Protocol 14 provides some additional measures that seek to fill this gap.<sup>140</sup> One innovation permits the committee, by a vote of two-thirds of its representatives, to seek an interpretive ruling from the court where there is disagreement as to the meaning of an original judgment. Another new measure gives the committee, also subject to a two-thirds vote, the authority to bring infringement proceedings against a recalcitrant state (having first served it with a notice to

comply).<sup>141</sup> This infringement procedure, as the Explanatory Report to Protocol No. 14 notes, “does not aim to reopen the question of a violation,” nor does it provide for the payment of financial penalties by a party found to be in violation of Article 46. Rather, it was thought that the “political pressure exerted by proceedings for non-compliance in the Grand Chamber and by the latter’s judgment should suffice to secure execution of the Court’s initial judgment by the state concerned.”<sup>142</sup> However, as commentators have noted, infringement proceedings will not be without risk because the method, as presently conceived, would remove the committee’s jurisdiction over supervision pending the court’s findings and would require the committee to close the case if the court found no Article 46 breach.<sup>143</sup> Moreover, even assuming the court did find a failure to comply, it is not yet clear what the consequence of doing so would be, because the case would ultimately return to the Committee of Ministers. At the same time, both interpretation and infringement proceedings could be of crucial importance. As Alastair Mowbray notes, they may prove particularly useful “for pilot judgments where no friendly settlement has taken place,” insofar as they would “be a useful tool for the Committee to employ as a way of assisting or encouraging [a] state to introduce key reforms.”<sup>144</sup>

### **The Council of Europe’s Parliamentary Assembly**

In addition to the Committee of Ministers, the Council of Europe’s other main statutory body is the Parliamentary Assembly (PACE). PACE is composed of delegations from the member states’ parliaments and also engages on matters of compliance with court judgments.<sup>145</sup> The agenda of one of PACE’s four annual sessions now includes the implementation of judgments, regarding which various resolutions and recommendations are adopted. The Committee on Legal Affairs and Human Rights, a subcommittee of the Parliamentary Assembly, is responsible for reporting to the assembly on implementation-related issues. In addition to the sanctions that the Committee of Ministers may impose, the assembly may also sanction Council members for their “persistent failure to honor obligations and commitments accepted ... by adopting a resolution and/or a recommendation,” or by the non-ratification of the credentials of a state’s parliamentary delegation.<sup>146</sup>

PACE’s increased involvement in the execution of judgments dates back to 1993, when it instructed the Legal Affairs Committee to report to it “when problems arise on the situation of human rights in member states, including their compliance with judgments by the European Court,” and adopted a monitoring procedure to that effect.<sup>147</sup> Furthermore, in 1997 the assembly established a monitoring mechanism—the Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)—responsible for “verifying the fulfillment of [member state] obligations” under the terms of the Statute of the Council of Europe, as well as the European Convention.<sup>148</sup> While less frequently engaged with

compliance-related efforts than the Legal Affairs Committee, the Monitoring Committee has included the implementation of judgments in several of its reports on the honoring of obligations and commitments by member states.<sup>149</sup>

Currently, the Parliamentary Assembly's role in supervising the execution of judgments takes several forms. First, as Lambert-Abdelgawad notes, members of the assembly "have no hesitation in using written questions to obtain explanations from the Committee of Ministers concerning the failure to execute certain judgments," which, in turn, requires the committee to provide a written answer.<sup>150</sup> Second, under PACE Resolution 1226, the assembly decided to "adopt recommendations to the Committee of Ministers, and through it to the relevant states, if it [noticed] abnormal delays," and to hold an "urgent debate," if necessary, "if the state in question [had] neglected to execute or deliberately refrained from executing the judgment."<sup>151</sup>

To this end, in 2002, the Legal Affairs Committee was assigned open-ended terms of reference to pursue its monitoring activities, a mandate that allows its current rapporteur, Christos Pourgourides, "to work on the implementation of the [Convention] on an open-ended basis." Since assuming office in June 2007, Pourgourides has largely extended the working methods of his predecessor, Erik Jurgens, in developing a monitoring procedure for non-compliant states that is guided by two criteria: (1) the time elapsed since the ECHR's decision, defined as judgments that have not been "fully implemented more than five years after their delivery;" and (2) decisions that raise "important implementation issues, whether individual or general," as highlighted, notably, by the Committee of Ministers' interim resolutions.<sup>152</sup> Based on these criteria, Pourgourides sought information from the national parliamentary delegations of eleven member states and, based on this information, made *in situ* visits to the following: Bulgaria, Greece, Italy, Moldova, Romania, Russia, Turkey, and Ukraine. Although the visits are not yet complete, a progress report released in September 2009 highlights the increase in cases of "particularly problematic instances of late and of non-execution."<sup>153</sup> As a result, the Legal Affairs Committee has decided that the thrust of its work will address judgments that "raise prevalent implementation problems," including cases of the non-implementation of domestic judicial decisions, excessive length of judicial proceedings, and deaths or ill-treatment under the authority of state forces and lack of an adequate investigation into them.<sup>154</sup>

While the Parliamentary Assembly's engagement in implementation has been generally welcomed, it is worth noting, as Andrew Drzemczewski does, that "the Assembly was never actually intended to be a body for monitoring the execution of judgments." Rather, it has "taken an interest in the matter, given its general powers."<sup>155</sup> Currently, however, the assembly's role in monitoring the execution of judgments is accepted and well-regarded, to the point that the Committee of Ministers has invited assembly participation in drawing up various implementation-related recommenda-

tions.<sup>156</sup> Furthermore, in Lambert-Abdelgawad's view, the significance of the assembly's involvement "lies in particular in the public nature of the denunciation of recalcitrant states," which, she contends, "can only be salutary, ... as it entails close coordination with the Committee of Ministers and complements the latter's role."<sup>157</sup> Indeed, since 2000, the assembly has adopted six reports and resolutions and five recommendations on the subject of implementation, in order to help states comply with ECHR judgments. PACE also has a crucial part to play insofar as its members fill a dual role as members of their respective national parliaments and of the assembly; thus, they are well placed to draw national parliamentary actors into closer contact with the court's jurisprudence and bring legislative pressure to bear on governments where compliance is still outstanding.<sup>158</sup>

### **The European Commissioner for Human Rights**

In addition to the Parliamentary Assembly, the European Commissioner for Human Rights (currently Thomas Hammarberg) is another important office worth highlighting in the context of implementation monitoring. Established by the Council of Europe in 2000, the commissioner, in addition to promoting education and awareness of human rights generally in member states, is empowered to identify possible shortcomings in the law and practice of member states with regard to human rights compliance, and to provide assistance and information on the prevention of human rights violations, including encouraging the establishment of national human rights structures.<sup>159</sup> The commissioner is also charged with cooperating with other international institutions in the protection of human rights and, in so doing, has the authority to visit member states and contact governments directly. However, the commissioner does not have any investigative power or binding dispute-resolution power.

Recently, efforts to bring the commissioner, PACE, and the Committee of Ministers closer together have borne some fruit, as the committee decided in 2006 to set up annual tripartite meetings among the three, in order "to promote stronger interaction with regard to the execution of judgments," although it is unclear the extent to which these meetings are taking place.<sup>160</sup> Encouraging this development, Steven Greer notes that the commissioner could assist in the enforcement of the court's judgments by, "for example, monitoring implementation and by seeking to identify to the Committee of Ministers the domestic legal and administrative changes necessary to increase the prospects of compliance."<sup>161</sup> Indeed, Protocol 14 provides an increased role for the commissioner in relation to the European Court, insofar as he or she will be allowed to participate in all cases before the court. As Protocol 14's Explanatory Report states: "The Commissioner's experience may help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties."<sup>162</sup>

# Compliance Challenges and Lessons Learned

In comparison to other regional human right systems, the overall rate of compliance with the European Court's judgments is impressive, as is the larger transformative effects of the court's jurisprudence in shaping other international and national court systems. Furthermore, it is encouraging that the Committee of Ministers has grown increasingly robust and probing in its supervision of the implementation of judgments. Whereas the committee's initial practice was once described as "relatively timorous,"<sup>163</sup> it has now become quite rigorous, despite the increasing amount of time spent monitoring implementation. To that end, it is not so much the non-implementation of judgments that is of concern, but in the words of one interlocutor, "partial and delayed enforcement," that threatens to compromise the integrity and functioning of the system.<sup>164</sup> The fact that the monitoring process now allows the public better access to information about the implementation of judgments is also a positive development, as is the committee's prioritization of cases involving general measures and systemic problems.

In light of the welcome evolution of the court and committee, several general successes with respect to state compliance can be identified. First, as noted, compliance with the court's just satisfaction orders continues to be quite high and, with few exceptions, states continue to pay the ordered sums on time and without controversy. (Although not discussed herein, "friendly settlements" have also enjoyed a high rate of compliance that should not be overlooked.) Moreover, it is encouraging to note that compliance with the payment of sums is due, in part, to the court's own ruling that default interest could be assessed on untimely payments, which has served as an effective coercive measure.<sup>165</sup>

Second, while the court has historically adopted a restrictive attitude in assessing individual remedies, the Committee of Ministers, aided in certain instances by the specificity of the court's judgments, has adopted a more robust and vigorous supervisory process to ensure that, in addition to the payment of damages, *restitutio in integrum* is also achieved. This appears to have worked well in certain applications of the pilot judgment procedure, which offers the court an "effective way to ... [deal] with the large number of repetitive applications that clog its docket."<sup>166</sup> Finally, despite the fact that general measures are undoubtedly the most difficult to implement and monitor, hundreds of such measures have successfully resulted in the creation of new, or significantly modified, laws and public institutions designed to prevent the recurrence of future convention violations.<sup>167</sup>

Nevertheless, the implementation of judgments remains a challenge and there are numerous instances in which full compliance has been slow to obtain. The Parliamentary Assembly has identified seven factors it attributes to complicating the implementa-

tion of judgments: “political reasons; reasons to do with the reforms required; practical reasons relating to national legislative procedures; judgments drafted in a casuistical or unclear manner; reasons relating to interference with obligations deriving from other institutions.”<sup>168</sup> Similarly, interviewees tended to cite political reasons and the scale of reforms required as the principal impediments to prompt implementation. Speaking in the context of Bulgaria and other Eastern European states, Yonko Grozev, an attorney who has litigated a number of cases before the European Court, notes that because the adoption of general measures is a time consuming and frequently complicated process, it is treated as a relatively low priority by the governments of Council states.<sup>169</sup> Furthermore, where implementation has been protracted it is often because the proposed general measures were politically unacceptable, likely because they challenged institutional powers, were contrary to established political interests, or were ideologically contrary to public opinion. In the United Kingdom, for example, certain cases—the court’s finding that the physical punishment of children amounts to ill-treatment, judgments concerning the actions of security forces in Northern Ireland in the 1980s and 1990s,<sup>170</sup> and its holding that the denial of prisoner’s voting rights violated the convention<sup>171</sup>—have struck a political chord and proved particularly nettlesome, despite the country’s relatively strong record on implementation.

Thus, while states undertake a range of legislative and administrative measures in response to judgments, many do not take all of the actions that could follow from these judgments. As a result, the overall picture is often one of “limited corrective measures that avoid broad comprehensive reform.”<sup>172</sup> These failures of implementation are particularly pronounced in several areas of the court’s jurisprudence. One area is ethnic minority rights, where many of the general measures that flow from the ECHR’s judgments have not been fulfilled due to a lack of political will and public support. Moreover, ethnic minorities’ litigation raises violations of a diverse number of basic rights, which has “made the analysis of the implementation and the broader political effect of that litigation more difficult.”<sup>173</sup> For instance, several recent decisions by the court—have drawn attention to Roma rights in the area of education equality, but have yet to be implemented.

Investigating and prosecuting gross human rights violations is another area in which implementation has largely failed. In Dinah Shelton’s view, this “indicates the limitations of the judicial process in resolving systemic failures of the rule of law.”<sup>174</sup> To its credit, the court itself has undertaken important fact-finding missions in several cases alleging large-scale human rights violations, effectively taking on the role of a first instance domestic court. Yet despite the court’s repeated findings of violations, the duty upon states to investigate these crimes and undertake prosecution has been met with resistance, if not hostility. Opposition to these investigations is often linked to contentious domestic politics—as with the Kurds in Turkey, the Chechens in Russia, or the

court's judgments finding violations by British security forces in Northern Ireland—as well as a strong reluctance by states to undertake reform of their security apparatus at the direction of Strasbourg.<sup>175</sup> In a recent report on this topic, Human Rights Watch found that of the 115 judgments issued to date on cases concerning serious human rights violations in Chechnya, Russia has failed to ensure effective investigations and hold perpetrators accountable in even a single case.<sup>176</sup>

A perennial problem for the European system is the resolution of cases involving unreasonable length of proceedings and the failure to ensure the domestic execution of judgments. As noted, the Committee of Ministers has not dealt satisfactorily with the extreme delay experienced by many litigants in Italy, and other countries as well, despite the passage of numerous resolutions requiring that states address the matter.<sup>177</sup> Walter Schwimmer, secretary general of the Council of Europe, notes that such continuing complaints are a “worrying signal of [a state’s] incapacity or unwillingness to rapidly and effectively remedy the underlying structural problems,” while other commentators have argued that “the problem[s] within the Italian legal system are so deep-rooted and pernicious that there is a limit to what the Government can do to ... bring about effective reform.”<sup>178</sup> The Italian example demonstrates as well that much of the court’s overwhelming docket is, in fact, comprised of repetitive applications arising from either a failure to implement earlier ECHR decisions or an approach best described as “minimal compliance” with court judgments. As the United Kingdom’s Joint Parliamentary Committee on Human Rights has noted, this “exacerbates the problem ... because it leads to future litigation which can culminate in predictable findings of violation.”<sup>179</sup>

The persistence of these cases, and the burden they continue to pose on the European system, underscores the urgency that the Interlaken Declaration attached to the development of member states’ domestic capacity to execute ECHR judgments.<sup>180</sup> Indeed, the declaration’s focus on the principle of subsidiarity stands as further endorsement of a number of recent recommendations passed by the Committee of Ministers and Parliamentary Assembly, both of which have prioritized improving domestic capacity as a way to speed the implementation process. In one recommendation, member states were told to ensure that there are appropriate mechanisms for verifying the compatibility of draft national laws with the convention, while another called upon states to ensure that there are proper domestic remedies in place for anyone who brings a claim of having his convention rights violated.<sup>181</sup> States are also encouraged to review the effectiveness of their existing domestic remedies where the court has, in its judgment, pointed to structural or general deficiencies in national law or practice.

In response to these recommendations, some Council member states have created national institutions dedicated to monitoring compliance with both adverse judgments and the European Convention more broadly. Perhaps most notable of these is the United Kingdom’s Parliamentary Joint Select Committee on Human Rights

(Joint Committee), which is generally regarded as a model for other countries to follow. Established in 2001 after the passage of the Human Rights Act, the Joint Committee is empowered to monitor the implementation of judgments in the U.K. by corresponding with the relevant ministers about steps taken to execute the court's judgments. It then publishes that inter-agency correspondence and analyzes the progress made.<sup>182</sup> The Joint Committee also implemented a new process in 2006 wherein it publishes yearly progress reports examining the status of implementation.<sup>183</sup> The committee's mandate further permits it to scrutinize proposed legislation and, where it considers that a provision can be improved to better ensure compatibility with the European Convention, it makes recommendations that the legislation be remedied to "make the relevant human rights standard explicit."<sup>184</sup> As Anthony Lester notes, "This reduces the need for judicial interpretation of the scope of the new provision, providing greater legal and administrative remedy."<sup>185</sup> One example of the Joint Committee's involvement at an early stage of a bill was the Draft Gender Recognition Bill, which dealt, in part, with the issue of legal recognition in the acquired gender for transsexual people.<sup>186</sup> The pace at which the bill was reviewed owed largely to increased pressure that was placed on the issue by the Joint Committee following the European Court's 2002 decision in *Goodwin v. United Kingdom*, which led to it being brought before Parliament by July 2003, only one year after *Goodwin* had been decided.<sup>187</sup>

Such an approach, however, remains the exception rather than the rule. As Drzemczewski notes, only six parliaments—those of Croatia, Finland, Hungary, Romania, Ukraine,<sup>188</sup> and the United Kingdom—have indicated that they possess a special body for supervising the implementation of judgments.<sup>189</sup> While the existence of such special bodies is a welcome development, many of these procedures are relatively recent and thus, little is yet known of their actual impact at the national level. In addition, only 12 of 47 states have indicated that they possess procedures to inform national parliamentarians of adverse judgments by the European Court: Austria, Bosnia and Herzegovina, Croatia, Cyprus, Germany, Hungary, Italy, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom.<sup>190</sup> (Notably, with the exception of Italy, most of these states are not the chief source of non-implementation at the Strasbourg level.) Of these twelve, the Netherlands law has been regarded as a model because it requires Dutch parliamentarians to be briefed on implementation of judgments against not only The Netherlands, but other countries as well.<sup>191</sup> Less well known, but still important given its role in the implementation debate, is Italy's 2006 passage of the "Azzolini Law," which provides that the Presidency of Italy's Council of Ministers shall coordinate the execution of ECHR judgments.<sup>192</sup> The Azzolini Law also requires that the judgments be transmitted to the Italian Parliament, so that the competent commission can scrutinize them. The Presidency of the Council of Ministers shall further submit an annual report on implementation, as in the U.K. model, to Parliament on a yearly basis.

Finally, a focus on the domestic arena as a site for improved implementation would not be complete without noting the crucial role that national human rights institutions have to play in improving compliance. Interestingly, the Draft Declaration for Interlaken failed to discuss the role of NHRIs in any significant depth, a fact that was noted by the European Group of NHRIs, which submitted a response expressing “great concern with the lack of mention of the role [that they] can play in the reform of the European Court.”<sup>193</sup> This oversight is unfortunate, particularly as commentators have noted that the European system of national institutions remains “underdeveloped,” and that most European countries lack a “broadly based national institution to monitor and review human rights issues in a strategic and structured way.”<sup>194</sup> Greer, a particularly eloquent advocate of urging the Council of Europe to develop its policy of encouraging member states to establish NHRIs, notes two principal roles for these institutions. First, they could serve to “domesticate” the debate over how to give effect to the convention’s standards by “providing a form of nationally institutionalized pressure, particularly on executive institutions, to take more effective action” in honoring convention obligations. Second, they would “Europeanize” national human rights debates by “providing the European Commission for Human Rights, the European Court of Human Rights, and the Committee of Ministers with reliable, comprehensive, and regular accounts of key domestic Convention-related issues and controversies.”<sup>195</sup> Such a regular exchange of information would not only better ensure the rapid and complete implementation of ECHR judgments, but would put pressure on the relevant authorities to amend other practices that the court has deemed incompatible with the convention.

## Conclusions and Recommendations

As the new measures of Protocol 14 are put into place and the European Court of Human Rights embarks on further reforms in the wake of the Interlaken, the growing challenges of compliance with court judgments must be of primary concern. To that end, the following recommendations are offered:

### **Encourage the Progressive Development of More Efficient Working Procedures**

While the Committee of Ministers is the primary Council body charged with the implementation of court judgments, a plurality of actors are concerned with compliance at large. To this end, the committee, the Parliamentary Assembly, and the commissioner of human rights should continue to improve their own working methods, in addition to developing increasingly formalized synergies in their respective monitoring rules, particularly regarding judgments revealing the existence of systemic problems.

With respect to the Committee of Ministers, a lack of resources is hindering the effective execution of its duties: as several interlocutors indicated that the Department for the Execution of Judgments remains under-resourced in light of its vast workload. Furthermore, the committee should strive to improve its working procedures, including prioritizing and, as much as possible, agglomerating those cases that contribute most to the pending backlog before the committee.<sup>196</sup> The emphasis should therefore be on those states (Russia, Turkey, Ukraine, Italy, and Romania) that are the sources of the most applications, and those cases (failure to investigate human rights violations, excessive length of proceedings, systematic discrimination, failure to enforce domestic remedies) where the compliance deficit is greatest. As Philip Leach suggests, these criteria might include applications that are likely to establish important legal precedents; lead case(s) posing a particularly serious problem in a country or region; cases that represent “a large group of cases relating to endemic violations;” or cases where non-implementation is systemic.<sup>197</sup> Finally, as the court continues its application of the pilot judgment procedure, the committee must take all possible measures to ensure that the manner of implementation “genuinely affords an effective remedy for similarly situated persons,” not only in principle, but in practice as well.<sup>198</sup> To that end, both the Committee of Ministers and the court must take adequate steps to ensure the proper level of scrutiny of any proposed remedial scheme and, given that the procedure effectively freezes numerous other cases pending successful implementation, they must enforce the timeliness of any deadlines imposed on states through the process.

As to the other Council of Europe actors, PACE’s Committee on Legal Affairs should continue to develop its invaluable work on implementation and to capitalize on its unique status as a parliamentary body, one that permits greater possibilities for dialogue with national legislators. It would be particularly useful for PACE to undertake a closer examination of the impact and effectiveness of a number of the national implementation and monitoring laws that have recently passed in Council member states, including Ukraine and Italy; currently, not enough is known about whether these models are, in fact, improving implementation rates. The committee should also continue to highlight the lamentable lack of parliamentary involvement at the domestic level in far too many aspects of implementation and call upon national parliaments to increase their level of engagement with the court’s jurisprudence, so as to ensure that national legislation is consistent with the European Convention.

Finally, as noted, the European Commission for Human Rights has an increasingly important role to play in the work of the court, as reflected by the new competencies bestowed on the office through Protocol 14. The commissioner’s ability to now participate as *amicus curiae* in judicial proceedings, in particular, provides an opportunity for greater synergy with the court. For instance, the commissioner could, where needed, conduct on-site visits to countries against which cases have been brought.

The commissioner could also and provide the court, whose ability to conduct its own fact-finding is already constrained, with information about alleged violations and proposed remedies. The commissioner can also serve as a clearinghouse for national best practices with respect to implementation, making information and know-how available to other Council states seeking to develop national reforms for better enforcement of decisions. Lastly, as one interlocutor noted, the commissioner's independence and the neutrality of the office opens up a useful political space in which the commissioner may press recalcitrant states to comply with court judgments.

## **Enhance the Use and Awareness of the Committee of Ministers' Communication**

### **Procedures**

Unlike other regional human rights systems, the participatory rights of victims and their advocates in the enforcement of European Court judgments is relatively modest. This is unlikely to change. Indeed, the stiff resistance with which the proposal to allow even written submissions was first met suggests that expanding the scope of victims' participatory rights is unlikely. Still, the advances of Rule 9 are a significant development, as they represent an important expansion of the range of information to which the committee is now privy. As Fredrik Sundberg, deputy head of the Department for the Execution of Judgments, has noted, the Committee of Ministers is not "well equipped to supervise the real effects of norms enacted and depends to a great extent on information submitted by the respondent state."<sup>199</sup> Such dependence risks presenting a skewed picture of implementation, as the information that governments provide is, as Leach notes, "too frequently ... incomplete or unclear."<sup>200</sup> Moreover, the delays in providing such information can be considerable and, at present, states are not obliged to disclose their action plans, further disadvantaging victims' advocates in the implementation process.<sup>201</sup>

Thus, given the importance of communicating with the committee, advocates should take full advantage of all opportunities to keep the ministers informed about the status and sufficiency of a state's implementation efforts. While several interlocutors indicated that the Rule 9 procedures are being increasingly utilized, the degree to which advocates are aware of the Committee of Ministers' supervisory role over implementation and of their access to the committee during this process is not clear. Leach notes, for instance, that NGOs and NHRIs "are not fully aware of the possibilities, nor the mechanics, of engaging in this process," while Professor Basak Cali, who is currently undertaking a review of the domestic impact of the European Court's decisions, has remarked that a number of human rights lawyers and NGOs do "not know how to use the Committee of Ministers effectively."<sup>202</sup> Further research is therefore needed into this question in order to determine how well understood and utilized the Rule 9 procedures are. Similarly, workshops and seminars that can facilitate civil society engagement in

the implementation process are also needed. Such training is particularly necessary in states where civil society is less active and in states that have the greatest rate of non-implementation. Advocates should also insist that a state's action plan be submitted to them for scrutiny at the same time it is to the committee.

Litigants and interveners alike can also play a role in urging the court to identify cases that pose an “underlying systemic problem.”<sup>203</sup> Such a designation would not only better position a case for greater scrutiny before the committee during the monitoring and execution phase, but engage the other Council of Europe enforcement organs (notably the Parliamentary Assembly) as well. Advocates should also press for more information about the pilot judgment procedure, especially regarding the respective roles of the court and the committee in evaluating the implementation of pilot judgments at the national level.

### **Continue to Develop an Enhanced Role for the European Court**

While the European Court's functions have been cordoned off from the Committee of Ministers for many years, the court should continue to seek, where appropriate, to supplement the committee's monitoring and enforcement role. Although limitations on the court's role in the implementation of judgments are textually evident in the convention itself and should be respected, if the court is to preserve its role as Europe's human rights guarantor, then, as one commentator has noted, “it will have to demonstrate a more acute awareness of its connections to the wider institutional system [of] which it is [a] part.”<sup>204</sup>

To that end, the movement towards greater specificity by the court in its approach to remedies should be encouraged, while recognizing that greater specificity in itself does not guarantee implementation. Thus, as other working groups have suggested, the court's use of the pilot judgment procedure, and its efforts to be more prescriptive regarding the remedies states should undertake, are important initiatives for improving compliance and should be continued.<sup>205</sup> As Anthony Lester notes, *Broniowski* was important in enabling the court to deal with repetitive complaints that highlight such practices.<sup>206</sup> Similarly, Fredrik Sundberg argues that the precision of states' obligation to enact general measures is crucial for the effectiveness of the convention system and “intimately linked with the coherence of the Court in its decision-making.”<sup>207</sup> Related to the development of the pilot judgment procedures, serious consideration should also be given to adding a collective redress mechanism—such as a class action procedure—to the European system. While this proposal has been raised before and rejected, it should be debated anew in the wake of Interlaken.

Another area in which implementation might be furthered is litigation under Article 46 of the convention, which the European Court is currently considering in the *Ilascu* case. Historically, as Lambert-Abdelgawad notes, the court has refused to find a

state in breach of Article 46, in the absence of express provisions giving it jurisdiction to this effect.<sup>208</sup> If the court were to do so here, it would conceivably open an avenue for other litigants to file similar complaints. This approach is not without risks, however, as such litigation would add to the court's already significant caseload. Moreover, after Ilascu filed his new application, the Committee of Ministers suspended its examination of the case pending the court's decision. The passage of Protocol 14, particularly the infringement proceedings process, offers similar opportunities to more vigorously press for implementation, although similar risks apply.

### **Strengthen Implementation and Monitoring at the National Level**

Enhancing the capacity of state institutions and national governments to effectively implement ECHR judgments, and its case law more generally, is essential. Although the passage of Protocol 14 represents an important step forward in the Council's attempts to more effectively manage the court's caseload and address a growing implementation deficit, states still have the ultimate role to play in the execution of the court's judgments.

Each Council member state should have, at the least, a system or process in place for responding to court judgments. Enhanced parliamentary scrutiny of a state's "action plan" for implementation is also crucial to increasing the pressure for compliance at the domestic political level. Finally, the establishment of robust NHRIs in every state should be required by the Council of Europe, rather than merely encouraged, as a way to further develop "effective mechanisms of reception" at the national level. In particular, the role of the European Commissioner for Human Rights should be examined in this context, as a way to maximize the mandate of that office. Other initiatives worthy of continued support include the Human Rights Trust Fund Project, established by Norway, whose aim it is to "support national efforts of member states through specific projects to consolidate the rule of law, by strengthening the action of the European Court of Human Rights." Currently, the Trust Fund focuses on six member states in particular: Albania, Azerbaijan, Bosnia and Herzegovina, Moldova, Serbia, and Ukraine.<sup>209</sup> Thus far, €785,000 has been allocated to finance execution-related activities, but additional resources would allow the fund to extend its reach further.

Better knowledge of the court, and of state obligations to conform legislation to Strasbourg case law, is also essential. For instance, more frequent translation of all judgments into the local language of Council-member countries, not only those rendered against a particular state party, would do much to deepen the knowledge and awareness of court decisions and the convention, at the national level. If a judgment is available in a state's formal language, it is more like to be considered by the national courts and incorporated into domestic adjudication. Moreover, if the court is to become a constitutional court for Europe—one whose judgments carry *res interpretata*, if not *res*

*judicata*, effect—then translation is a key measure for member states to undertake. This recommendation was highlighted by an earlier working group, which recommended that translated material “should be distributed as widely as possible, particularly within public institutions such as courts, investigative bodies, prison administrations, and non-state entities such as bar associations and professional organizations.”<sup>210</sup> Attention should also be focused on improving trainings for lawyers and judges in states with poor compliance records. For instance, the European Court’s former registrar, Paul Mahoney, has suggested that the Council should establish a European Judicial Training Institute on Human Rights, one whose expertise could be “plugged directly into each national judicial circuit, for dispensing, coordinating, and facilitating [judicial] training and for ensuring a ‘like-minded’ approach in each country.”<sup>211</sup> Such a useful proposal is worthy of support.



## II. The Inter-American Human Rights System

### Introduction

The Inter-American Human Rights System, the regional human rights system of the Americas, is composed of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The system thereby provides two instances for the consideration of individual complaints against member states of the Organization of American States (OAS), and two opportunities for regional human rights authorities to provide guidance to states on how to comply with their obligations that arise under such instruments as the American Convention on Human Rights.<sup>212</sup>

While the Inter-American system has had a tremendous and positive impact on the legal and socio-political development of the region over the past quarter century,<sup>213</sup> the commission and court have struggled with low levels of implementation of their final recommendations and orders in contentious cases.<sup>214</sup> As the conversation about the challenges to promoting broader and more consistent implementation with these decisions has evolved, so have procedures and mechanisms to monitor and compel implementation on the regional and national levels.<sup>215</sup> Such procedures and mechanisms provide a means to identify the most problematic areas of implementation and to design strategies to address these problems. While the procedures and mechanisms are imperfect, their utility is unquestionable, and efforts to perfect them—driven by

an honest understanding of the implementation problem—should be central to the regional human rights agenda.

This chapter discusses the implementation of decisions in the Inter-American system with an eye towards assessing current implementation procedures and mechanisms and supporting their continued development. In order to provide a framework for this discussion, this chapter offers a detailed analysis of the varying rates of implementation across the wide-ranging remedial framework of the Inter-American human rights bodies together with anecdotal insight, so as to highlight the specific challenges to achieving complete implementation. The chapter goes on to review some of the more notable implementation successes of the Inter-American system in the hopes of extracting some important lessons that can be used to direct future implementation efforts. The chapter then provides an overview of important initiatives to create mechanisms and procedures to address the implementation problem in the Inter-American system and traces their development at the level of the OAS, the commission, the court, and nationally. Finally, it concludes that certain efforts, either because they have provided notable results or because they have the clear potential to do so, should be progressively developed, and it provides some recommendations for how to carry this out.

## Overview of the Implementation Problem

While scholars have rightly cautioned against a purely quantitative approach to measuring implementation,<sup>216</sup> the data published by the Inter-American human rights bodies themselves are instructive and provide a useful backdrop to a discussion about impediments to full implementation and initiatives to effectively address the current problem. The Inter-American Commission, a quasi-judicial body with both promotion and protection functions, has processed individual petitions against all 35 member states of the OAS.<sup>217</sup> To date, the commission has received over 14,000 such petitions,<sup>218</sup> and it was processing 1,450 cases at the end of 2009.<sup>219</sup> Based on information about implementation published in the commission's 2009 annual report, of the 128 cases that have been resolved through friendly settlement agreement or final merits decision since 2000 (when the commission first began collecting such data), states have fully complied with recommendations in 12.5 percent of cases, taken some steps towards compliance in 69.5 percent of cases, and refused to comply with any recommendations in 18 percent of cases.<sup>220</sup> Part of the problem with implementing Inter-American Commission decisions is that the Inter-American Court itself has stated that while states should comply with such recommendations in good faith, only the court issues binding decisions.<sup>221</sup>

The Inter-American Court receives contentious cases through referral from the commission where the offending state has ratified the court's jurisdiction.<sup>222</sup> By the end

of 2009, the court had issued a total of 118 merits decisions, and found the respondent state in violation of its obligations under the American Convention in all but two of those cases.<sup>223</sup> In its 2009 annual report to the OAS, the court reported that it was monitoring compliance with 104 of the 116 reparations decisions it had issued, which translates into a “total compliance” rate of approximately 9 percent.<sup>224</sup> While the court does little to provide more complete raw data about this apparently low rate of implementation, it has indicated that the low rate could be attributed to states’ failure to comply with their obligations to investigate the circumstances of human rights violations and punish those responsible—commonly referred to as “justice” measures.<sup>225</sup>

There is a growing body of scholarship analyzing implementation of the decisions of the Inter-American bodies and attempting to identify the factors that contribute to implementation.<sup>226</sup> A particularly important quantitative study by the Association for Civil Rights (*Asociación por los Derechos Civiles*, or ADC) provides an implementation analysis of 462 remedies recommended in final merits decisions and friendly settlement agreements of the Inter-American Commission and ordered in reparations decisions of the Inter-American Court between 2001 and 2006.<sup>227</sup> Looking specifically at the court, the study found a 29 percent rate of total implementation with the different types of remedies ordered, a 12 percent rate of partial implementation, and a 59 percent rate of non-implementation. The study found that the commission, in turn, suffered from an 11 percent rate of full implementation, an 18 percent rate of partial implementation, and an unfortunate 71 percent rate of non-implementation of recommendations in final merits decisions. At the same time, however, the commission has a 54 percent rate of implementation of remedies articulated in friendly settlement agreements, and corresponding 16 percent and 30 percent rates of partial implementation and non-implementation.<sup>228</sup> A closer look at the implementation rates of different types of remedial orders, considered together with anecdotal information on the topic, reveals many of the problem areas regarding implementation in the Inter-American system.

## The Relationship between Implementation and Remedies

The remedial scheme utilized by the Inter-American Commission and Inter-American Court is considered by many to be among the most comprehensive and progressive, and as it has evolved over time, trends in implementation have evolved with it.<sup>229</sup> The first case decided by the Inter-American Court, *Velásquez Rodríguez v. Honduras*,<sup>230</sup> set a baseline for reparations in the Inter-American system and it provides a useful way to frame a discussion of the implementation problem. In *Velásquez Rodríguez*, the Inter-American Court found a systematic practice of forced disappearance in Honduras, and its decision reverberated throughout a region that was grappling with gross, systematic

human rights violations associated with military dictatorships and their violent repression of opposition forces.<sup>231</sup> The court ordered “just compensation” to be paid to the families of the victims, and in its reparations decision detailed the exact amounts to be paid and specified the “form and means of payment of the indemnity.”<sup>232</sup> Significantly, pecuniary damages were the only remedy the court mentioned in the operational portion of its reparations decision, at the conclusion of which it provided that it would “supervise the indemnification ordered and shall close the file only when the compensation has been paid.”<sup>233</sup>

In its reparations decision, the court considered the Inter-American Commission’s request that it specifically order Honduras to investigate and punish those responsible for the violations of human rights identified by the court in its merits decision.<sup>234</sup> The court, however, found it unnecessary to make such an order explicit in its reparations decision, and merely declared in dicta that the duty to investigate the forcible disappearances of the victims would continue until their whereabouts were known.<sup>235</sup> In a similar vein, the court declared that implicit in a finding that forcible disappearance was a systemic violation was an order that the state “prevent involuntary disappearances” generally.<sup>236</sup> While the Inter-American Court closed *Velásquez Rodríguez* in 1996 after Honduras paid the pecuniary damages outlined in its reparations decision,<sup>237</sup> significant questions remain about whether the state complied with its obligations to investigate and punish those responsible for the forced disappearances or to prevent similar violations from occurring in the future.<sup>238</sup>

This brief analysis of the Inter-American Court’s first reparations decision highlights a number of important themes in the discussion about implementation in the Inter-American system, namely: (1) the success in achieving implementation of orders to pay pecuniary damages and other individual measures of reparation; (2) the general failure of states to investigate and punish those responsible for human rights violations; and (3) the challenges to implementing general measures to guarantee non-repetition.

### **Pecuniary Damages and Other Individual Measures**

Just as Honduras implemented the court’s reparations decision in *Velásquez Rodríguez*, states have usually implemented orders to pay monetary reparations issued by the human rights bodies. Indeed, according to the ADC study, states fully implemented monetary reparations ordered by the commission and court at a rate of 58 percent, partially implemented 15 percent of such orders, and failed to implement 27 percent of such orders. There is a fairly substantial difference between the implementation rates of the court and the commission: states were found to fully implement monetary reparations ordered by the court at a rate of 48 percent, compared to 17 percent for commission recommendations. However, the implementation rate for monetary reparations in friendly settlement agreements is as high as 88 percent, highlighting the importance of the commission’s procedure to achieve negotiated outcomes.

Anecdotally speaking, there are examples from Guatemala and Colombia in which those states have implemented orders to pay hundreds of thousands of dollars for grave violations of human rights,<sup>239</sup> payments by Panama and Peru for labor and property rights violations based on the real value of salaries or pensions denied,<sup>240</sup> and payments by Honduras and the Dominican Republic to discriminated minorities.<sup>241</sup> While it is true that monetary payments to individual victims may not be the ultimate goal of international human rights litigation in many cases, implementation of orders to pay large sums of money, provide compensation for violations of economic and social rights, or give redress to members of marginalized groups, is not insignificant.

When the composition of the Inter-American Court changed in the late-1990s, it began to develop a wide range of individual remedies, including symbolic and equitable remedies.<sup>242</sup> The court has since elaborated a variety of symbolic measures aimed at making whole the victims of human rights abuse, as well as their next-of-kin and communities. For example, the court will now order the erection of memorials and other measures to commemorate victims of human rights abuse. In *Villagran Morales v. Guatemala*, Guatemala complied with an order to name a school after a group of massacred street children.<sup>243</sup> Similarly, it named a street and established commemorative university scholarships in compliance with the court's order in *Mack Chang v. Guatemala*, in order to honor the prominent sociologist who was extrajudicially executed by state agents.<sup>244</sup> States will often comply with orders to hold ceremonies to ask for forgiveness for human rights violations, as Guatemala did in *Villagran Morales* and *Mack Chang*, and Peru did in *Huilca Tesce v. Peru*, a case involving the extrajudicial execution of a union leader.<sup>245</sup> More often than not, states also comply with separate orders to publish the facts section of a case in a newspaper of national circulation, as part of its formal recognition of the violation. The ADC study indicates that such symbolic reparations represent 21 percent of all remedies ordered by the Inter-American Commission and Inter-American Court, and that they are implemented 52 percent of the time.<sup>246</sup>

Countries such as the Dominican Republic and Venezuela that are generally hostile to the oversight of the Inter-American bodies resist compliance with measures that require them to acknowledge wrongdoing in a public ceremony, even if they are willing to pay pecuniary damages.<sup>247</sup> This is likely because such remedies lie at the intersection of individual measures and general measures, which arise from countries' obligations associated with non-repetition.<sup>248</sup> Furthermore, the perceived political cost for such governments to humble themselves under pressure from regional human rights bodies is high.

Implementation of other equitable remedies of restitution and rehabilitation has been relatively good. Orders to release detainees, reverse arbitrary firings, leave local judicial decisions without effect, or grant certain security measures represent nine percent of those remedies ordered (in the cases studied by ADC) and are implemented at a

rate of 36 percent.<sup>249</sup> Indeed, states have pardoned people through executive decree in response to decisions of the commission and court, and national courts have reopened proceedings with new evidence produced during Inter-American proceedings.<sup>250</sup> Nevertheless, with a rate of non-implementation exceeding 50 percent, negative anecdotes abound. For example, while the court acknowledged the importance of restoring “options for personal fulfillment” of victims of human rights abuse in *Loyaza Tamayo v. Peru*,<sup>251</sup> as of February 2008 Peru had not implemented the court’s orders to reinstate the victim to her prior teaching position or to provide her with retirement benefits she would have otherwise enjoyed had she not been arrested and detained.<sup>252</sup>

Similarly, the court ordered in *Ivcher Bronstein v. Peru* that Peru reestablish a businessman whose property had been seized as a majority shareholder in his company, after concluding that the state had arbitrarily stripped him of his nationality.<sup>253</sup> As of November 2009, however, Peru had not complied with this aspect of the order despite its payment of all of the money damages ordered by the court.<sup>254</sup> Significantly, the other aspect of the court’s reparations decision in *Ivcher Bronstein* that remains unimplemented more than eight years after judgment is the court’s order that Peru investigate the violation of the victim’s rights and punish those responsible.<sup>255</sup>

### **Investigation and Punishment**

Any conversation about implementation in the Inter-American system must include the low rates of investigating and punishing those identified by the Inter-American bodies as responsible for human rights abuses. In 1996, the court explicitly ordered for the first time in the operative portion of its reparations decision in *El Amparo v. Venezuela* that “the State of Venezuela shall be obliged to continue investigations into the events referred to in the instant case, and to punish those responsible.”<sup>256</sup> The court is still monitoring compliance in that case,<sup>257</sup> and it has since only found one state (Peru) to have fully implemented an order to investigate and punish those responsible for violations of human rights.<sup>258</sup> This problem pervades the Inter-American system; indeed, the ADC study discussed above indicates that remedies requiring investigation and punishment have been implemented at a rate of only 10-14 percent.<sup>259</sup>

Viviana Krsticevic, in her comprehensive volume on the implementation of Inter-American Commission and Court decisions, highlights three challenges that have arisen in compelling implementation of orders to investigate and punish: (1) amnesty laws promulgated to absolve abusive regimes of atrocities; (2) statutes of limitation for crimes that ultimately give rise to international responsibility; and (3) complications related to the principle of *non bis in idem* (“double jeopardy”).<sup>260</sup> The court first cemented its position on the obligation to investigate and punish perpetrators of human rights violations despite the existence of amnesty laws in *Castillo Paez v. Peru*,<sup>261</sup> and subsequently applied this rationale in cases against Guatemala, Argentina, Colombia,

Chile, and Paraguay.<sup>262</sup> Nevertheless, because amnesty laws exist in the national legal framework they have presented additional implementation challenges, as they have required other legislative reform or a decision from the nation's constitutional court. It is interesting to note that the Inter-American Commission recommended the repeal of the amnesty laws in Argentina in a 1992 case,<sup>263</sup> but it was not until 2005 that the Argentine Supreme Court nullified the 1987 amnesty law protecting those who committed crimes during the rule of that country's military junta.<sup>264</sup> Significantly, when it did so, Argentina's high court relied on the Inter-American Court's decision in *Barrios Altos v. Peru* in deciding to nullify its own amnesty law, not the 1992 Inter-American Commission decision, though there is little question that the commission decision influenced the outcome.<sup>265</sup>

Statutes of limitation have presented another stumbling block in the push to ensure that individuals who have participated in human rights violations are held accountable. While international law is clear on the inapplicability of statutes of limitations to certain grave violations of human rights,<sup>266</sup> statutes of limitations have provided a basis for some of the resistance to national investigations into past human rights abuse.<sup>267</sup> Similarly, the principle that no legal action can be instituted twice for the same crime (*non bis in idem*) has presented a challenge where the court issues a decision to investigate certain human rights violations for which the state has already held persons accountable.<sup>268</sup> Problems have also arisen in cases before the Inter-American Court, where certain individuals who are widely known to have been involved in the commission of human rights violations have already been absolved of crimes by domestic courts. Nevertheless, while the cases and rationales have differed, the Inter-American Court has consistently found that the obligation to investigate human rights violations and prosecute those responsible may persist even after domestic courts have purportedly resolved the issue.<sup>269</sup>

While it is true that the Inter-American system has dealt with these challenges as they have arisen, and that the Inter-American Court has had tremendous success in cases involving amnesty laws, blanket non-compliance with orders to investigate and punish continues to be an impediment to justice for human rights abuses in the Americas. Similarly, general measures of non-repetition, despite some successes, have been implemented in a very limited fashion.

### **General Measures of Non-Repetition**

The Inter-American bodies, particularly the Inter-American Court, have taken a creative approach to engineering general measures to address the root causes of human rights violations when the facts of certain cases indicate that the problem may be systemic in nature. The commission and court have ordered varying degrees of legislative and policy reform, training and education programs for state officials, and community-wide remedies.

The court has discussed states' obligations to promulgate, amend, or repeal certain legislation in many different contexts. For example, in *Loyaza Tamayo*, discussed above, the court ordered "Peru [to] adopt the internal legal measures necessary to adapt Decree-Laws 25,475 (Crime of Terrorism) and 25,659 (Crime of Treason) to conform to the American Convention."<sup>270</sup> In *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, the court ordered that "the State [] abstain from applying the Offences Against the Person Act of 1925 and within a reasonable period of time should modify said Act to comply with international norms of human rights protection [relating to capital punishment]."<sup>271</sup> In *Yean and Bosico v. Dominican Republic*, the court ordered the Dominican state "[t]o adopt within its domestic legislation, in accordance with Article 2 of the American Convention, the legislative, administrative and any other measures needed to regulate the procedure and requirements for acquiring Dominican nationality based on late declaration of birth."<sup>272</sup> However, none of these measures have been implemented by the respective states, and in the second two examples, the situation has arguably worsened—in Trinidad and Tobago because it has withdrawn from international scrutiny on the matter, and in the case of Dominican Republic because it has recently passed a constitutional reform that will further entrench the problem of systematic discrimination identified by the court.<sup>273</sup> While these developments are troubling, the more common response by states to general measures is inaction. Indeed, while the ADC study indicates that nine percent of the reparations ordered by the commission and court include some type of legal reform, states make no effort to implement approximately 75 percent of such orders.<sup>274</sup> States do, however, implement 14 percent of orders to reform national laws, and decisions of the commission and court have helped to consolidate efforts to promulgate laws on domestic violence in Brazil,<sup>275</sup> and on the protection of minors in Guatemala.<sup>276</sup>

The Inter-American bodies will also order training of state officials in those cases where it is determined that systematic human rights violations result from widespread *ultra vires* activity, or routine abuse of discretionary powers by state actors. The ADC study found that reparations orders to train state personnel, which represent only three percent of the remedies ordered, were fully implemented 42 percent of the time.<sup>277</sup> All cases of implementation of this type of remedy arise in the context of judgments issued by the Inter-American Court. For example, in *Mapiripán Massacre v. Colombia*, the court ordered the state to "implement, within a reasonable term, permanent education programs on human rights and international humanitarian law within the Colombian Armed Forces, at all levels of its hierarchy," along the lines specified by the court in its reparations decision.<sup>278</sup> As a result, Colombia entered into a cooperation agreement with the United Nations High Commissioner on Human Rights and hired consultants to study the training of the Colombian Armed Forces. The result was a "Comprehensive Human Rights and International Humanitarian Law Policy" implemented by the Ministry of Defense in January 2008.<sup>279</sup>

While the Colombian example can be considered a success, the statistics indicate that there are many more examples of disappointment. One example can be found in the implementation phase of *Tibi v. Ecuador*, where the court ordered the state to “establish a training and education program for the staff of the judiciary, the public prosecutor’s office, the police and penitentiary staff, including the medical, psychiatric and psychological staff, on the principles and provisions regarding protection of human rights in the treatment of inmates.”<sup>280</sup> Seeking to guarantee that the training program was effective, the court also ordered that the “[d]esign and implementation of the training program must include allocation of specific resources to attain its goals, and it will be conducted with participation by civil society.”<sup>281</sup> When Ecuador failed to implement this order, the court, in an attempt to guide the process, provided further direction in a compliance order, requiring that Ecuador “establish an inter-institutional committee to define and execute the training programs on human rights and treatment of inmates.” Ecuador still has not implemented the court’s order.<sup>282</sup> Nevertheless, efforts by the court to structure states’ implementation activities are significant, as will be highlighted below.

Other creative general measures ordered by the court include those designed to address human rights violations suffered by certain communities. In *Plan de Sanchez v. Guatemala*, the court ordered the state to implement a comprehensive set of programs in 13 different indigenous communities, including: (1) the commission of a study of the Maya-Achí culture by the Guatemalan Academy of Mayan Languages or a similar organization; (2) the initiation of public works such as road construction and the development of a sewage system and potable water supply; (3) the supply of teachers with intercultural and bilingual training to the communities; and (4) the establishment of a health center with adequate personnel and conditions to provide medical and psychological care to certain victims of human rights abuse.<sup>283</sup> While Guatemala paid a portion of the monetary damages, implemented some of the symbolic reparations, and even took the step of establishing a health care center in the village of Plan de Sanchez, it nevertheless failed to implement most of the programs ordered by the court.<sup>284</sup>

The court developed a similar community-centered remedial framework in *Moiwana v. Surinam*, ordering that the state “adopt such legislative, administrative, and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for the members’ use and enjoyment of those territories.”<sup>285</sup> The court ordered that “these measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories.”<sup>286</sup> The court also directed that Surinam take action to “guarantee the safety of those community members who decide to return to Moiwana Village,” and to “establish a community development fund,” in order to address the impact of past violations on the community

as a whole.<sup>287</sup> Although Surinam has complied with the court's order to pay money damages, it has failed to date to implement any of the general measures.<sup>288</sup>

These last two cases both touch on the rights of indigenous communities, and while indigenous rights have been a centerpiece of the Inter-American human rights bodies' work over the past decade, such communities continue to be among the most marginalized groups on the continent. This makes the remarkable story of full implementation of the court's landmark indigenous rights case *Awás Tingni v. Nicaragua* an important case study, and highlights the importance of identifying those cases in which implementation was truly exceptional and attempting to identify any lessons to be learned from such successes.

## Implementation Successes and Lessons Learned

In *Velásquez Rodríguez*, the court was able to close the case upon payment of pecuniary damages because it had not required the investigation and punishment of those responsible or the institution of measures of non-repetition. Notably, the court took the same approach in the *Godínez Cruz v. Honduras* reparations order,<sup>289</sup> which it issued on the same day as *Velásquez Rodríguez*, and closed at the same time.<sup>290</sup> The Inter-American Court followed this same pattern in its next two reparations decisions: *Aloeboetoe et al. v. Suriname*—a case involving seven members of a Maroon ethnic community that had been killed by members of the military<sup>291</sup>—and *Gangaram-Panday v. Suriname*, a case of a man who died in military detention.<sup>292</sup> While the orders in all of these cases were fully implemented, it is difficult to say that they are exceptional because, as noted, the payment of pecuniary damages is relatively common. After the court began in 1996 to require implementation of a wider variety of remedial orders before it would close a case, only four other Inter-American Court cases have been fully implemented.<sup>293</sup> These four are: *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) *v. Chile*, *Claude Reyes v. Chile*, and *Ricardo Canese v. Paraguay*. That so few of the court's 116 reparations orders have been fully implemented requires a review of these four to discern any lessons of general application.

### Indigenous Rights in Nicaragua

*Mayagna (Sumo) Awás Tingni Community v. Nicaragua* is remarkable not only because it was the first time a regional tribunal recognized indigenous peoples' communal right to their ancestral land, but because the reparations order was implemented despite the technical and political challenges of doing so. In April 2002, when the Nicaraguan government and the representatives of the Awás Tingni community met for the first time to discuss implementation of the Inter-American Court order, they formed two

joint commissions with representatives from the community and the government, each assigned to give effect to a different part of the court's reparations order.<sup>294</sup> One joint commission was responsible for the investment of \$50,000 for the benefit of the community, while the second joint commission was responsible for the more difficult task of beginning to delimit, demarcate, and title the territory, while also protecting it from intrusion by third parties. The first joint commission succeeded in carrying out its mandate when, in February 2003, the government funded the construction of an Awas Tingni student boarding house. In contrast, the second joint commission failed in carrying out its mandate: the government attempted to induce community members to agree to inferior reparations agreements, even as third party invasions into the Awas Tingni territory increased. A second attempt at implementation was initiated in January 2003 when the Nicaraguan legislature enacted a land demarcation law known as Law 445.<sup>295</sup> While the Awas Tingni insisted that their right to demarcation existed beyond the confines of the law, the community agreed to submit to the process established by the law in November 2003. The effectiveness of the process was undermined by then-President Enrique Bolaños, and distracted by land conflicts between the Awas Tingni and other indigenous communities. A decisive change came about, however, with the election of President Daniel Ortega, and the state officially conveyed more than 70,000 hectares to the Awas Tingni community in December 2008 pursuant to Law 445.<sup>296</sup>

Two lessons from this case study should be highlighted. First, while the Awas Tingni community correctly asserted that their communal right to their indigenous lands was not dependant on the process established under Law 445, the importance of a national law to aid the process of implementation should not be overlooked. The joint commissions that were initially established were positive developments, and for the portion of the reparations order that required a monetary investment in the community, such a model was sufficient. However, the joint commission assigned to oversee the demarcation and titling of the territory and protect against encroachment on the Awas Tingni territory was incapable of fulfilling its mandate. Had the Nicaraguan legislature never passed Law 445, it is very possible that the reparations order would not have been fully implemented. Second, the election of President Ortega, historically a friend of the indigenous rights movement, was essential, underscoring the positive impact on implementation of political officials who are engaged with the process. While a supportive president is a somewhat extreme example (though not without precedent; the election of Roberto Reina, a former Inter-American Court judge, as president of Honduras, was integral to implementing the *Velásquez Rodríguez* and *Godínez Cruz* cases<sup>297</sup>), it is clear that the support of state officials in implementation efforts is crucial.

These lessons are particularly significant when they are considered in the general context of indigenous rights in the Americas and the more specific context of compli-

ance with decisions of the Inter-American Court. The *Moiwana v. Surinam* and *Saramaka People v. Surinam* decisions, in which the court ordered Surinam to demarcate and title the lands of those respective communities, have yet to be implemented.<sup>298</sup> Similarly, the court's orders in the cases *Sawhoyamaxa Indigenous Community v. Paraguay* and *Yakye Axa Indigenous Community v. Paraguay*, requiring Paraguay to recognize the ancestral land rights of those communities, have also gone unimplemented.<sup>299</sup> Without the conditions that abetted the *Awas Tingni* implementation, it appears virtually impossible for those historically marginalized groups to vindicate their rights, even with an order from the Inter-American Court. In a discussion about the failure by Surinam and Paraguay to implement the Court's decisions, the historical marginalization of groups should not be understated. The *Awas Tingni* implementation appears even more unusual when one considers that the three other cases of full compliance all concern the arguably less controversial right of freedom of expression.

### **Freedom of Expression in Chile**

In another unprecedented case of full compliance, Chile amended its constitution to eliminate the censorship of movies and promulgated Act No. 19,846 regarding the classification of films—leading to the exhibition of the film “The Last Temptation of Christ”—in response to the Inter-American Court's 2001 reparations order in “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) *v. Chile*.<sup>300</sup> The court closed that case, the only one to result in constitutional amendment, in 2003.<sup>301</sup> Indeed, many refer to this case as the ultimate example of compliance because of Chile's willingness to alter its constitution in order to implement the decision of a regional human rights body—a clear and decisive manifestation of political will to implement a human rights obligation. This case should also be understood as the beginning of a very important process in Chile to develop one of the region's most progressive legal guarantees of freedom of expression.

Another significant moment in this process was the issuance of the court's 2006 reparations order in *Claude Reyes et al. v. Chile*, which led Chile to promulgate the Law on Transparency in Public Office and Access to Information on State Administration (*Ley de Transparencia y Acceso a la Información de la Administración del Estado*), regulating Article 8 of the Political Constitution of Chile and establishing a procedure to secure access to state-held information.<sup>302</sup> The passage of this law was the culmination of years of work by Chile's transparency movement, which benefitted from tremendous resources and political support. Indeed, when Michelle Bachelet was running for president, she committed to supporting the law as one of her campaign promises, and followed through once elected.<sup>303</sup> Significantly, the law established the Council for Transparency, a state institution dedicated to the promotion and protection of the right of access to information. Juan Pablo Almero, the lawyer principally responsible for bringing *Claude Reyes et al.* before the Inter-American Court, currently directs that institution.

It is important to compare these two Chilean cases with the fourth case of full implementation, *Ricardo Canese v. Paraguay*, which also involved freedom of expression.<sup>304</sup> While full implementation is a significant achievement in the Inter-American system, the court in *Ricardo Canese* limited its reparations order to requiring the state to pay money damages,<sup>305</sup> a form of reparations that is regularly implemented. Accordingly, rather than support for the proposition that freedom of expression cases enjoy higher rates of implementation regionally, *Ricardo Canese* stands for the uncontroversial proposition that states regularly implement the monetary aspect of the court's reparations orders. Moreover, the fact that the two other freedom of expression cases that were fully implemented originated in Chile raises questions about whether this is a country-specific phenomenon.

In this regard, it should be noted that Chile is one of the only states to fully implement the recommendations issued by the Inter-American Commission in a final merits decision; that case, *Alejandra Marcela Matus Acuña et al. v. Chile*, also involved freedom of expression.<sup>306</sup> Specifically, the commission found that Chile had violated the American Convention when it censored a journalist's book entitled *Black Book of Chilean Justice* and initiated judicial proceedings against her. The commission reported that Chile paid the victim 30 million pesos and "promulgated Law No. 19,733, repealing the crime at Article 6(b) and the measures at Article 16 of Law on Internal State Security, No. 12,927, and Article 41 of Law No. 16,643 on Abusive Advertising, making it possible to dismiss with prejudice the criminal case against her, and to lift the confiscatory measures and prohibition that affected her book."<sup>307</sup>

Interestingly, another recent Inter-American Court case concerning freedom of expression issued against Chile, *Palamara-Iribarne v. Chile*, has yet to be fully implemented.<sup>308</sup> That case involved a naval mechanical engineer who published a book entitled "Ethics and Intelligence Services," despite the naval authorities' denial of his request to do so, and who was subsequently subject to criminal proceedings before a naval court. The Inter-American Court found a series of violations and ordered a range of individual remedies, including the return of the seized books and the cessation of the criminal proceedings against the victim, and general remedies, including an order to limit the scope of military jurisdiction. The topic of military jurisdiction is substantially more controversial in Chile, so it is not surprising that the state has been slower to implement general measures of non-repetition on this topic.<sup>309</sup> A process is currently under way, however, to make the necessary legislative changes to implement the Inter-American Court order, which would be a legal breakthrough in the region.<sup>310</sup>

It is possible to extrapolate a number of lessons from these freedom of expression cases. One way to achieve something as significant as a constitutional amendment is to bring a case on film censorship, which taps into a strong public sentiment against repression connected to Chile's experience with dictatorial rule.. The transpar-

ency movement, empowered by its experience with the Inter-American system in “*The Last Temptation of Christ*” case, was able to compel then presidential candidate Bachelet to support legislation in the novel area of freedom of information in *Claude Reyes et al.* Advocates then, in a fairly intentional way, capitalized on the openness by the Chilean state to implement measures of non-repetition in cases involving freedom of expression and brought *Palamara-Iribarne*, a freedom of expression case that also addressed the more contentious issue of military jurisdiction. It appears Chile is currently on the verge of limiting the application of military jurisdiction, which would be an unprecedented and important step forward. The Chilean transparency movement has therefore developed an institutional dialogue with the state through its litigation before the Inter-American bodies, capitalizing on strong public support for freedom of expression, and used that right as a touchstone to advance the cause of human rights more generally.

### **Lessons Learned from *Awas Tingni* and *Claude Reyes et al.***

Comparing the implementation experiences of *Awas Tingni* and *Claude Reyes et al.*, both landmark cases that represented substantial developments in international human rights law, it is possible to discern some important lessons on advancing the implementation of cases generally. First, the decisions of the highest regional human rights authority represented the culmination of intense advocacy by the *Awas Tingni* indigenous people and the Chilean transparency movement, and such decisions were useful in legitimizing their positions. Moreover, in both cases, the remedial framework articulated by the Inter-American Court aided the groups in channeling their advocacy efforts, and supporting the further articulation of their advocacy agendas.

Second, in both cases, the affected communities were able to translate the remedial framework provided by the court into national initiatives. In the case of the *Awas Tingni*, they created the joint commissions in collaboration with the government, one of which was successful in fulfilling its mandate to identify an opportunity for investment in a communal resource. In order to implement the order to demarcate and title the territory of the *Awas Tingni*, the community had to submit to a process established under the national land demarcation law. In the case of the Chilean transparency community, simultaneous to their litigation of *Claude Reyes et al.*, advocates had worked to develop a legislative proposal for freedom of information, which included in it the establishment of an oversight office to carry out the trainings required by the Inter-American Court.

Third, both cases enjoyed key political support that made implementation possible, but in both cases, the political support may not have been sufficient to reach implementation if the international obligations had not been translated into a national legal framework. The election of President Daniel Ortega was unquestionably a significant factor in finally demarcating the *Awas Tingni* lands, but without the national demarcation law it would have been considerably more difficult for President Ortega to translate

his support into implementation of the Inter-American Court's order. Similarly, President Michelle Bachelet did not create new legislation to comply with *Claude Reyes et al.*; rather, she supported a legislative proposal that advocates had already developed. The proposal was presented to her at a moment when it was politically convenient to support it, and then she was encouraged to follow through when she won the presidency with the support of the transparency community. In this regard, a framework for implementation of decisions appears to be as important as the political will to implement. While implementation is virtually impossible where there is no political will to do so, degrees of political will translate into degrees of implementation, and implementation mechanisms can facilitate that process. For this reason, the next section focuses on the types of mechanisms that have been used to promote implementation.

## Procedures and Mechanisms to Promote Implementation

The implementation crisis in the Inter-American system has received increasing attention over the past decade. Efforts by the commission and court to collect data about implementation, coupled with efforts by civil society organizations and academics to systematize and analyze that information, provide us with a relatively accurate picture of the implementation problem in the Inter-American system, and elucidate key strategies for capitalizing on the willingness of states to comply with their international human rights obligations.

### **Organization of American States**

For the last decade, the General Assembly of the OAS has issued resolutions highlighting the importance of implementation. In its Thirtieth Regular Session in 2000, the General Assembly issued a resolution reiterating that states parties to the American Convention must comply with the Inter American Court's rulings in all cases to which they are party.<sup>311</sup> The General Assembly went a step further in its next regular session in 2001, issuing a resolution instructing the OAS Permanent Council to focus on implementation of the decisions of the Inter-American Court and the recommendations of the Inter-American Commission.<sup>312</sup> The resolution urged member states to take the necessary steps to "comply with the decisions or judgments of the Inter-American Court of Human Rights and make every effort to implement the recommendations of the Inter-American Commission on Human Rights." Additionally, it resolved to "take appropriate action in connection with the annual reports of the Court and the Commission, in the framework of the Permanent Council and the General Assembly of the

[OAS],” and linked this to the duty to guarantee observance of the obligations set forth in the relevant instruments of the Inter-American system.

In 2003, the General Assembly again instructed the Permanent Council to consider ways to encourage compliance by states parties with the judgments of the court.<sup>313</sup> In 2004, the General Assembly reiterated the need for member states to provide information requested by the court to enable it to fully meet its obligation to report to the OAS on compliance.<sup>314</sup> And in 2005, the General Assembly emphasized the importance of states’ dissemination of the court’s decisions.<sup>315</sup>

In June 2009, the General Assembly issued a resolution entitled “Observations and Recommendations on the Annual Report of the Inter-American Court of Human Rights,”<sup>316</sup> in which it recognized the “important and constructive practice begun by the Inter-American Court of Human Rights to hold private hearings on the monitoring of compliance with its judgments, and the outcomes thereof.” This positive development is discussed in greater detail below. The General Assembly reiterated that the “state parties to the American Convention on Human Rights undertake to comply with the Court’s decisions in all cases to which they are a party,” and also emphasized the need for parties to provide the information requested by the court so that it may fulfill its duty to report to the OAS on compliance with its judgments. The General Assembly also instructed the Permanent Council to continue to consider ways to encourage compliance with the court’s judgments.

While these resolutions have not had a clear effect on implementation practices, there is one notable initiative to urge the General Assembly to more actively pursue the stated goals of such resolutions. As president of the Inter-American Court from 1999 to 2004, Judge Antonio Cançado Trindade regularly presented reports to the political organs of the OAS (including the General Assembly and the Committee on Juridical and Political Affairs (CJPA) of the Permanent Council) in which he urged them to establish a permanent mechanism to monitor and promote compliance.<sup>317</sup> Judge Cançado Trindade argued that a Working Group of the CJPA could be modeled on the Committee of Ministers of the Council of Europe, and that it would offer a political space for state representatives to discuss and debate efforts to implement decisions of the Inter-American human rights bodies. While Judge Cançado Trindade believed such a mechanism was essential to realize the “collective guarantee” represented by the American Convention, his calls went unheeded. Ultimately, it has been the Inter-American Commission and Inter-American Court that have made the most sustained efforts to realize the “collective guarantee.” Thus, it is essential to review the work that each body has done to develop mechanisms and procedures to monitor and promote implementation.

## Inter-American Commission

Perhaps the most significant moment in the contemporary history of the Inter-American system was the passage of the 2001 reform to the Rules of Procedure of the Inter-American Commission and Court. Indeed, that reform acted as a trigger for many changes in the Inter-American system. While the overall effect of the 2009–2010 reform to the Rules of Procedure is still unclear, these two moments of significant institutional reform provide a useful framework to examine each body’s development with regard to implementation.

The 2001 reform of the Rules of Procedure of the Inter-American Commission represented, among many other things, the culmination of a process of institutional reflection about the implementation of the commission’s recommendations. This was reflected in Article 46, which provided that:

Once the Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations.

While the commission took the important step of formally establishing the basis for its follow-up work, because Article 46 merely provided that the commission “*may* adopt the follow-up measures *it deems appropriate*,” the commission’s follow-up activities under this provision have been carried out on an ad hoc basis, more in response to pressure by advocates than on the commission’s own initiative. Nevertheless, this marked the beginning of the Inter-American Commission’s compliance reporting mechanism.

For its 2001 annual report, the Inter-American Commission collected data about implementation of its recommendations issued in 2000 and published that information for the first time.<sup>318</sup> The commission created four categories for reporting compliance: full compliance, partial compliance, noncompliance (where the state presented information), and noncompliance (where the state did not present information). Because of the objection of some states to these classifications, the 2002 annual report, which reported compliance data from 2000 and 2001, featured the three categories that continue to be used today: total compliance, partial compliance, and pending compliance.<sup>319</sup> In its 2003–2006 annual reports, the commission published compliance data for those friendly settlement agreements and merits decisions issued over the three preceding years;<sup>320</sup> in its 2007 and 2008 annual reports, it published compliance data for those cases resolved within the preceding seven years;<sup>321</sup> and, in its 2009 annual report, it published compliance data for cases issued in the previous nine years.<sup>322</sup> Generally speaking, the commission collects this data by sending a letter in mid-November to the parties in all cases resolved in the relevant time period, giving them one month to update the official record of implementation.

Article 46 specifically mentions compliance hearings as a means for the commission to follow-up on the implementation of its recommendations. However, such hearings have been relatively uncommon. Requests for these hearings are considered with all other requests for case-specific and thematic hearings during the commission's two sessions in Washington DC in February/March and October/November each year, and often there are more than 200 requests for as few as 50 hearing slots. Moreover, compliance hearings are sometimes granted in the "working meeting" model,<sup>323</sup> as opposed to the "public hearing" model, making it more difficult for advocates to draw attention to them and take full advantage of the opportunity to shame non-compliant states.

Significantly, it appears that when the Inter American Commission adopted new rules of procedure in 2009, it did not alter the existing framework so as to make certain follow-up activities mandatory. As a result, Article 46 of the 2001 Rules of Procedure simply became Article 48.1 of the new Rules of Procedure of the Inter-American Commission that took effect on December 31, 2009.<sup>324</sup> Accordingly, there is no indication that the commission's follow-up activities will develop in any significant way in the near future, and its reporting and hearing activities will likely continue to be limited in this regard.

Another aspect of the 2001 procedural reforms germane to implementation is the decision of the Inter-American Commission to refer more cases to the jurisdiction of the Inter-American Court. Until 2001, the commission's decision to submit a case to the jurisdiction of the court was largely a discretionary one, made with very little transparency. The 2001 reforms instituted a process of consultation with the parties regarding submitting the case to the jurisdiction of the court. The practical effect of this change was to transform the submission of cases to the court from the exception to the rule.<sup>325</sup> This resulted in a rapid increase in the caseload of the Inter-American Court. Indeed, fewer than 20 merits decisions were issued by the Inter-American Court between 1989 and 1999, compared to more than 80 such decisions between 1999 and 2009, an increase of more than 300 percent over one decade. Because states have historically responded with more seriousness to orders of the court, this increase in the court's output has translated into more implementation generally, if not better *rates* of implementation.<sup>326</sup>

### **Inter-American Court**

The Inter-American Court's authority to issue binding decisions that are "final and not subject to appeal" arises from Article 67 of the American Convention. Article 68, in turn, requires that states "undertake to comply with the judgment of the Court," and specifically provides that "part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state." With regard to reporting, Article 65 pro-

vides that the court “shall” include in its annual report to the OAS “the cases in which a state has not complied with its judgments, making any pertinent recommendations,” and the court has concluded that this is the basis for its implementation monitoring activities, as it would not be possible to report to the OAS on compliance with its judgments if it did not follow up with the state in question.<sup>327</sup>

In 1999, the court began the practice of issuing “compliance orders” against states that it determines have not adequately fulfilled their obligations to implement its reparations orders.<sup>328</sup> These compliance orders, which are issued after the submission of written allegations by the parties to the cases, provide insight into implementation in different cases, as well as the justifications states give for their failure to implement decisions. The court has issued compliance orders in roughly 75 percent of the cases in which it has issued reparations decisions, and has issued multiple orders in a number of cases, providing substantial insight into the implementation process of those cases with which the court is more engaged.<sup>329</sup> Interestingly, while the court had the opportunity to institutionalize its procedures for monitoring compliance when it reformed its Rules of Procedure along with the Inter-American Commission in 2001, it declined to do so.<sup>330</sup>

Despite the court’s decision not to include explicit follow-up procedures in its Rules of Procedure in 2001, it has continued to develop such procedures. For example, in the reparations decisions issued in *Barrios-Altos* and *Durand and Uguarte* against Peru in 2001, the court required Peru to present a report on compliance within six months of the date that the decision was issued,<sup>331</sup> and in *Cantoral-Benavides* it required such a report “every six months” following the decision.<sup>332</sup> In almost every decision since issued, the Inter-American Court has incorporated a reporting requirement, though it has fluctuated between six months and one year in 2002 and 2003, one year in 2004 and 2005, one year and 18 months in 2006 and 2007, and six months and one year in 2008 and 2009.<sup>333</sup> By 2002, the court had begun to attach timetables to the specific aspects of its reparations decisions, clearly establishing its expectations for when the state should pay pecuniary damages, issue public apologies, or engage in activities to guarantee non-repetition.

In addition to its regular compliance reporting to the OAS General Assembly, the court can issue a more substantial report on non-compliance to the General Assembly under Article 65. Judge Cañado Trinidad has encouraged the “full application” of the Article 65 sanction in cases of severe non-compliance, citing the two examples of such application during his tenure on the court: when the court denounced the Fujimori regime’s non-compliance with the court decisions during the 2000 General Assembly, and when it denounced Trinidad and Tobago’s failure to comply with a court decision ordering the revision of its capital punishment regime during the General Assembly in 2003.<sup>334</sup> According to Judge Cañado Trinidad, this sanction consists of the court’s

consistently and vocally expressing its concern about a particular country during the time it is given to address OAS member states during the General Assembly.

Interestingly, many advocates are disinclined to ask the court to apply the full force of the Article 65 sanction in their own cases, indicating that this is a final measure reserved for when there is no hope of implementation. For obvious reasons, few advocates want to admit that their case has arrived at this point. Moreover, because the OAS General Assembly provides the court with a limited period of time to present its annual report every year, there are serious questions about the utility of having the court dedicate that time to denouncing a state for its failure to implement one or more decisions, if such a denunciation could represent an end point of the court's implementation work. There are active conversations at all levels about the possible form and impact of the "full application" of Article 65, but because the practice is so uncommon, there is very little frame of reference for such a discussion. Accordingly, advocates focus their efforts on utilizing the court's compliance monitoring mechanisms.

The court continued the process of developing its compliance monitoring procedures with a 2005 resolution entitled "Supervision of Compliance with Sentences (Applicability of Article 65 of the American Convention on Human Rights)."<sup>335</sup> That resolution outlined both the supervisory practices that the court had developed up to that point, as well as the normative bases for those practices.<sup>336</sup> The resolution provided, presumably in the interest of judicial economy, that the court would make a final determination of non-compliance after the prescribed time-periods for implementation had lapsed, and then report that case to the OAS annually until the state in question had demonstrated to the court that it had fully implemented all ordered reparations.<sup>337</sup> Pursuant to this procedure, the court will include in its annual report to the OAS a list of states that have failed to implement a decision of the court, and the state must inform the court of any progress towards implementation if it wants to be removed from that list. Significantly, the court retains the ability to require compliance reporting when it deems necessary so that it may issue compliance orders.<sup>338</sup> In fact, since the issuance of the resolution, the court has progressively developed its practices in reporting on the compliance phase of litigation.

For example, the court will use compliance orders to increase a state's reporting requirements. In *Sawhoyamaxa Indigenous Community v. Paraguay*, the court initially ordered that, "[a]s long as the members of the Sawhoyamaxa Indigenous Community remain landless, the State shall deliver to them the basic supplies and services necessary for their survival."<sup>339</sup> However, when the state failed to implement this order, and members of the Sawhoyamaxa Indigenous Community died, the court required more regular and explicit reporting, ordering that the state "submit information that will allow the Court to differentiate the goods and services supplied to the members of the Sawhoyamaxa Community from those supplied to other communities."<sup>340</sup>

The Inter-American Court has also taken the important step of ordering states to identify agents responsible for carrying out the implementation of decisions at the national level. Recently, the Presidential Commission for Coordinating Executive Policy on Human Rights (*Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos*, COPREDEH)—the state agency that represents Guatemala before the Inter-American human rights bodies—confronted the court with its inability to implement certain aspects of the court’s decisions because the relevant state institutions were not responding to their requests for support. The court took the unprecedented step of ordering Guatemala to name state agents as interlocutors for implementation of orders to investigate and punish those responsible for the violations identified in the cases, and to develop legislative measures of non-repetition.<sup>341</sup> Specifically, the court ordered the state to identify an agent from the National Commission for Follow-Up and Support on the Strengthening of Justice (*Comisión Nacional para el Seguimiento y Apoyo al Fortalecimiento de la Justicia*) to work with COPREDEH to develop a comprehensive plan for the investigation of the case within a four-month time-frame, at which point the state should submit the plan for the court’s review.<sup>342</sup> Similarly, the court required that the state identify a member of the legislative branch to work with COPREDEH in developing a comprehensive plan to implement the administrative and legislative procedures called for in the court’s decision.<sup>343</sup> While results of these efforts are not yet clear, expanded and more specific reporting has the potential to encourage state accountability and provide a potential means for overcoming bureaucratic bottlenecks relating to implementation.

In 2008, the court began the practice of convening “compliance hearings.”<sup>344</sup> Since the first compliance orders were issued in 1999, the court had developed the official record of implementation exclusively through written submissions from the parties. The compliance hearings now provide the parties with an opportunity to present their evidence and arguments orally. The court has held dozens of these hearings in the past two years. They have been very well received by advocates, and were acknowledged in the resolution issued by the General Assembly in 2009.<sup>345</sup> In addition, the setting for these hearings has grown increasingly dynamic. Whereas initially all such hearings were closed and presided over by one to three judges, the court recently began the practice of convening public hearings.<sup>346</sup> In July 2009, the court held its first such public hearing in *Sawhoyamaya Indigenous Community v. Paraguay*, clearly intending to promote implementation by holding the state publicly accountable for its human rights failures in that case.<sup>347</sup>

The format of these hearings is also becoming increasingly dynamic. The court recently held a compliance hearing in eight Colombian cases, to hear submissions from the parties regarding the state’s implementation of the court’s orders to provide medical and psychological treatment.<sup>348</sup> The request for this hearing arose from Colombian

human rights organizations frustrated by their limited success in pursuing implementation of the non-monetary aspects of the court's reparations orders. In an attempt to better organize their advocacy on matters pertaining to implementation, Colombian organizations have entered into a collaborative agreement and authorized an individual to coordinate certain aspects of their implementation strategy. The recent request by this collective for a compliance hearing on a common element in multiple cases is a novel approach to compliance litigation, and the Inter-American Court's decision to grant the hearing is an indication that it is open to more dynamic uses of such hearings. It is also a sign that the court will continue to develop its monitoring compliance procedures generally.

The Inter-American Court's new Rules of Procedure, which entered into force on January 1, 2010, provide the basis for the implementation procedures the court has developed over the past decade.<sup>349</sup> Article 69.1 provides that "[t]he procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives," and that "[t]he Commission shall present observations to the state's reports and to the observations of the victims or their representatives." Article 69.2 empowers the court to request expert opinions about issues relating to compliance where appropriate. Article 69.3 provides that "the Tribunal may convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions," when it deems appropriate, and that "the Court shall hear the opinion of the Commission at that hearing." Finally, Article 69.4 provides that "[o]nce the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders."

One important procedure established by the rules, which had not previously been implemented by the court, is the Article 30.5 procedure permitting the joinder of monitoring compliance proceedings in related cases. While the court likely established this procedure in the interest of judicial economy,<sup>350</sup> joined monitoring compliance proceedings may provide a mechanism to discuss important systemic changes that arise consistently in cases against a certain state. Such consolidated proceedings provide the opportunity for advocates to combine their efforts, and force states to consolidate their responses. In the event of such joined proceedings, the court's 2010 rules provide in Article 25 for the designation of a "common intervener," or up to three interveners in the event that consensus cannot be reached. While it is not clear how this new model for monitoring compliance will aid in efforts to improve implementation, it presents an important strategic opportunity for advocates that should be explored.

## National Implementation Laws and Mechanisms

Perhaps even more important than the efforts to develop implementation mechanisms at the regional level are the efforts by states themselves to develop implementation machinery within their national legal framework. One of the best examples of this development is in Peru.

Under President Alberto Fujimori, the government of Peru regularly contested the decisions of the Inter-American Court, refusing to implement any aspect of the court's reparations orders in *Neira-Alegria v. Peru*, *Castillo-Paez v. Peru* and *Castillo-Petruzzi, et al. v. Peru*. Peru attempted to withdraw from the contentious jurisdiction of the court in 1999, arguing that the court was interfering with its sovereign right to control a terrorist threat. Questions were raised, however, about Peru's true motivation in attempting to withdraw when it contested court decisions in the *Ivcher Bronstein* and *Constitutional Court* cases, where the court found violations of human rights related to the state's efforts to silence criticism rather than confront terrorism. When a corruption scandal led to the Fujimori regime's demise, the Peruvian Congress named Valentin Paniagua as interim president.

Paniagua entered power on a platform of respect for human rights, and after a month in power he issued a decree regulating procedures for following up on recommendations of international human rights bodies.<sup>351</sup> Under that presidential decree, the government committed to processing the recommendations of bodies with non-binding jurisdiction, such as the Inter-American Commission, in good faith and in accordance with its international obligations.<sup>352</sup> The decree further charged the National Human Rights Advisory (*Consejo Nacional de Derechos Humanos*, CNDH) of the Ministry of Justice with the responsibility of following up on all recommendations, and directed the Foreign Affairs Ministry to communicate all such recommendations to the CNDH's Secretariat along with its observations.<sup>353</sup> It further provided that the secretariat should communicate the recommendations to the full CNDH along with all relevant observations (including its own), so that the president of the CNDH could determine which actions corresponded to different executive offices. However, the decree limited the authority of the president of the CNDH to implement general remedies, permitting the president to merely make recommendations to the legislative and judicial branches and request that they inform the CNDH of any actions taken.<sup>354</sup>

While the framework established in this decree may not be ideal, it resolves the question of what process the state should follow when the Inter-American Commission issues a decision against it. Further, just over a year later, in April 2001, interim President Paniagua approved the CNDH's regulations through presidential decree, which *inter alia*, created the Special Commission to Follow-Up on International Procedures (*Comision Especial de Seguimiento y Atencion de Procedimientos Internacionales*, CESAPI).<sup>355</sup>

CESAPI, in charge of participating in all international human rights proceedings, is composed of the president of the CNDH, a representative from the Foreign Affairs Ministry, and an international law expert named by the Ministry of Justice.<sup>356</sup> CESAPI has a technical committee, and is responsible for receiving and responding to all communications from international human rights bodies established under the auspices of the UN, the OAS, or another multilateral organization in which Peru participates.<sup>357</sup> CESAPI is responsible for forming policies with regard to these proceedings together with the Foreign Affairs Ministry, and may name a state official to respond in specific proceedings.<sup>358</sup> The decree also charges CESAPI with supervising the implementation of the decisions and recommendations of international human rights bodies.<sup>359</sup> This last element is significant, as it expands the scope of the earlier presidential decree to cover the binding decisions of regional human rights bodies. In terms of implementation, the decree specifically directs CESAPI to spearhead compliance activities, coordinate relations with NGOs, and recommend compliance measures, such as legislative proposals, to the president of the CNDH.<sup>360</sup>

While these presidential decrees were extremely important in shifting the policy of the Peruvian state after the fall of the Fujimori regime, it is important to note that they are only decrees of the executive and, unlike legislation, can be overturned by another executive act. For this reason, it is particularly significant that President Alejandro Toledo, who won the July 2001 elections in Peru, oversaw the passage of a law regulating the procedure for the execution of sentences issued by supranational courts.<sup>361</sup> That law establishes the specific steps that should be taken in order to give effect to those decisions of supranational courts that require either the payment of pecuniary damages or declaratory relief.<sup>362</sup> First, the Foreign Affairs Ministry should transmit such a decision to the Supreme Court, which will then be responsible for transmitting it to the appropriate national court with jurisdiction to comply with the sentence.<sup>363</sup> If the decision requires the payment of a specific monetary amount, the national court judge referred to the case should order the Ministry of Justice to pay the amount within ten days.<sup>364</sup> If the decision requires the payment of an undetermined amount of money, the national court judge will initiate a process to determine an appropriate amount that should take no longer than thirty days.<sup>365</sup> The law further provides a process for the resolution of conflicts that arise between national law and the decision of the relevant supranational court, as well as procedures to find individual responsibility for human rights violations and sanction those state officials responsible.<sup>366</sup>

While at least one lawyer who has worked within this framework on the implementation of Inter-American Court decisions found it to be overly general in many circumstances,<sup>367</sup> the Peruvian law provides what is possibly the most comprehensive model of national implementation legislation in the Americas. Such legislation is significant because it provides a framework for specific actions that can be taken by advocates

after the Inter-American Court issues a decision. Indeed, while no Peruvian case has been fully implemented, the Inter-American Court has decided more cases against Peru than any other country, and there are numerous important examples of the implementation of both individual and general measures, including the only order by the court to investigate the circumstances of a human rights violation and punish the perpetrators ever to be fully implemented. While there are legitimate complaints about Peru's failure to adequately institute measures of non-repetition, a condition that leads to continued violations and increasing reliance on the Inter-American Commission and Court,<sup>368</sup> the Inter-American system has provided a concrete and reliable option for the people of Peru to pursue justice when they are denied it at the national level. For this reason, the Peruvian implementation mechanisms could provide a blueprint for how the regional community can work to improve implementation in a systematic manner.

Similar to the implementation framework in Peru, Colombian legislation provides a process for the payment of pecuniary damages ordered in decisions by international human rights bodies.<sup>369</sup> In 1996, Colombia passed Law 288 on the indemnity of victims of human rights abuse.<sup>370</sup> The law covers all of those cases in which the UN Human Rights Committee or the Inter-American Commission have determined Colombia to be responsible for a violation of human rights and ordered money damages, and where a committee composed of representatives of the Interior Ministry, the Foreign Affairs Ministry, the Justice Ministry, and the Defense Ministry has approved implementation.<sup>371</sup> The law sets forth the process by which the committee will consider whether to implement the recommendations of the international body, and provides the process by which the decision to indemnify should be effectuated in the event that the committee approves payment.<sup>372</sup> This law provides a framework for Colombia to engage in a good faith effort to implement the recommendations of those quasi-judicial bodies that it does not otherwise consider to have the authority to issue binding decisions.

In contrast, Colombia gives the decisions of the Inter-American Court ordering pecuniary damages full effect, because the state recognizes such decisions as legally binding.<sup>373</sup> However, there is no legal mechanism under which Colombia implements such decisions, and some problems inherent in that process are illustrative of problems throughout the region.

With regard to monetary compensation, which is less controversial in the Colombian context, the state will identify the responsibility of each ministry in a particular human rights case and require it to pay its share of the damages. As an example of how uncontroversial this process has become, the Colombian Ministry of Defense has incorporated a line item in its annual budget for the payment of international human rights decisions.<sup>374</sup> The procedures for the implementation of other measures ordered in an Inter-American Court decision are less systematized. Generally, the Foreign Affairs Ministry will convene a compliance meeting following the court's decision, inviting

representatives from the other ministries with a stake in implementation, which usually include the Defense Ministry and the Public Ministry among others. However, because the process is not formalized under the law, the Foreign Affairs Ministry must rely on its political influence to bring representatives from the different ministries together. Accordingly, shifts in the political will or attitudes of public officials influence the implementation process. For example, the head prosecutors in charge of the investigations used to attend the compliance meetings, which the representatives of the victims thought to be very positive, but they stopped attending because they are often investigating officials from the Defense Ministry, which often sends representatives to the meetings.<sup>375</sup> However, the dynamic of including the relevant ministries in the implementation process, as a matter of law when pecuniary damages are involved, and as a matter of fact with regard to other reparations, is generally considered a positive development.

In addition to the implementation laws in Peru and Colombia, Costa Rica has signed an agreement with the Inter-American Court establishing that resolutions issued by the latter will have the same effect as sentences handed down by the national courts upon transmission to domestic administrative or judicial authorities.<sup>376</sup> Moreover, a number of countries have ongoing processes that are worth noting. Argentina in particular has been debating a law on compliance for the past decade, and at least five legislative proposals have been presented suggesting frameworks for implementation of Inter-American Court and Commission decisions.<sup>377</sup> Legislative proposals were similarly presented in Brazil in 2000 and 2004.<sup>378</sup> Such legislative processes are promising expressions of an interest in institutionalizing a willingness among certain state sectors to implement human rights obligations, particularly those arising from contentious Inter-American proceedings.

## Conclusions and Recommendations

There is little question that there is an implementation crisis in the Inter-American system that threatens its legitimacy and its viability as a method to obtain redress for violations of human rights. The initiatives outlined above should all be considered as different aspects of an integral approach to promote broader implementation of the decisions of the Inter-American system. Below are some conclusions about the importance of these initiatives, and recommendations for their progressive development and to coordinate related activities.

### **Urge the OAS to Develop Its Mandate to Promote Implementation**

As was discussed above, the General Assembly of the OAS has consistently issued resolutions on the importance of implementing the decisions of the Inter-American human rights bodies and called on states to act in accordance with their treaty obligations. However, none of these resolutions have established a mandate to take concrete actions to improve implementation. Interested parties should see these resolutions as a possible framework within which they can focus their regional activities to promote implementation. There are numerous activities that the General Assembly could order in relation to implementation; below are a few ideas drawn from the types of human right-related activities ordered in other General Assembly resolutions.

In the interest of accelerating the discussion on implementation, the General Assembly could require the Permanent Council to hold an annual, day-long conference at the OAS headquarters, with the participation of states, representatives from the commission and court, and civil society, to discuss matters pertinent to the implementation of decisions. In this context, state representatives from Peru and Colombia could make presentations about their implementation laws, Argentina and Brazil could speak about their legislative processes, the commission and court could speak about their implementation activities, and civil society organizations could talk about their implementation successes and frustrations. This would create a record of the implementation challenge at the regional level, as well as provide the basis for more active conversations among interested parties.

Either prior to the event on implementation described above, or after the first such meeting and in anticipation of the second, the General Assembly could order the Department of Legal Services of the OAS to produce a report on implementation. Such a report could have numerous purposes and goals. One could be to collect a broad range of implementation experiences, surveying the different ways in which states incorporate the obligations that arise from commission and court decisions into their national legal order.

Finally, the General Assembly could order the Permanent Council to establish a working group on implementation within the Committee on Juridical and Political Affairs (CJPA), in line with the proposal made by Judge Cançado Trindade in his addresses to the OAS. The goal of such a working group would be to create a space for a sustained discussion about the implementation of commission recommendations and court orders in the political sphere of the OAS. The CJPA is the body within the OAS responsible for matters relating to the human rights practices of member states, and there is precedent for the General Assembly to require the establishment of working groups in the CJPA through its resolutions. Accordingly, the General Assembly could establish a working group in the CJPA to discuss implementation challenges and exchange best practices, with one possible objective being the production of model directives on how to implement the decisions of the Inter-American Commission and Inter-American Court at the national level.

### **Boost the Implementation Activities of the Commission**

It is clear from a review of the commission's activities that there has not been a sustained effort to develop its implementation procedures and mechanisms since the 2001 reform to its Rules of Procedure. The progress made at the time of that reform, however, was not insignificant. It established a reporting mechanism that, while imperfect, has provided the basic data for numerous quantitative implementation analyses. The rules further provided the basis for other implementation activities, such as hearings during the sessions of the commission and promotional visits by commissioners, although these activities have not been carried out in a sustained manner. The commission does emphasize the virtue of friendly settlement negotiations, and regularly refers cases to the Inter-American Court, partially in recognition of the advantage of each of these procedures in achieving implementation. Nevertheless, it is crucial that the commission continue to develop its implementation mechanisms and procedures.

While the commission began reporting in 2001 on implementation of decisions issued since 2000, it wavered between 2004 and 2006 when it only reported on implementation of those decisions issued during the three years prior. However, in 2007 the commission resumed collection of implementation data for all of the cases it had decided since 2000, and it will provide a full decade of implementation data in its 2010 annual report. Nevertheless, the commission has not substantially developed its methods of data collection since it began this initiative; it passively collects information and includes the version of each party in a report, without taking the opportunity to decide which party's assessment of implementation is more accurate. The commission does not issue resolutions condemning states that are not fulfilling their obligations. Were the commission to follow the example of the court and create a contentious phase of implementation litigation, it would certainly create a more accurate record of actual implementation, and it might pressure states to improve their practices.

Similarly, the commission should consider increasing the number of implementation hearings it holds, and making implementation a more integral and predictable part of its country visits. Were the commission to take steps to convert its implementation reporting mechanism into a contentious phase in litigation, it may find that by exercising its power to hold states accountable in private hearings, or to embarrass states in public hearings, it would achieve higher rates of implementation. However, even if the commission does not create a more rigorous system of implementation reporting across the board, interested parties can urge it to grant more implementation hearings in their specific cases. In most cases, states will feel compelled to present reports on implementation measures when called to such hearings, and in that way a more complete implementation record can be created on a case-by-case basis. The only way that the commission will begin to prioritize compliance hearings is if interested parties request them consistently.

Finally, the possibility of establishing a rapporteurship on implementation within the Inter-American Commission should be considered. Such a rapporteurship would likely need to be funded independently, like the Rapporteurship on Freedom of Expression, but it is an idea that merits study as it could provide the exact means for the commission to step up its implementation activities without further stretching its already overextended budget. It would also be able to give the appropriate attention to the issue of implementation, and coordinate with other regional and national compliance mechanisms to realize the “collective guarantee” of the American Convention. While this is not a proposal that has been taken up in the past, it should certainly be considered in the context of the growing dialogue on regional implementation mechanisms.

### **Develop Dynamic Implementation Litigation before the Court**

Of the OAS bodies, the court is without question the most committed to the mission of improving the rates of implementation of its decisions. Over the past decade, the court has actively developed an implementation phase of litigation, such that it now takes written submissions and holds hearings, both private and public, on matters pertaining to implementation of its orders. Worth special mention are the efforts of the court to identify where impediments to compliance exist on the national level, and require states to specifically address them. Litigants should recognize this as one of the initiatives with the most potential to boost implementation in the Inter-American system, and assist in the dynamic evolution of these procedures.

Some specific examples that show promise are requests that the court require more detailed reporting from different state agencies and order states to identify agents responsible for particular aspects of implementation. The court has demonstrated its willingness to issue such orders recently in a series of Guatemalan cases in response to frustration voiced by COPREDEH, which is itself a state agency. Litigants should test the court’s resolve in this regard, requesting specific orders in a range of cases and on a variety of issues. Similarly, litigants should push the court to order that states construct national mechanisms to implement court orders in specific cases, such as the “inter-institutional committee to define and execute the training programs on human rights and treatment of inmates” it ordered in *Tibi v. Ecuador*. Court orders of this nature are significant because they recognize that implementation often requires buy-in by multiple state agencies, and demonstrate the court’s willingness to exercise its binding jurisdiction to instruct the state on the best way to implement its decision.

The problem of unresponsive or uncooperative state agencies is currently being addressed by Colombian civil society organizations within the context of implementation litigation. Colombian organizations that have litigated favorable outcomes before the Inter-American Court have recently spearheaded a new initiative by designating an individual who will coordinate certain activities to promote the implementation of Inter-

American Court decisions. In their first collective act, they have requested a hearing in eight cases simultaneously to address the court's order that the state provide medical and psychological care to the victims. Other civil society actors in states against which multiple cases have been issued on similar matters could use this technique. This technique can be combined with the other litigation strategies mentioned above, such that collaborating civil society organizations can make collective requests to the court to order the state to identify individuals responsible for implementation, require them to form an inter-agency task force, and then provide specific reports on concrete matters to be debated during both private and public hearings.

### **Promote the Articulation of National Implementation Legislation**

Ultimately, implementation litigation before the court is a substitute for the initiative at the state level to identify those agents responsible for giving the court's order effect at the national level. While the court can help to structure state initiative and pressure the state to make progress when it is not inclined to do so, the ideal scenario is for the state to structure its own initiatives for implementing the decisions of the commission and court.

National legislation is the clearest way for states to structure their efforts to implement Inter-American decisions. Some examples of national laws that provide a framework for compliance or implementation activities are provided above, and laws from Peru and Colombia have been discussed in considerable detail. The consensus of almost all of those individuals interviewed for this report is that the proliferation of national legislation establishing permanent mechanisms for the implementation of Inter-American Commission and Court decisions is the best hope for improvement in the rates of implementation. A complete implementation advocacy agenda, therefore, should include an effort to promote individual legislative processes to elaborate compliance laws and policies. Moreover, efforts to develop model legislation, or guiding principles for the establishment of national implementation mechanisms (akin to the Paris Principles for NHRIs), could be an important step to assist countries considering such a legislative proposal. Such model legislation could also aid civil society organizations pushing for legislative change.

Civil society groups that regularly work before the Inter-American system should advocate in their respective countries for a serious legislative process. These organizations should collaborate regionally in order to share experiences and prospects for such laws, so that best practices and mutual support networks can develop. This regional collaboration should also target the OAS and the Inter-American bodies in an attempt to foster the natural link between their work on the national level and the efforts to develop regional compliance mechanisms.

# III. The African System on Human and Peoples' Rights

## Introduction

The African Commission on Human and Peoples' Rights was established as a regional human rights body with the mandate to promote and protect human rights in the African continent upon the entry into force of the African [Banjul] Charter on Human and Peoples' Rights in 1986.<sup>379</sup> The central feature of the commission's protective mandate is its review of "individual communications" submitted by persons or entities alleging violations by states of their human rights obligations under the charter.<sup>380</sup> In 1998, in hopes of expanding the regional system of human rights protection, the Organization of African Unity (OAU) promulgated the Protocol to the African Charter of Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.<sup>381</sup> The African Court of Human and Peoples' Rights entered into force in January 2004 upon the ratification of the protocol by fifteen member states of the OAU's successor, the African Union (AU).<sup>382</sup> In January 2006, eleven judges were elected to the African Court,<sup>383</sup> and a Host Agreement was signed between the AU and Tanzania that established the seat of the court in that country.<sup>384</sup>

The African Commission and African Court constitute the youngest of the regional human rights systems reviewed in this report, and both bodies have been of limited use to individuals seeking redress for human rights violations in the African continent.

Indeed, according to a review of those communications published in the commission's seventh through 26th activity reports,<sup>385</sup> it has found violations of the charter in only 60 cases against less than half of the 53 AU member states.<sup>386</sup> The African Court, which represented an exciting hope for enforcement of regional human rights obligations at the time of its establishment, has only decided one case to date, which it disposed of on admissibility grounds.<sup>387</sup> Many factors contribute to the system's underutilization; two often cited reasons are the exceedingly low rates of implementation of commission decisions and the commission's reluctance to refer unimplemented decisions to the jurisdiction of the African Court, making the process appear futile to many. Partly in response to the frustration of practitioners with the system's apparent ineffectiveness, the commission and court in 2010 reformed their rules of procedure to establish processes for the commission to follow-up on the implementation of its recommendations and to refer cases to the jurisdiction of the court when it has exhausted its follow-up activities.

This chapter explores both the nature of the African Commission's implementation crisis and the potential of the new rules of procedure to improve implementation and breathe new life into this regional system of human rights protection. In so doing, it looks at the past implementation successes of the commission and explores the relationship between implementation and the rights at issue in a case, the remedies ordered, and the follow-up activities carried out during the implementation phase. It goes on to explore the reform to the rules of procedure of the African Commission and Court, identifying strengths, weaknesses, and potential ambiguities. Finally, the chapter concludes with concrete recommendations for how interested parties can encourage the commission and court's work under the new rules with the goal of improving implementation in the African System on Human and Peoples' Rights.

## The Implementation Problem and the Institutional Response

Distinguished observers Frans Viljoen, Lurette Louw, and Obiora Chinedu Okafor have discussed seven implementation successes in their writings on the African system.<sup>388</sup> Considering that the African Commission has issued 60 decisions on the merits finding countries to have violated their human rights obligations under the African Charter in the roughly 25 years of its existence, these seven cases—which will be discussed below in more detail—represent a 12 percent rate of implementation.<sup>389</sup> However, this does not account for some cases of “partial compliance,” which former Communications Reform Expert Abiola Ayinla calculated at 34 percent in her report, “Suggested Reforms of the Communications Procedure of the African Commission on Human and

Peoples' Rights",<sup>390</sup> produced under the auspices of the Expertise Program.<sup>391</sup> The basis for Ayinla's calculation is not clear, however, and because the commission does not keep implementation data, it is difficult to substantiate.

While there may be some debate over how to measure implementation of the commission's recommendations, there is little argument that the overall rate of implementation is poor.<sup>392</sup> Ayinla and George Mukundi Wachira provide various explanations for this poor rate of implementation, which "include the lack of political will on the part of state parties, a lack of good governance, outdated concepts of sovereignty, a lack of an institutionalized follow-up mechanism for ensuring the implementation of its recommendations, weak powers of investigation and enforcement and the non-binding character of the Commission's recommendations, the last of which is the most cited reason why states have not been inclined to enforce its recommendations."<sup>393</sup> While questions of political will, good governance, and concepts of sovereignty are serious impediments to implementation, they manifest differently in each case, are fairly unpredictable, and will likely continue to be a challenge for the African system. The African Commission and African Court are currently working to address the other issues highlighted by Ayinla and Wachira, namely the non-binding nature of the commission's decisions and its lack of an institutionalized follow-up mechanism, but it is important to acknowledge at the outset that the African system's evolving powers are not uncontroversial; they have been, and will continue to be, met with resistance.

As an initial matter, it is important to note that there has been some debate about the authority of the commission to process individual communications.<sup>394</sup> This debate arises, in part, because the charter provides in Articles 47–54 an explicit mandate for the commission to consider state communications alleging violations of the charter and to issue recommendations, and provides under Article 55 that it may consider "other communications," but that it should only issue recommendations in limited circumstances. Specifically, Article 58 provides that "the Commission shall draw the attention of the Assembly of Heads of State and Government to ... special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights," and that "[t]he Assembly of Heads of State and Government *may* then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations" (emphasis added). Regardless of what could be interpreted as a very limited mandate for the consideration of individual communications, the commission processes "other communications" under Article 55 of the charter in the same way it processes communications submitted by states. Moreover, all but one of the communications presented to the jurisdiction of the African Commission have been "other communications" filed under Article 55.<sup>395</sup> Nevertheless, the commission's insistence on exercising its contentious jurisdiction in

the face of objections by states puts the discussion about its evolving follow-up powers in an important historical context.

Adding to the implementation challenge is the fact that the commission decisions are commonly considered to be non-binding.<sup>396</sup> The commission itself acknowledges that its recommendations are not legally binding when they are issued in activity reports. However, the commission argues that once the AU Assembly of Heads of State adopts the activity report, the recommendations therein become legally binding on the states parties.<sup>397</sup> This position is fairly controversial, however, as there is nothing in the charter itself establishing that the recommendations of the commission are legally binding. Further, it does not appear that the AU Assembly makes any independent assessment of the commission's findings in adopting its decisions; rather, it merely acknowledges the work of the commission and makes it public.<sup>398</sup> There is little question that the binding nature of the commission recommendations will continue to be a source of contention and act as an impediment to implementation.

In contrast, the African Court Protocol provides that the court will exercise binding jurisdiction over states in cases that involve violations of human rights guaranteed by the charter.<sup>399</sup> Accordingly, with a reliable procedure for the African Commission to refer cases to the court, the African system could provide an institutional response to those states that cite the non-binding nature of commission decisions as a reason for declining to implement its recommendations. Ironically, many observers opine that the principal problem in getting the African Court to hear a meritorious case has been the commission's lack of initiative in presenting such a case to the jurisdiction of the court.

As noted above, however, the commission and the court in 2010 adopted new rules of procedure that will govern, *inter alia*, the commission's referral of cases to the court.<sup>400</sup> This new procedural framework represents the potential for improved implementation of African Commission decisions because states will likely want to avoid being among the first to be condemned by the African Court for their human rights practices, a sentiment that may induce good faith efforts by states to implement the commission's recommendations. Additionally, if the commission does refer an unimplemented case to the court, and the court finds a state in violation of its charter obligations, there will certainly be added pressure to implement the court's decision due to the binding nature of its jurisdiction.

Similarly, the new rules address Ayinla and Wachira's concern regarding the lack of any institutionalized follow-up mechanism to support implementation of African Commission decisions. As will be discussed in greater detail, the commission's new follow-up mechanism provides specific direction to the commission and interested parties as to how it will work to promote implementation of its decisions. Before specifically reviewing this new follow-up mechanism, it is important to review the commission's experience with actual cases over the past 25 years to identify those elements of cases,

such as rights and remedies, which may influence implementation and inform follow-up activities.

## Implementation Successes, Rights, Remedies, and Follow-Up Activities

It is important to acknowledge at the outset those cases in which states have implemented the recommendations of the African Commission. While they constitute the exception rather than the rule, identifying positive trends will aid efforts to improve implementation moving forward. The seven commonly cited examples of implementation success are: *Pagnouille v. Cameroon*,<sup>401</sup> *Constitutional Rights Project v. Nigeria*,<sup>402</sup> *Centre for Free Speech v. Nigeria*,<sup>403</sup> *Forum of Conscience v. Sierra Leone*,<sup>404</sup> *Modise v. Botswana*,<sup>405</sup> *Amnesty International v. Zambia*,<sup>406</sup> and *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v. Nigeria*.<sup>407</sup> An overview of the issues involved in these cases is a useful place to begin an analysis of implementation in the African system.

In *Constitutional Rights Project v. Nigeria*, the government arrested five men, accused them of serious offenses ranging from armed robbery to kidnapping, and detained them without charge.<sup>408</sup> The commission found that Nigeria had violated the men's rights to personal liberty (Article 6) and fair trial (Article 7) protected under the charter, and recommended that it charge the men or release them. Nigeria ultimately charged them.<sup>409</sup>

In another case against Nigeria, *Centre for Free Speech v. Nigeria*, four journalists were imprisoned and denied the right to select their own counsel for a trial before a military tribunal on charges related to unfavorable reporting.<sup>410</sup> The commission found that Nigeria had violated the journalists' rights to personal liberty, a fair trial, and the guarantee of the independence of the courts (Article 26), and recommended that the government release them. The government subsequently released them.<sup>411</sup> In the third Nigerian implementation success, *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v. Nigeria*, the commission found that Nigeria had violated the charter's fair trial protection when it tried seven prominent leaders of the Katsina ethnic minority in a military tribunal and sentenced them to death.<sup>412</sup> After the commission announced grave violations of due process and recommended that Nigeria release the men in 1996, they were released later that year.

In *Forum of Conscience v. Sierra Leone*, the commission reviewed a communication submitted by a human rights organization on behalf of 24 soldiers who were sentenced to death for their alleged role in a coup attempt, and executed without a right to appeal.<sup>413</sup> The commission found that Sierra Leone had violated the charter's guarantees

to life (Article 4) and judicial protection. Sierra Leone subsequently altered its laws to provide for a right to appeal in such cases.

*Pagnouille v. Cameroon* concerned a magistrate who was imprisoned by order of a military tribunal without proper judicial protections.<sup>414</sup> Pagnouille was ultimately released after a five-year term, but was not reinstated as required under an applicable amnesty law. The commission found that Cameroon had violated Pagnouille's rights to personal liberty, fair trial, and to work (Article 15) under the charter and recommended that it "reinstates the victim in his rights." In 2002, Cameroon reported in its Article 62 report that it had reinstated Pagnouille to the judiciary, and that it had offered him compensation, which he refused to accept because he considered it to be inadequate.<sup>415</sup>

In *Modise v. Botswana*, the commission found that Botswana had arbitrarily deprived Modise of his nationality because of his political activity, and on several occasions deported him to South Africa without trial in violation of the rights to equal protection under the law (Articles 3), physical integrity (Article 5), freedom of movement (Article 12), political participation (Article 13), property (Article 14), and family unity (Article 18).<sup>416</sup> The commission urged Botswana to recognize Modise's right to nationality, and it agreed to do so after protracted negotiations. However, no agreement has ever been made with regard to compensation because Modise insists that he deserves much more than the state is willing to pay.<sup>417</sup> Nevertheless, *Modise* is commonly cited as a case of implementation success.

Finally, in *Amnesty International v. Zambia*, the commission reviewed Zambia's politically motivated arbitrary detention and deportation to Malawi of William Steven Banda and John Luson Chinula.<sup>418</sup> The commission found that Zambia had violated the complainants' rights to be free from discrimination (Article 2), fair trial, freedom of conscience (Article 8), freedom of speech (Article 9), freedom of association (Article 10), and family unity, enshrined in the charter. Three years after the commission's decision, the Zambian government overturned Banda and Chinula's deportation orders, invited Banda to return unconditionally, and allowed for the return of Chinula's remains after he had died in exile.

### **Observable Trends in the Rights at Stake**

The rights at stake in the cases that have been resolved by the African Commission can be divided into some general categories: (1) civil and political rights such as due process, personal liberty, and physical integrity (Article 1–7); (2) civil and political rights, such as the rights to free expression and association (Articles 8–13); (3) economic, social, and cultural rights (Articles 14–18); and (4) group rights (Articles 19–24).

A review of the rights at issue in these cases is telling. Almost every case decided by the commission has concerned category (1) rights, many of which involved the arbitrary detention of a specified number of individuals and accompanying mistreatment, but

in some circumstances involved more systemic due process violations as well. Approximately 50 percent of the cases issued by the commission also implicate category (2) rights, involving political participation and association and also free expression related to journalism and other speech.<sup>419</sup> Approximately 25 percent of the commission's cases involve economic, social, and cultural rights from category (3), while just five percent can be considered group rights cases under category (4). For the most part, the cases of full implementation principally involved violations of the rights to due process, personal liberty, physical integrity, and political rights. A closer review, however, reveals that the only rights not implicated in any of the seven cases are category (4) group rights.

Notwithstanding the multiple violations found by the commission in these cases, it is not accurate to call any of these cases economic, social, and cultural rights cases, as the findings of violations of those rights were largely incidental to the violations of the civil and political rights at issue. This phenomenon is fairly common in African Commission cases, where a substantial number of deportation and nationality cases also implicate economic, social, and cultural rights.<sup>420</sup> For example, in *Amnesty International v. Zambia* and *Modise v. Botswana*, the commission found that by deporting Banda and Chinula, Zambia had deprived them of the right to family unity. Interestingly, the commission also addressed the fact that Modise was left homeless for a substantial period of time as a violation of his Article 5 right to be free from inhumane treatment.<sup>421</sup> Similarly, in cases of mass expulsion, such as *Union Interafricaine des Droits de l'Homme, et al. v. Angola* and *Malawi African Association, et al. v. Mauritania*, the commission found violations of the rights to property, the right to work (Article 15), the right to education (Article 17), and the right to health (Article 16).<sup>422</sup> While many of the same rights are at issue in these cases, the commission's recommendations in the two cases that involve isolated incidents have been successfully implemented; however, its recommendations in the second two, which involved substantial numbers of people, have not.

This trend is also apparent in the few cases that do involve group rights, such as *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, where in addition to finding violations of the rights to life and equal protection, the commission found violations of the rights to property, health, family unity, natural resources (Article 21), and a generally satisfactory environment (Article 24) based on ample evidence of the degradation of the environment of the Ogoni people.<sup>423</sup> Like the mass expulsion cases, this case has yet to be successfully implemented. This is likely attributable in part to the group nature of the right that the case addresses, but also the marginalization of Nigeria's Ogoni people and the complexity of the remedy set forth by the commission.

From this brief review, it is apparent that it is difficult to draw useful conclusions from rights-based comparisons, because almost every case involves a violation of core civil and political rights, and that a subset involves social, economic, cultural, and group

rights, often only incidentally. Thus, rights do not appear to be determinative of whether the commission's recommendations will be implemented.<sup>424</sup> Cases that require states to respect the traditional civil and political rights of small numbers of individuals have a better chance of being implemented than cases involving larger groups. Similarly, the complexity of the case itself and attendant complexity of the remedies ordered by the commission, also affect implementation. To develop a more complete picture of the factors that influence implementation, a review of the remedial framework of the commission follows.

### **Types of Recommendations and their Relationship to Implementation**

As the above discussion on rights suggests, the nature and complexity of the commission's proposed remedy is equally if not more determinative of implementation. Interestingly, the form and substance of the commission's recommendations has changed over time. Among the 60 final merits decisions, the commission has, in some cases, offered no recommendations, while in others it has detailed a wide range of individual and general measures.

As an initial matter, it is interesting to review those cases in which the commission failed to provide recommendations. Of the nine cases decided before the publication of the Tenth Activity Report, five did not include any specific recommendations, while the other four provided specific recommendations to remedy the violation identified, including *Pagnouille v. Cameroon*. In the 51 cases published since the Tenth Activity Report, the commission has failed to provide explicit recommendations in only five cases; interestingly, *Forum of Conscience v. Sierra Leone* and *Amnesty International v. Zambia*, two of the examples of successful implementation described above, were among them. Accordingly, while there may be a temptation to associate the specificity of a recommendation with implementation, it does not in fact appear that this relationship is particularly important. This is a somewhat troubling proposition, which calls for a more in depth inquiry.

One example of a case in which the commission did not provide a recommendation is *Rights International v. Nigeria*, where the commission found that the state of Nigeria had violated Charles Baridorn Wiwa's rights under the charter when it arrested him and tortured him at a Nigerian military detention camp in Gokana.<sup>425</sup> At the end of its report on the case, the commission merely concluded that Nigeria had violated certain provisions of the charter without suggesting a remedy. Similarly, in *Huri-Laws v. Nigeria*, the commission found that Nigeria had violated the charter's guarantee to humane treatment, the freedom from arbitrary detention, the right to judicial protection, as well as the freedoms of expression, association and movement, as a result of its security services persecuting the Civil Liberties Organization, and specifically the arrest and mistreatment of the organization's leadership.<sup>426</sup> After noting that the government

of Nigeria had neither responded to the commission's requests for additional information or arguments on the merits of the case, the commission announced that Nigeria had violated its obligations under the charter, but failed to recommend steps it should take in order to come into compliance with those obligations. Finally, in *Interights, et al. v. Islamic Republic of Mauritania*, the commission found that Mauritania had violated rights protected under the charter when it issued Decree No. 2000/116.PM/MIPT in October 2000 in order to dissolve the "Union of Democratic Forces—New Era" political party.<sup>427</sup> The commission found that the dissolution decree was not "proportional to the nature of offences and breaches by the political party," and concluded that Mauritania had violated the freedom of association enshrined in the charter; however, it did not provide recommendations for how it should remedy the troubling situation.

Arguably, the remedy in each of these cases is implicit under generally accepted norms of international human rights law. Indeed, if a country is found to have violated the human rights of an individual or a community, such a finding requires that the state, at a minimum, cease or undo all activity contributing to the violation. For this reason, a decision by the African Commission finding a state in violation of its obligations under the charter would put the state on notice that some reparative measures must be taken. In fact, while the commission did not provide explicit recommendations in its final decisions in *Forum of Conscience v. Sierra Leone*<sup>428</sup> and *Amnesty International v. Zambia*,<sup>429</sup> the states ultimately implemented the implicit reparative measures that arose from the commission's adverse findings. Also significant is that the first of these two cases resulted in a change to the law in Sierra Leone, making it the only general measure to be implemented as the result of a commission decision. This somewhat unpredictable relationship between the nature of the remedies that the commission recommends and their implementation urges an inquiry into the range of recommendations that the commission has made over time.

A review of the commission's decisions carried out for this study reveals that the occasions when the commission has not issued recommendations are in the minority, constituting approximately 15 percent of the cases decided. In most cases, particularly those issued since the commission began publishing its decisions in activity reports, do include explicit recommendations. However, such recommendations are usually to institute a very specific measure in order to address the immediate problem faced by the victim(s) of human rights abuse featured in the communication(s). In a sense, these recommendations merely declare what was implicit in the decisions discussed above that were issued without recommendations. About 25 percent of the commission's decisions merely conclude that states have violated their charter obligations and recommend that they adopt measures consistent with the commission's findings. In about 10 percent of its cases, the commission provided slightly more specific recommendations, ordering a retrial, recognition of citizenship, or readmission to a country after deportation. In

another 10 percent of its cases the commission found that persons illegally detained should be released. In approximately 15 percent of its cases the commission ordered compensation of some sort, only once specifying the amount, and in approximately 20 percent of its cases the commission recommended some type of legal reform, in one case recommending a constitutional amendment.

In less than 10 percent of its cases, the commission has issued broader recommendations. For example, in *Purohit and Moore v. the Gambia*, the commission reviewed a challenge to the “Lunatic Detention Act” and found violations of the rights to equality before the law, human dignity, judicial protection, political rights, health, and family unity, arising both from how people were deemed mentally ill under the act as well as the conditions of their internment.<sup>430</sup> The commission “strongly urged” the Gambian government to: (1) repeal the Lunatic Detention Act and develop new legislation; (2) pending this repeal, establish an expert body to review all cases in which people have been detained under the act; and (3) provide adequate care for persons suffering from mental health problems in the country. Further, the commission urged the government of the Gambia to report back on implementation of such measures when submitting its next periodic report, required under Article 62 of the charter.

The commission has also articulated community remedies in *The Social and Economic Rights Action Center and the Center for Social and Economic Rights v. Nigeria*, a case that denounced the activities of the Nigerian military dictatorship, which violently oppressed the Ogoni people in order to guarantee Shell the opportunity to engage in oil exploration in Ogoni territories.<sup>431</sup> The commission found a range of violations of the charter, including the rights to life, property, health, family unity, and the collective enjoyment of natural resources. The commission recommended that the Nigerian state: (1) cease attacks against the Ogoni people and permit third parties to enter their territory; (2) conduct investigations into the human rights abuses that had taken place; (3) provide compensation and resettlement assistance to the victims of human rights abuse and undertake a comprehensive cleanup of their lands; (4) prepare the necessary environmental and social impact assessments before future oil exploration; and (5) provide information on the health and environmental risks of oil operations to the communities and guarantee them access to relevant regulatory agencies.

In contrast to the decisions that simply draw conclusions about the states’ violations of their charter obligations, the commission in the Ogoni case articulated a wide variety of individual measures, ranging from pecuniary damages to investigations as well as general measures such as a guarantee of access to regulatory agencies. Further, the commission took the additional step of urging the government to inform the African Commission about the work of the Federal Ministry of Environment, the Niger Delta Development Commission, and the Judicial Commission of Inquiry, all national institutions that had been mandated, in part, to investigate environmental disasters in the

Niger Delta and/or the human rights violations against the Ogoni people. This second aspect of the reparations decision is important, because in addition to extensive specific and general measures ordered in the case, the commission made an effort to direct certain national level follow-up activities. The value of this model of creating a reporting requirement for a specific case through the reparations decision will be explored in more detail below.

A number of observations are possible based on the above review. The first, and most obvious, is that the commission has no standard remedial scheme. The commission's baseline approach appears to be recommending that a state resolve the specific problem, without necessarily making recommendations about the general situation. For example, if a case concerns an unfair trial, or arbitrary denaturalization or deportation, the commission may request that the state reverse the earlier decision or reopen the proceedings. In rare cases, money damages are also associated with the harm suffered; equally rare are general remedies, which are designed to address what are often systemic problems. However, money damages and general remedies appear to be growing increasingly common in the commission's more recent decisions. Notably, the commission almost never orders the investigation and punishment of those responsible for charter violations. A number of practitioners in the African system attribute the inclusion of remedies in commission orders to pressure applied by advocates who specifically articulate the remedy that they are seeking.<sup>432</sup> Thus, the recent increase in the range and complexity of ordered remedies might be due to the work of experienced advocates who have prioritized the remedial phase of litigation before the commission.

The trends explored above, and common sense, indicate that implementation is more feasible when there is less that a state must do in order to comply with a decision of the commission. Accordingly, those commission decisions that isolate actions by the state in question and merely recommend that the state undoes or repairs the effects of those actions are logically easier to implement, for example by granting citizenship documents previously denied, or permitting an appeal from a conviction that was previously deemed final. However, there is little question that such actions are generally insufficient to make the victim whole. In the limited number of cases that order compensation, implementation becomes exponentially more complicated because the commission will not specify an amount, leaving room for significant differences of opinion.<sup>433</sup> More complicated still are the handful of cases that require amendments to existing laws or the passage of new legislation. Ultimately, those few cases that incorporate all of these components to address systematic or generalized human rights violations are the most difficult to implement.

The seven cases of full implementation either did not include a recommendation or the recommendation was for a very specific remedy. Furthermore, all of these cases remedied the situations of a finite number of complainants, except for *Forum of*

*Conscience v. Sierra Leone*, which could not feasibly remedy the situation of the executed men, but did result in a change in law. However, the cases that address generalized situations of human rights abuse are arguably more significant in the scope of the problems that they address. Practitioners should use this insight to shape their requests for certain recommendations, and ask for specific measures so as to strengthen the commission's mechanisms for follow-up. The importance of having an accurate remedial blueprint is particularly important as the commission begins to incorporate reporting requirements into its decisions.

### **The Importance of Follow-Up Activities**

Of the seven successes described above, three involve Nigeria, which is commonly considered one of the richest case studies of the work of the African Commission. During the repressive dictatorship of General Sani Abacha (1993-1998), multiple cases were brought before the African Commission by NGOs challenging a variety of systematic human rights abuses aimed at Abacha's opposition. Chidi Odinkalu, one of the lawyers who worked on the Abacha-era commission cases, describes the process of trying to convince the Nigerian government to release political prisoners as like "horse trading,"<sup>434</sup> a description that is inconsistent with the way that one might ideally imagine follow-up procedures to work. Nevertheless, it paints an important picture, which Obiora Chinedu Okafor describes in some detail in his book on the importance of "activist forces" in bringing about compliance with charter obligations, and how the commission, "with the facilitative contribution of local activists," was able to raise the profile of public outcry against Abacha's regime on the national and international levels.<sup>435</sup>

The importance of intense advocacy is also apparent in *Modise v. Botswana*, which had been closed by the commission and which lawyers petitioned to reopen in 1993. What followed was years of litigation that led to the guarantee of Modise's nationality. In order to achieve this ministerial act, however, Chidi Odinkalu, Ibrahima Kane, and other advocates had to travel multiple times to Botswana to meet with high-level officials in the Justice and Foreign Affairs Ministries, among others. In an attempt to resolve the last point of implementation, payment of compensation, protracted negotiations took place over the course of many years and ended in an offer of 30,000 pounds by the government of Botswana to Modise, who rejected the offer because he felt he was due much more. Aside from being a testament to the need for a clear remedial framework for African Commission cases, the *Modise* case is a lesson in the importance of zealous follow-up, and the level of access advocates need in order to do so effectively. The African Commission can play a key role in creating both the ways and the means for such follow-up work to promote implementation.

Indeed, in *Forum of Conscience v. Sierra Leone*<sup>436</sup> and *Amnesty International v. Zambia*, no specific remedy was articulated by the commission, but the topic of the cases

was raised during promotional visits by the commission to each respective country.<sup>437</sup> In *Forum of Conscience*, the commission recommended that Sierra Leone fulfill its obligations under the charter even if the soldier applicants themselves were already deceased. The commission specifically raised the subject of the case with the government of Sierra Leone during a promotional visit in February 2000, and subsequently the state passed legislation that guaranteed soldiers the right to appeal the decisions of court-martial proceedings.<sup>438</sup> Similarly, the commission noted in its decision in *Amnesty International v. Zambia* that Zambia should allow Banda to apply for citizenship and grant Chinula's family's request that his remains be repatriated, acknowledging that he had passed away while in Malawi. While these reparations were not explicitly ordered in the operative section of the decision, as is the commission's general practice, they turned out to be significant. Indeed, in September 2002, during a promotional visit of the African Commission to Zambia, Commissioner Andrew R. Chigovera raised the issue of implementation in a conversation with the Ministry of Justice. In that conversation, the ministry indicated that the deportation order had been revoked, Banda had been permitted to return to Zambia unconditionally, and Chinula's remains had been repatriated.<sup>439</sup>

For the commission to make such promotional visits, or engage in real and rigorous discussions with relevant state agencies about the implementation of recommendations requires that commissioners have the capacity and the independence to do so. Fortunately, over time, the commission has begun to value these qualities more, and it has become more proactive in terms of its mandate. A particularly significant example of this can be found in the coordinated work of the African Commission and advocates to follow up on the commission's recommendations in *Malawi African Association, et al. v. Mauritania*, presented below as a case study of implementation activities.<sup>440</sup>

*Malawi African Association, et al.* involved 26 consolidated communications which arose from events that took place in the late 1980s, when the Mauritanian government initiated a policy of "Arabisation" that resulted in widespread repression of black Mauritians. In 1986 and 1987, those who protested against the wave of repression were arrested, tried summarily, and even executed. Activists were detained incommunicado, often in solitary confinement. In 1989, following an outbreak of cross-border violence with Senegal, the Mauritanian government expelled 70,000 black Mauritians to Senegal and Mali. Many of those expelled were government employees, or villagers occupying fertile farmland in the south. Thousands were arbitrarily detained, particularly those who resisted the confiscation of their property. Entire villages were emptied, and the land given to Moors, some of whom formed militias to defend their newly acquired property. Expellees who attempted to reoccupy the villages were often arrested or even executed. In the villages that were not emptied, curfews were imposed, and sometimes enforced through violence—including torture and rape—by the army and militias.

In 1991, the Mauritanian government made superficial attempts at reconciliation with the remaining black Mauritians. It announced the release of some of the arrestees, but others were unaccounted for, and some had died in custody. The government then set up a commission of inquiry to investigate the arrests and expulsions, but the commission was not independent, did not disclose its methodology, and never made a public report of its findings. Mauritania did not contest the allegations of widespread human rights violations. In 1992, the government declared that displaced Mauritians could return to their homes and promised to assist returnees, but failed to acknowledge the citizenship or rights of expellees who attempted to repatriate.

The commission issued a decision against Mauritania in May 2000, finding violations of numerous charter guarantees and recommended that the state:

- 1) arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared, identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned;
- 2) take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania;
- 3) ensure the restitution of the belongings looted from the [persons expelled] at the time of the said expulsion;
- 4) take the necessary steps for the reparation of the deprivations of the victims of the above-cited events;
- 5) take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations;
- 6) reinstate the rights due to the unduly dismissed and/or forcibly retired workers, with all the legal consequences appertaining thereto;
- 7) [a]s regards the victims of degrading practices, carry out an assessment of the status of such practices in the country with a view to identify with precision the deep-rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication; and
- 8) take appropriate administrative measures for the effective enforcement of Ordinance n° 81-234 of 9 November 1981, on the abolition of slavery in Mauritania.

Three years after the African Commission's decision, the Mauritanian government had not complied with the recommendations, despite pressure from civil society and human rights organizations. In 2003, the commission's Special Rapporteur on

Refugees was mandated to undertake a fact-finding mission to document the situation of the expellees in Senegal.

In 2004, the Open Society Justice Initiative and partners visited the camps along the Senegal-Mauritania border where 25,000 Mauritians were living and obtained sworn statements from expellees regarding the confiscation of their identity documents and loss of citizenship. This was followed by another visit by the Justice Initiative in 2005, this time with the Special Rapporteur to document the situation of expellees in Senegal. The Special Rapporteur met with the Senegalese High Commissioner for Human Rights and members of the Senegalese Foreign Ministry. The team also met with the United Nations High Commissioner for Refugees (UNHCR) representative, NGO partners, and expellees in the settlements.

In August of 2007, the Special Rapporteur, the Justice Initiative, and the Institute for Human Rights and Development in Africa (IHRDA) visited Mauritania and Mali, where expellees reiterated their demands to return and to be given their citizenship. In November of that year, a tripartite agreement was signed by Mauritania, Senegal, and the UNHCR for the return and reintegration of expellees. The government subsequently committed to compensating former civil servants with reinstatement of retirement benefits and designated a loan of \$2.18 million to support reintegration through micro-credit loans for farming and other development projects. In order to facilitate this process, UNHCR officers visited the refugee sites and opened two coordination offices, and a local NGO was designated to support expellees crossing the Senegal River, and four refugee associations were established as mediators. The Justice Initiative and IHRDA participated in a follow-up consultation in Senegal to explain the conclusions of the national consultation and agreement.

All of this work began to yield results in January 2008, when the first convoy of 103 refugees from Senegal arrived in Mauritania. Returnees benefited from an assistance package and food rations, and civil society partners worked to build infrastructure to benefit the returnees and local communities. By November 2008, over 5,000 displaced Mauritians had returned. However, there were concerns about the lack of transparency in repatriations, and delays in the issuance of identification papers. The Justice Initiative and IHRDA organized a workshop in Dakar in December, bringing leaders of expellees to express their views and concerns to UNHCR and government officials.

A coup caused delays, as a result of which only 10,000 Mauritanian expellees had been repatriated by April 2009, although 25,000 should have been repatriated by that time. By October 2009, UNHCR committed to the repatriation of approximately 700 people per day to Mauritania. At the same time, the government proposed a comprehensive census and the immediate reinstatement of 144 teachers and support staff already identified.

Many of the commission's recommendations in this case are still pending implementation, not only within the states, but also at the regional and institutional level. Nevertheless, while the Mauritania case remains one of only partial implementation, it highlights the importance of the guidance of expansive remedial orders, and provides an excellent example of what can be achieved through persistent follow-up activities. Moreover, it provides specific examples of what types of activities have been useful, such as promotional visits by commissioners, coordinated activities with civil society and UN agencies, workshops and trainings for local actors, and government consultations. All of these activities are institutionalized in the follow-up framework recently promulgated by the commission.

## The New Rules of Procedure and the Follow-Up Framework

It is important to acknowledge the history of the African Commission's struggle with implementation. Past initiatives to address the problem of implementing the commission's recommendations include the formation of a working group on implementation and proposals for follow-up mechanisms such as a rapporteurship. Specifically, the commission issued a resolution in its 37th session on "The Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission" (Resolution 77) which specified that the newly established working group "deal with" a number of "specific issues," including the "mechanism and procedure of the follow-up on decisions and recommendations of the African Commission."<sup>441</sup> Resolution 77 provided that the working group should be composed of three members of the African Commission and three external experts from Interights, the Justice Initiative, and the IHRDA, and provided that the working group would report its findings in the 38th session, during which its mandate was renewed.<sup>442</sup> While the issue appears to have been dropped in subsequent sessions, a resolution reported in the 23rd Activity Report again renewed the working group's mandate.<sup>443</sup>

The Communications Reform Report, presented to the commission during its 40th session in Banjul, contained a proposal for a follow-up mechanism.<sup>444</sup> The proposal included the establishment of a follow-up database, which would centralize information about compliance with commission recommendations, as well as the appointment of a follow-up rapporteur among the commissioners who would be empowered to, *inter alia*, call follow-up meetings with states, perform site visits focused on implementation, and publish its findings in the commission's activity reports.<sup>445</sup> During that session, the commission approved a "Resolution on the Importance of the Implementation of

the Recommendations of the African Commission on Human and Peoples' Rights,"<sup>446</sup> which incorporated the principal suggestions of the Communications Reform Report.<sup>447</sup> However, none of the functional aspects of this resolution, such as the database or rapporteurship on implementation, were ever implemented by the commission, and the recommendations in the Communications Reform Report have not been implemented in any other way.<sup>448</sup>

Important aspects of many of these initiatives have been consolidated in the African Commission's new Rules of Procedure, which were adopted in 2010.<sup>449</sup> Under Rule 115 of the commission's new rules: (1) the Secretariat shall notify the parties after one month of the dissemination of a decision; (2) if the decision finds a state in violation of its charter obligations, the state shall inform the commission in writing in six months of all of the measures it has taken to implement the decision; (3) the commission may request more information about follow-up measures taken by the state three months after the initial report; (4) the commission may send reminders every three months if there is no state response; (5) the commissioner assigned to the case, or "Rapporteur for the communication ... shall ascertain the measures taken by the state party to give effect to the Commission's recommendations on each communication;" (6) the rapporteur may take such actions and make such recommendations for further action by the commission as may be necessary; (7) the rapporteur will report on the implementation of the commission's recommendations in a public session during the ordinary session of the commission; (8) the commission shall call the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the AU to incidents of non-compliance; and (9) the commission shall include information on any follow-up activities in its activity report. It remains to be seen how this new follow-up framework will be operationalized, as there is no apparent increase in the commission's budget to support these activities in every case, but it represents a significant opportunity for progressive development.

In essence, Rule 115 provides that commissioners will be assigned as rapporteurs on the implementation of recommendations in final decisions of the commission and will carry out what could be considered three categories of implementation activities. First, the rapporteur "shall" ascertain the state's activities with regard to implementation, report on those activities during the regular session of the commission, and include such a report in the annual activity report of the commission. This is essentially a mandatory reporting mechanism that provides for the publicity of states' recalcitrance with regard to implementation. Second, the rapporteur "may" take action on behalf of the commission to further implementation; this non-mandatory provision could act as the basis for a wide range of implementation-related activities. Finally, the draft rules provide that the commission "shall" report on non-compliance to the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the

Implementation of the Decisions of the AU. This requirement creates a mandatory reporting mechanism that provides for communication between the commission and the political organs of the AU with regard to implementation.

While a framework for the commission to follow-up on its recommendations is exceedingly important, perhaps even more significant is the prospect for the commission to refer cases to the jurisdiction of the African Court.<sup>450</sup> Rule 117 of the new rules of the commission provides that “the Court shall complement the protective mandate of the Commission” in accordance with Article 2 of the court protocol and Articles 30 and 45(2) of the African Charter. In this regard, Rule 118 establishes that the commission and the court shall meet at least once a year so as to maintain a “good working relationship,” that the bureaus of each body shall meet regularly, and that any conclusions from those meetings adopted by the commission shall be published in its activity report. Specifically, Rule 121(1) of the new rules suggests that the commission will begin referring cases of non-implementation to the African Court:

If the Commission has taken a decision with respect to a communication submitted under article 48, 49, or 55 of the Charter and the Commission considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in Rule 115 [approximately 9 months], the Commission may submit the Case to the Court pursuant to Article 5(1) of the protocol and inform the parties accordingly.

The new rules also provide for referral to the court in cases of non-compliance with provisional measures issued by the commission, or in those instances in which a situation of serious and massive violations of human rights as provided under Article 58 of the charter.<sup>451</sup> Further, the new rules include the extremely broad provision that “[t]he Commission may seize the Court with any other case and at any stage of the proceedings.”<sup>452</sup> This last rule could easily be read to mean that the commission is not restricted in any way in its decision to refer cases to the court; for example, it could refer cases that it decided before the entry into force of the new rules, or cases that it has yet to decide. However, this broad reading is not supported by discussions with the commission’s Secretariat, which indicate that there is an internal policy to refer cases resolved by the commission after the entry into force of the new rules.

As for the African Court itself, some commentators have opined that the African Court Protocol addresses many of the failures of the commission by creating a judicial body that will issue legally binding decisions after publicly conducted hearings.<sup>453</sup> The new Rules of Procedure of the African Court provide that, once it has issued a decision in a case “the Court shall duly notify the parties to the case, the Commission, the Assembly, the African Union Commission and any person or institution concerned of the judgment by certified true copies thereof.”<sup>454</sup> Beyond this mechanism to shame

governments, the new rules provide that: “The Executive Council shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.”<sup>455</sup> This would indicate that the AU aspires towards an enforcement mechanism like that used in the European system, and that a political body akin to the Council of Europe’s Committee of Ministers will oversee the enforcement of judgments. This is a possibility that should be further explored.

## Conclusions and Recommendations

The new rules of procedure for the African Commission and African Court represent an opportunity to substantially increase the commission’s follow-up activities and the chances of referral to the court, which in turn could improve the rate of implementation in the African system. However, this is by no means a foregone conclusion. Coordination and strategy will be necessary if interested parties are to take full advantage of this opportunity, and discussions should begin immediately about what the commission’s priorities should be in implementing its new follow-up mandate so as to have the greatest impact.

The Working Group on Specific Issues Relevant to the Work of the African Commission, already in existence, represents an established institutional forum for civil society actors to convene with the commission and discuss those issues of particular relevance to the functioning of the regional human rights system. Organizations that participate in this working group should encourage it to establish a forum to discuss the operationalization of the new rules of procedure and emphasize increased implementation as a goal of these discussions.

What follows are four agenda items that should be central to the discussions about the new rules of procedure, whether such discussions occur within civil society organizations, across coalitions of interested organizations and institutions, or in the context of the meetings of the working group with the participation of the commission:

### **Establish a Rigorous and Comprehensive Implementation Reporting Mechanism**

As noted above, Rule 115 of the new rules requires that a state must inform the commission of the measures it has taken to implement recommendations after six months. The rule further provides that the commission shall call the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the AU to incidents of non-compliance. The procedure, while fairly straightforward, could be instrumental in creating a record of implementation of decisions; however, the utility of that record in advancing implementation is still unclear.

Ideally, this reporting procedure would provide the individual or organization that brought the case an opportunity to comment on the state's report of its efforts to implement the commission's recommendations and then provide the commission itself an opportunity to evaluate the positions of the parties. This is important so as to avoid situations, all too common, in which states make empty claims of taking seriously their obligations to comply with their human rights commitments. Giving interested parties the opportunity to comment on a state's assertions with regard to implementation will, it is hoped, compel a state to provide a more complete and accurate version of its efforts to implement the commission's recommendations. Finally, it is important for the commission to evaluate the assertions of the parties in writing and determine whether recommendations have been implemented. Without this official version, states can continue to claim that they are fulfilling their human rights obligations when that might not be the case.

There is reason to believe, however, that these reporting activities will not be well organized or consistently documented, which could severely limit their utility. Accordingly, as a general matter, interested parties should encourage the establishment of some type of registry within the commission's Secretariat to track compliance with Rule 115. One possibility could be that, just as the commission reports in its activity reports on state compliance with the Article 62 human rights reporting requirements, the commission could commit to reporting on implementation in the same way. In order to facilitate such monitoring, it would be important to establish some type of central repository for these reports at the commission's Secretariat, akin to the database that was recommended in the Communications Reform Report. Arguably, the working group could act as the central repository for the information on implementation collected in the reports, as well as supplemental information collected by the new case-specific implementation rapporteurs.

### **Support Meaningful and Consistent Work by Implementation Rapporteurs**

In addition to requiring implementation reporting by states, Rule 115 also provides that a commissioner will be assigned to each case decided by the commission and that he or she will act as the rapporteur for implementation in that case. The rapporteur "may" engage in activities to support implementation and may make recommendations for further action to the commission. Finally, the rapporteur will report during the sessions of the commission on the state of implementation in those cases he or she is assigned to follow, and the commission should report all such activities in its activity reports.

It is important to note that this rule actually falls short of the proposal by advocates that the commission establish a permanent rapporteurship on follow-up. A permanent rapporteurship is arguably superior to having multiple rapporteurs because one individual cultivates an expertise in the process of promoting implementation, and central-

izes all of the information relevant to his or her follow-up activities in one office, which facilitates comparative analysis. That said, there are benefits to the system proposed in the commission's new rules, inasmuch as it does not overburden one individual with all implementation activities, and it prevents the possibility that all follow-up activities cease when an inactive rapporteur is appointed. The goal of those committed to improving implementation should be to foster a tradition of implementation expertise and centralization of information in the case-specific rapporteur system. Because the new rules require the rapporteurs to report on follow-up activities during the sessions and to publish this information in activity reports, it would take relatively little effort to centralize that information. Further, it would be important to compile this information with the implementation reports, and create a space in which all rapporteurs can exchange experiences and best practices. Once again, the working group could serve the function of both acting as a central repository and convening discussions about trends in implementation during the sessions.

With regard to the work of the rapporteurs themselves, the provision that they “may” develop those activities they deem appropriate offers both the potential for creative advocacy as well as the risk of inaction. For example, while Rule 115 only provides a procedure for the submission of reports on implementation by states, it is certainly within the rapporteur's discretionary powers under the new rules to request comments on the state report from the victims' representative or another interested party, and then to issue his or her written findings. The rapporteur could then present these written findings to the commission during the sessions as outlined in Rule 115, and include them in his activity reports. There also exists the possibility that a rapporteur might entertain a request to hold a hearing on implementation during the commission's session, where it would hear from the state and interested parties about efforts to implement the commission's recommendations, and the findings from such hearings could similarly be included in the activity reports. Additionally, a precedent already exists for commissioners to make implementation a priority during their promotional visits to countries. This practice should become more common and consistent, and commissioners should schedule trips in their capacity as implementation rapporteurs, and produce specific reports on the matter that could be presented with other written findings during the sessions.

### **Elaborate a Strategy for Litigation and Implementation of Court Decisions**

Because the possibility of a decision by the African Court represents a potential leap forward for implementation in the African system, there will surely be a rush on the court now that the new rules of procedure have been ratified. However, experiences from the other regional human rights systems suggest that there is no guarantee that a decision from the African Court will be implemented. Because a positive experience

will help to foster future litigation, litigants should therefore think very carefully about the first matters they intend to take to the court.

There are a number of considerations to keep in mind. First, it is important to remember that the court will likely operate very slowly at first, as it negotiates its way around its procedures and the vast body of human rights jurisprudence that will inform its decisions. Because it will receive a lot of attention regionally during this extended period of deliberation, it would be best that the first cases represent problems endemic to the region, leading many different communities to look to the court for a possible resolution of their situation. Second, the first cases will determine in many ways how the court will treat subsequent cases, which could have an impact on implementation. Accordingly, litigants should consult lawyers that practice before international tribunals to identify important issues to highlight for the court's resolution. For example, the scope of the court's temporal jurisdiction will be extremely important in its first years, and the lawyers who litigate the first cases should be prepared to argue for the most progressive interpretation of the court's authority to hear cases arising from temporally remote events. For all issues of this nature, there will be ideal test cases, and practitioners should work together with the commission to find them. Finally, even if a case has public appeal and involves important legal issues, it would be a mistake to believe that the decision of the African Court will be easy to implement; therefore, those that bring the first cases would be well advised to develop implementation strategies alongside their litigation strategies.

An implementation strategy for a court case should involve, at a minimum, sensitizing the population about the issues that the court will address, reaching out to government officials who may be open to working on those issues, and creating a domestic advocacy platform, which could include such specific measures as a retrial or an investigation, or general measures such as a legislative or policy proposal. Also very significant is the fact that Rule 64.2 of the court's Rules of Procedure provides that the Executive Council of the AU Assembly will monitor the implementation of court decisions. There is little question from the wording of this rule that the intention is to create a political monitoring mechanism; however, it is unclear exactly what the executive council is willing to do with regard to the implementation of decisions, and there will likely have to be extensive dialogue among regional actors to devise operating procedures in this regard. That said, this possibility presents a tremendous opportunity for the advancement of human rights protection in Africa, and interested parties should begin to support this process from the moment the first case is submitted to the court's jurisdiction.

### **Encourage the Retroactive Application of Rules on Follow-Up and Referrals**

It appears at this stage that the African Commission has not made a decision whether it should apply the follow-up procedure retroactively to those 60 cases it has decided to date; however, persons interviewed for this study indicate that the commission has made a decision that it will only refer cases to the court that it decides after the entry into force of the new rules. As to the retroactive application of the commission's new implementation framework, including implementation reporting requirements and the assignment of a follow-up rapporteur, interested parties should encourage the commission to begin this process in those cases it has already decided. There is apparently room for such advocacy, either on a case-by-case basis, or as a matter of policy, and it would only benefit the integrity of the follow-up procedures to begin implementing them now. This could involve, as a first step, a letter from the commission asking a state to report on the implementation of a decision under Rule 115. Such a letter would bring the case into the new procedural framework and decisions about how to proceed could then be made.

Another advantage in getting the commission to retroactively apply its Rule 115 procedures is that it increases the chance that the commission might rethink—or make an exception to—its rumored position that it will only refer cases to the court that have been decided after the entry into force of the new rules. If there is potential for the commission to become invested in the process of implementing a specific decision, it may be receptive to the idea of broaching referral with the court during one of their planned meetings to discuss matters of common concern. Because there is no apparent drawback to trying to convince the commission to submit a case that was decided before the new rules take effect, interested parties may wish to extend their advocacy to include the retroactive application of the commission's rules on referral.



# IV. United Nations Treaty Bodies: The Human Rights Committee

## Introduction

The United Nations' treaty bodies are treaty-based institutions that run on a parallel track to those human rights bodies established under the United Nations Charter. Composed of independent experts, the treaty bodies undertake two principal activities: a reporting procedure, wherein states must periodically report on the conformity of their domestic standards and practices with the respective human rights treaties to which they are party, and an individual communications procedure.<sup>456</sup> Although both activities are broadly designed to monitor state compliance with treaty obligations, the communications procedure is distinct from the reporting requirement in that it is an optional mechanism that permits the treaty bodies to receive and consider, in a quasi-judicial manner, the complaint of any individual within the jurisdiction of a ratifying state who claims to be the victim of a human rights violation over which the committee has competence. In addition, all of the treaty bodies periodically publish general comments, sometimes referred to as "general recommendations," which serve to clarify the content of treaty provisions, give procedural advice, and define the scope of state obligations.

Currently, there are five treaty bodies, or committees, competent to receive individual communications: the Human Rights Committee (HRC), 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 (CRPD). In the case of the HRC, CEDAW, and CRPD, only those states that have ratified the Optional Protocols of the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of Persons with Disabilities, respectively, participate in the individual communications procedure.<sup>457</sup> The CAT and CERD may only consider individual communications relating to those states parties that have made the necessary declarations under Article 22 of the Convention Against Torture and Article 14 of the Convention on the Elimination of Racial Discrimination.<sup>458</sup>

Of the five treaty bodies, the Human Rights Committee, which first started its work in 1977, has adjudicated the vast majority of individual communications to date. The HRC was the first treaty body to begin monitoring the implementation of its decisions (or, in the committee's parlance, its "Views") in the form of a Special Rapporteur for the Follow-Up of Views, a mechanism on which the other UN treaty bodies have all largely modeled their follow-up activities as well. For these reasons, this chapter primarily examines the compliance record and follow-up activities of the HRC, although reference is made, where relevant, to the jurisprudence and follow-up procedures of the other committees as well.<sup>459</sup>

To that end, this chapter assesses the compliance rates of the Human Rights Committee as they stood at the time of its 2009 annual report, while highlighting several areas in which this data remains unclear. It then examines the procedures for monitoring compliance with the treaty bodies—particularly the Special Rapporteur for Follow-Up—as well as relevant factors that influence implementation rates, with a particular emphasis on the remedial framework of the HRC as compared to other treaty bodies such as CEDAW. Several broad trends in compliance over time are then identified, followed by recommendations for the treaty bodies and other UN Charter-based bodies in the future.

## Compliance Rates of the Treaty Bodies

### Human Rights Committee

Any attempt to categorize follow-up replies is "inherently imprecise," as the Human Rights Committee itself has noted.<sup>460</sup> Nevertheless, a review of the data compiled by the Petitions Section of the United Nations High Commissioner for Human Rights (OHCHR), the UN office that services the treaty bodies, reveals that the state of implementation is grim. This assessment is based on data contained in the committee's 2009 Annual Report to the UN General Assembly, which is the most recent data currently

available. A review of the chart compiled therein shows that there are currently 546 cases against 71 states being monitored by OHCHR’s Petitions Section; however, of these 546 cases, “satisfactory” responses—those defined as “the *willingness* of the State party to implement the Committee’s recommendations or to offer the complainant an appropriate remedy”—have been received in only 67.<sup>461</sup>

Those cases not deemed “satisfactory,” that is, where compliance has been insufficient or not obtained at all, are either the result of a state failing to respond to the committee’s finding of a violation or those that, according to the annual report, were received but “do not address the Committee’s Views at all or relate only to certain aspects of them.”<sup>462</sup> Such replies might “challenge the Committee’s Views and findings on factual or legal grounds, constitute much belated submissions on the merits of the complaint ... or indicate that the [s]tate party will not, for one reason or another, give effect to the Committee’s recommendation.”<sup>463</sup>

In almost all cases where a state party’s response is recorded as “unsatisfactory,” and in certain cases where no response from the state party was received, the committee considers follow-up dialogue with the state to be “ongoing.” Importantly, however, many “no response” cases are categorized without further elaboration, making it unclear whether any follow-up is still being pursued or ever was pursued. Similarly, a small number of cases are registered as having received a response to the committee’s decision, but without elaboration as to the nature of that reply or the status of follow-up. The following table breaks down these categories and statistics further:

DESIGNATION	NUMBER OF CASES	PERCENTAGE
<b>“Satisfactory” Response</b>	<b>67</b>	<b>12.27</b>
<b>Follow-Up “Dialogue Ongoing”</b>	<b>283</b>	<b>51.84</b>
• Response Received but “Unsatisfactory”	85	15.57
• Response Received without Designation	119	21.80
• No Response Received	79	14.47
<b>Follow-Up Status Unclear</b>	<b>196</b>	<b>35.89</b>
• Response Received without Designation	8	1.46
• No Response Received	95	17.40
• Miscellaneous <sup>464</sup>	93	17.03
<b>TOTAL</b>	<b>546</b>	<b>100.00</b>

Based on this data, the HRC’s compliance rate hovers slightly above 12 percent, a low figure by any measure. Several qualifications should, however, be noted in evaluating this data. First, there are a number of oversights in the annual report’s record

keeping. For instance, in the significant number of cases where dialogue is considered to be ongoing, over 20 percent of the state parties' replies are not described at all (unsatisfactory, incomplete, unresponsive, etc.). Moreover, there is no indication as to the status of implementation monitoring in more than a third of those cases where a violation was found.

Second, neither the category of "satisfactory" or "unsatisfactory" is clearly defined in the committee's annual report. For instance, a satisfactory response might encompass a state's expressed willingness to implement the committee's decision, such as a promise to investigate a particular human rights violation, while others might indicate that, although the state does not consider itself legally obligated to provide a remedy, one will nevertheless "be afforded ... on an *ex gratia* basis." Still other cases have been deemed "satisfactory" when the committee has determined that the finding of a covenant violation was in itself an adequate remedy.<sup>465</sup> These distinctions underscore the fact that, although the committee might deem a state's response to the finding of a violation "satisfactory," in actuality the state may only have partially implemented the committee's decision. Some of these cases are discussed in further detail below.

Third, the category of "unsatisfactory," which all of the treaty bodies use, is itself ambiguous because compliance, even in the best of circumstances, is rarely immediate. Accordingly, there are a number of cases in which compliance remains outstanding but where follow-up dialogue is genuinely ongoing between the committee and the state party, as examples highlighted later in this chapter attest. At the same time, however, the designation of "ongoing dialogue," which is also employed by all of the treaty bodies, raises questions as to the criteria for legitimately continuing dialogue. Such criteria are not evident in the annual report, particularly as OHCHR's data indicates that a number of cases that are twenty to thirty years old are still considered on-going. Nevertheless, given that some "unsatisfactory" cases are certainly the subject of continuing follow-up and sincere attempts by the state party to implement the committee's Views, the "satisfactory" rate may be somewhat higher than the 12 percent statistic alone suggests.

Finally, it should be noted that implementation of HRC decisions appears to have actually deteriorated over time. Indeed, although compliance presently hovers between 12 to 15 percent, the committee's 1999 report to the General Assembly doubled that figure, noting that, "roughly 30 percent of the replies received could be considered satisfactory."<sup>466</sup> Similarly, in her 2001 report on the UN human rights treaty system, Anne Bayefsky characterized the HRC record of compliance as "extremely poor," noting that remedies were forthcoming by states parties in only 21 percent of the cases.<sup>467</sup> Although troubling, 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 in the past ten years, often outpacing the number of cases

the committee can conclude in a year. In 1999, for instance, 59 new cases were registered with the committee, whereas recent years have seen the number of registered cases range from 100 in 2004 to as high as 206 in 2007. As a result, not only does the committee face a significant backlog in adjudicating its petitions (399 cases are currently listed as pending), but the number of cases per year in which ICCPR violations have been found has increased sharply.<sup>468</sup> To that end, it has been estimated that the committee will not reach a decision on the merits of a communications until after almost three years from when the case was first filed.<sup>469</sup>

### **CAT, CEDAW, CERD, and CRPD**

The only other treaty body to have adjudicated a comparably large number of cases under the communications procedure as the Human Rights Committee is the Committee Against Torture. As of May 2009, the CAT's annual report to the General Assembly states that it has received 384 petitions against 29 states parties, and has adopted final decisions on the merits in 158 complaints, while 67 remain pending.<sup>470</sup> Of the 158 cases that have been adjudicated, violations of the convention were found in 48 cases, 22 of which were closed following a determination by the committee that the respondent state had fully complied. In 17 other cases, however, dialogue remains "ongoing" and in six cases the committee has not received any response to its follow-up requests.<sup>471</sup> (Like the HRC, the CAT is also suffering from a case backlog of "some 100 cases."<sup>472</sup>) Thus, at present, there is nearly a 50 percent rate of compliance with the CAT's Views, which is significantly higher than the HRC's. Although this higher rate does not appear to have been previously remarked upon, a number of interlocutors attributed it, in part, to the nature of the cases the CAT hears, the majority of which concern the Article 3 duty of non-refoulement.<sup>473</sup>

With respect to the remaining treaty bodies, CEDAW has only registered 24 communications to date, eight of which are pending and 11 of which have been either declared inadmissible or discontinued. Of the remaining five cases, four—two against Hungary and two against Austria—have resulted in a violation finding; follow-up in three of those cases remains ongoing, while one, *A.T. v. Hungary*, was deemed closed as of July 2009.<sup>474</sup> As for CERD, it has adjudicated 24 admissible cases to date, 10 of which resulted in findings of a violation.<sup>475</sup> Of those 10, satisfactory responses have only been received in three cases thus far, all of which concerned Denmark.<sup>476</sup> Finally, given the fact that it has only recently come into effect, no communications have been registered with the CRPD to date.

## Procedures for Monitoring Compliance

Prior to 1990, the HRC was seldom informed of actions taken by states parties with respect to its Views. Markus Schmidt notes that the issue of follow-up to Views was discussed for the first time in 1982 but, “[a]gainst the backdrop of Cold War polarization,” discussions made little progress until 1989, at which point the committee commissioned a working paper from the UN Secretariat “on possible approaches to monitor compliance with its views under the Optional Protocol.”<sup>477</sup> Finally, in July 1990, the HRC established a monitoring procedure by creating the position of Special Rapporteur for Follow-up on Views, whose two-year, renewable mandate it is to monitor implementation of the committee’s decisions.<sup>478</sup> The committee spelled out the Special Rapporteur’s competencies in its annual report for 1990 as follows:

- a) To recommend to the Committee action upon all letters of complaint henceforth received from individuals held, in the Views of the Committee under the Optional Protocol, to have been the victims of a violation, and who claim that no appropriate remedy has been provided;
- b) To communicate with States parties, and, if he deems appropriate, with victims, in respect of such letters already received by the Committee;
- c) To seek to provide information on any action taken by States parties in relation to Views adopted by the Committee to date, when such information has not otherwise been made available. To this end the Special Rapporteur will communicate with all States parties and, if he deems appropriate, victims in respect of whom findings of violations have been made, in order to ascertain what action, if any, has been taken. This information, when collected, will also be made available in a future annual report;
- d) To assist the Rapporteur of the Committee in the preparation of the relevant sections of the annual report that will henceforth contain detailed information on the follow-up of cases;
- e) To advise the Committee on the appropriate deadline for the receipt of information on remedial measures adopted by a State party found to have violated provisions of the Covenant;
- f) To submit to the Committee, at suitable intervals, recommendations on possible ways of rendering the follow-up procedure more effective.<sup>479</sup>

In 1997, the modalities of the special rapporteur’s duties were formalized (and later amended) under the HRC’s Rules of Procedure. They provide that the rapporteur

“may make such contacts and take such action as appropriate for the due performance of the follow-up mandate,” including making recommendations as necessary for further action by the committee, regularly reporting to the committee on follow-up activities, and including information on those activities in the committee’s annual report to the UN General Assembly.<sup>480</sup> The rules note that neither the decisions of the committee relating to follow-up activities, nor information furnished by the parties within the follow-up framework are subject to confidentiality, unless the committee decides otherwise.<sup>481</sup>

In recent years, the CAT, CERD, and CEDAW have instituted a similar procedure to monitor implementation, although, unlike the HRC, CEDAW does not have a permanent special rapporteur; rather, it assigns committee members to serve as follow-up rapporteurs for specific cases on an ad hoc basis.<sup>482</sup> The procedural rules of the other committees also formalize the special rapporteur’s duties, which largely mirror those of the HRC. For instance, under Rule 114 of the CAT, the rapporteur is expected to monitor the responses of states parties to the committee’s request for information on the remedy provided, and to meet with representatives of selected states parties that have not responded to the committee’s request; CERD provides the same in its Rule 95.<sup>483</sup> Unlike the other treaties, the Convention on the Elimination of All Forms of Discrimination Against Women’s Optional Protocol codified states parties’ obligations to consider the committee’s Views and provide information in the treaty itself, although Rule 73 of the committee’s rules formalizes this procedure.<sup>484</sup>

When the HRC finds a violation, it states in the closing portion of its decision that it “wishes to receive from the State party ... information about the measures taken to give effect to [its] Views,” whereupon the state has six months to submit a reply explaining how it intends to undertake implementation.<sup>485</sup> This rarely occurs, however, and often states, after having failed to engage in the consideration of the merits of a case, will submit replies that simply contest the factual basis for the committee’s decision, or challenge its interpretation of the covenant.<sup>486</sup> In *Marques v. Republic of Angola*, for instance, a case brought by the Open Society Justice Initiative concerning the unlawful detention and conviction of a journalist for publishing a news article critical of the Angolan president, Angola failed to submit information on either the admissibility or merits of the communication when it was under consideration. However, when it finally submitted a follow-up reply in January 2006 (a year and a half past due), it merely challenged the merits of the committee’s decision by requesting that the case be deemed inadmissible.<sup>487</sup>

When a state’s reply is received, it is transmitted by OHCHR’s Petitions Section to the member(s) of the committee who authored the decision and to the victim or his/her representative(s), who may then provide observations on the state’s submission. (Housed within the OHCHR’s Human Rights Treaties Division, one of the office’s four

divisions, the Petitions Section is presently comprised of eleven lawyers and three secretaries who provide technical assistance to the committees.<sup>488</sup>) Ordinarily, the special rapporteur presents a summary of these responses, and the committee makes a recommendation for further action, which, as noted, is published in its annual report to the UN General Assembly. (As of this year, the committee also publishes periodic follow-up progress reports of individual communications on the HRC's website.<sup>489</sup>) These recommendations, however, are often limited to stating that the state party's response is inadequate and that the committee regards the dialogue as ongoing. For example, in *Marques*, following the Justice Initiative's reply to Angola's submission, the HRC published its follow-up decision in the annual report for 2006, noting that Angola had "failed to address the violations found or even to acknowledge the Committee's findings."<sup>490</sup> Unfortunately, as a Justice Initiative officer who helped litigate *Marques* noted, the HRC did not even notify the parties of its formal decision; it was merely published in the report without further recommendation.<sup>491</sup>

Where a state's reply is either unsatisfactory or not forthcoming, the Petitions Section will typically address a reminder to the state party in an effort to engage them in the follow-up process. If that proves unsuccessful, the special rapporteur, having been informed of the state's failure to comply, may then organize direct follow-up consultations with diplomatic representatives of the state party (typically its permanent representative in Geneva or New York) to discuss the facilitation of implementation. In *Marques*, after Angola missed its first deadline to respond, the special rapporteur met with a state representative in 2005, during the committee's 84th session. The notes of that meeting indicate that he was informed that the reason for Angola not having replied was because it "had limited capacity to deal with all human rights issues before it."<sup>492</sup>

While one, or even several, unsatisfactory replies may be sufficient to trigger the Follow-Up Rapporteur's attention, those states most targeted for monitoring are repeat offenders, in that they have had a number of decisions against them in which compliance has been lacking.<sup>493</sup> If the alleged violation concerns a particularly serious matter, however, the gravity of the issue alone may flag a decision for follow-up. Furthermore, although the special rapporteur is the one who conducts the follow-up discussion, the Petitions Section coordinates the rapporteur's agenda. These discussions take place almost exclusively during the committee's three annual meetings, two of which are held in Geneva in July and October, and the other in New York in March. Notably, these discussions need not be limited to when the HRC is in session—the Special Rapporteur may seek to pursue his/her follow-up activities at other points during the year, for instance—but because the rapporteur has no independent budget to undertake such visits, this almost never occurs.<sup>494</sup>

These limitations on the rapporteur's functions are seldom discussed in earlier literature on the subject. Schmidt, for instance, notes that it is possible for the rappor-

teur to organize a follow-up mission to a state party that has experienced difficulties with the implementation of the committee's recommendations; however in the HRC's annual report from 2005, the committee "again expresse[d] its regret that its recommendation, formulated in its four previous reports, that at least one follow-up mission per year be budgeted by the Office of the High Commission for Human Rights, has still not been implemented."<sup>495</sup> Indeed, only one such mission—to Jamaica, in 1995—has been conducted to date. In that instance, the committee determined that a follow-up visit was required in the wake of a number of decisions that found the application of Jamaica's death penalty to violate Article 6 of the covenant.<sup>496</sup> (Other missions were apparently planned, including to Peru, the Democratic Republic of Congo, and, more recently, Tajikistan, but were never carried out.<sup>497</sup>) At the same time, the Jamaican experience serves to underscore the limitations of the communications procedure: the large number of follow-up requests that Jamaica received in the wake of the HRC's decisions led to its ultimate withdrawal from the Optional Protocol in 1997.<sup>498</sup>

## Factors Affecting the Implementation of Decisions

### **Legal Status of Treaty Body 'Views'**

One enduring challenge to the implementation of UN treaty body decisions is the fact that they are not legally binding. Schmidt, for instance, contends that the "major lacuna of UN individual complaints procedures ... remains the absence of binding and thus legally enforceable decisions," and that, as a result, the committees have "little leverage to ensure that states comply with recommendations."<sup>499</sup> Similarly, of the ICCPR's Optional Protocol, Henry Steiner notes: "[It] speaks in a guarded language ... that suggest[s] the political compromises in its formulation. Its principal terms—'communications' rather than complaints, 'Views' rather than decisions or opinions—express a cautious strategy in defining the Committee's functions and powers by distancing the Protocol from the more direct and forceful language ... used to describe adjudication."<sup>500</sup>

Yet although many states have premised their refusal to implement the Human Right Committee's Views on the basis that they are not legally binding, the treaty bodies have continued to advance the principle that states parties nevertheless have a good faith duty to comply with their decisions. At the Vienna World Conference on Human Rights in 1993, for instance, the bodies unsuccessfully proposed the insertion into the ICCPR's Optional Protocol of a provision that "states parties undertake to comply with the Committee's Views under the Optional protocol."<sup>501</sup> More recently, the Human Rights Committee took the opportunity to address this subject in General Comment 33, stating that, although it is not a judicial body, "the views issued by the Committee ... exhibit some important characteristics of a judicial decision" and that a "duty to

cooperate with the Committee arises from an application of the principle of good faith in the observance of all treaty obligations.”<sup>502</sup> Further, the HRC has said that there is an “obligation to respect” the Views of the committee and a “duty to cooperate,” which “arises from an application of the principle of good faith to the discharge of treaty obligations.”<sup>503</sup> Unsurprisingly, this general comment was reportedly met with resistance by a number of state parties.<sup>504</sup>

While debate over the legal status of treaty body opinions is unlikely to abate, little optimism has been expressed for the possibility that treaty body Views will ever possess the force of law, although they do possess considerable hortatory force. Furthermore, rather than attempt to render the treaty bodies’ opinions legally binding, the consensus of most experts appears to favor working within the system’s legal constraints.<sup>505</sup> To that end, David Kretzmer, a former member of the HRC, has argued that the treaty system “reflects the weakness of the international system. The fact that the Optional Protocol does not state that the Human Rights Committee’s Views under the Protocol are legally binding, and that there are no enforcement mechanisms, was a clear policy decision by the international community.”<sup>506</sup> Kretzmer also contends, as other commentators have, that even if the legal basis of the treaty bodies’ opinions were to be strengthened, “it is unlikely that the decision-makers within the United Nations [would] commit significantly greater resources to the communications system.”<sup>507</sup>

### **Rights Adjudicated and their Relationship to Compliance**

The HRC’s annual report, like those of the other treaty bodies, does not index follow-up cases by the right(s) that the committee found to be violated (although this would be a useful undertaking for future research). Nevertheless, a general review of the committee’s jurisprudence suggests that cases implicating personal liberty and discrimination have been the most successfully implemented, particularly where a strong domestic constituency exists to draw public attention to the case. For instance, in *Toonen v. Australia*, laws criminalizing consensual sex between adult men, which the committee found to violate the applicant’s privacy rights, were repealed, while in *Lovelace v. Canada*, the state amended a law that unfairly discriminated against Aboriginal women who married non-Aboriginal men.<sup>508</sup>

Immigration and citizenship is another area in which there has been a moderate level of compliance—particularly in cases where states have satisfied the committee’s findings by permitting non-citizen applicants to remain in the country rather than be deported. In *Madafferi v. Australia*, for instance, the committee found Australia’s impending deportation of the applicant to Italy (for crimes committed in Australia) to constitute an “interference” with his Article 17 right to family life.<sup>509</sup> In its reply, the Australian government made clear that it did not accept the committee’s decision, but stated that it had since issued Madafferi a “spouse (migrant) permanent visa,” permit-

ting him to remain on a permanent basis.<sup>510</sup> While “regretting the state party’s refusal to accept its Views,” the HRC stated that the visa was a satisfactory remedy to the violations found.<sup>511</sup> Similarly, in *Byahuranga v. Denmark*, the committee found that the applicant’s impending deportation to Uganda would constitute a violation of the prohibition against refoulement.<sup>512</sup>

Notably, implementation has frequently been successful in cases where the implicated right is negative, meaning compliance resulted from repealing or amending certain legislation. *Marques* is a good example of this: in 2006, Angola amended certain provisions of its Press Law, which previously did not allow journalists to defend against charges of defamation by arguing the truth of facts they had reported. Similarly, in *Leirvag v. Norway*, the committee found that Norway’s introduction of a mandatory Christian education subject called “Christian Knowledge and Religious and Ethical Education” violated the applicant’s expressive rights under Article 18 (a determination that had also been reached by the European Court of Human Rights), which led Norway to amend its Education Act.<sup>513</sup>

Ultimately, however, the relationship between the rights protected by the ICCPR and other human rights treaties, and the degree to which the Views of the treaty bodies are enforced, is far from clear. For many of the cases that the HRC has adjudicated, the violation of a particular right might be remedied in one instance but not another. Furthermore, it is not clear how much the committee’s follow-up procedures are driven by the nature of the rights violated, given that monitoring occurs in cases raising very different issues.

### **Competing Approaches to Remedies: HRC and CEDAW**

As a general matter, the Human Rights Committee takes a non-prescriptive approach to remedies, typically limiting its remedial language to the effect that states parties are “under an obligation to provide the author with an effective remedy for the violation suffered.”<sup>514</sup> While the committee’s reluctance to offer greater specificity in this regard is likely due, in part, to the fact that the decisions of the treaty bodies are not legally binding, several HRC members criticized the remedies-related portions of the HRC’s decisions as insufficiently pragmatic and lacking in specificity. One committee member noted, for instance, that the remedies suggested can be “excruciatingly vague”—attributable, in part, to the committee’s frequent struggles to even reach a consensus on whether or not there has been a violation, much less on what a state should do to rectify it.<sup>515</sup> In addition, while the HRC has gradually created its own jurisprudence on remedies, no digest of this jurisprudence exists. As one committee member noted, the HRC too often “reinvents the wheel” with each new case, and fails to give sufficient guidance to states. This point has been raised by states, too, in their follow-up meetings with the special rapporteur.<sup>516</sup> Indeed, several cases decided against Colombia were apparently

never implemented because, according to Colombia's Ministerial Committee (which was set up to ensure implementation of HRC and Inter-American Court decisions), the "absence of a specific remedy recommended by the [HRC]" led it to not recommend that compensation be paid to the victims.<sup>517</sup>

Emblematic of these tensions is the committee's recent decision in *Sankara v. Burkina Faso*, in which the family of Thomas Sankara, the former president of Burkina Faso who was assassinated in 1987, complained that the state had failed to organize a public inquiry into his death and to institute legal proceedings against his assassins. In 2006, the committee found, in part, that the state was "required to provide Ms. Sankara and her son with an effective and enforceable remedy in the form, *inter alia*, of official recognition of the place where Thomas Sankara is buried, and compensation for the anguish suffered by the family."<sup>518</sup> It declined, however, to specify or suggest the amount of such compensation. In a similarly vague decision in *Williams v. Spain*—a case concerning racial discrimination—the committee noted only that, in addition to a public apology, Spain was "under an obligation to take all necessary steps to ensure that its officials do not repeat the kind of acts observed in this case."<sup>519</sup>

It is the preventative dimension of many of the committee's decisions that is least often enforced, as states are more willing to either pay damages or offer restitution to an individual complainant, rather than reform larger structural issues. In a number of cases against Colombia, for instance, the committee has recommended such preventive actions as public investigations, amending laws, and "ensuring non-repetition of the violation;" in fact, however, compensation (in certain cases) is all that the state has offered.<sup>520</sup> Furthermore, often the committee will accept as satisfactory a state response that repairs the violation done to an individual petitioner, regardless of whether or not the state undertakes any general remedies. In *Sankara*, for instance, Burkina Faso promptly responded to the committee's Views, noting that it was prepared to officially acknowledge President Sankara's grave and make compensation. But the state declined to address the issue of investigating the cause of his death, which the applicants maintained was the only appropriate remedy.<sup>521</sup> In response, the committee noted that, although it had recommended such an inquiry, "it did not include a specific reference to it;" accordingly, it did "not intend to consider [the] matter any further under the follow-up procedure."<sup>522</sup> Similarly, in a case against Cameroon, where the applicant successfully argued that he had been unlawfully removed from his position as a magistrate judge, the committee declared that the state has "an obligation to reinstate the author of the communication in his career, ... and must ensure that similar violations do not recur in the future."<sup>523</sup> Seven years later, the committee's special rapporteur received confirmation from Cameroonian authorities that the applicant had been reinstated to his position, but failed to offer any information (publicly, at least) as to any preventive measures taken.<sup>524</sup> Nevertheless, the response was deemed satisfactory.

While CAT and CERD largely follow the HRC's approach to remedies, CEDAW has taken a more prescriptive approach. In this regard, two cases brought before CEDAW deserve mention. One is *A.T. v. Hungary*, decided in 2005, in which the committee held that Hungary had violated its convention obligations by failing to protect the applicant against domestic violence, despite her attempts to seek shelter and public services.<sup>525</sup> In so doing, the committee affirmed that gender-based violence against women is a form of discrimination that states are obligated to eliminate and, in contrast to the HRC's approach to remedies, recommended an array of proposed remedies that Hungary should undertake to achieve this goal, in addition to compensating the applicant.<sup>526</sup> Since that time, Hungary, which responded in a timely manner to the committee's Views, has taken a number of steps to address domestic violence, including the development of a national strategy on violence and the establishment of domestic violence shelters.<sup>527</sup> Indeed, after the ad hoc special rapporteurs held a follow-up meeting with Hungarian representatives in May 2006, the case was closed in August, with the instruction that any further information on follow-up be conducted under the convention's state reporting procedure.<sup>528</sup>

Another important CEDAW case is *A.S. v. Hungary*, which, while not yet closed, involved the sterilization of a Roma woman while she was undergoing surgery in connection with a miscarriage.<sup>529</sup> *A.S.* marked the first time an international human rights tribunal held a government accountable for failing to provide necessary information to a woman to enable her to give informed consent to a reproductive health procedure. Here, too, CEDAW provided a detailed list of proposed recommendations, including compensation and reform of domestic legislation on the principle of informed consent, as well as monitoring of public and private health centers.<sup>530</sup> As in *A.T.*, Hungary submitted its responses in a timely fashion and, to date, there have been three follow-up sessions with the special rapporteurs. At the most recent such session, Hungary indicated that legislative amendments are pending, as is the development of a legal framework enabling the state to provide compensation to complainants following a finding of a convention violation.<sup>531</sup>

## Broad Trends in Compliance and Lessons Learned

The countries of Western Europe commonly regarded as strong rule of law states—France, Norway, Finland, Denmark, Sweden—have been the most prompt and responsive in implementing the HRC's Views. Unsurprisingly, these states also have the fewest number of communications against them. However, certain states, such as Spain, that are generally regarded as having a sophisticated approach to the rule of law have only selectively complied with the committee's decisions.<sup>532</sup> Others have often expressed out-

right disagreement with its conclusions. Australia<sup>533</sup> and Canada,<sup>534</sup> for instance, both of which have an overall record of satisfactory implementation, have made clear their disagreements with the committee in several recent cases and stated that they either “cannot accept” the HRC’s Views or do not intend to implement them. By this same token, there are also cases of compliance with the committee View’s in which the state has implemented a remedy while making clear that it did not consider itself legally bound to do so. As noted, Australia did this in the *Madafferi* case, and did so again in 2007, in a case brought by eight Iranian asylum seekers who had been detained in mandatory immigration detention, some for three or four years.<sup>535</sup> Although Australia did not accept the committee’s finding that its detention system violated Article 9, nor that it was obligated to compensate the applicants, all of the complainants were later granted permanent protection visas (and in one case, citizenship).<sup>536</sup>

Even where implementation has been forthcoming, the path to implementation is not always clear. *Marques* is an example of partial compliance, insofar as the amendments to Angola’s Press Law partially remedied portions of the criminal law under which Marques had been convicted, but those changes were never attributed to the committee’s Views; indeed, Angola failed to even highlight the amendment in its follow-up reply to the special rapporteur. In a similar case, Zeljko Bodrozic, a well-known Serbian journalist who had been convicted of “criminal insult,” applied to the committee on the basis that his expressive rights under Article 19 had been violated.<sup>537</sup> The committee recommended that Bodrozic’s conviction be quashed and that he be compensated, but the Serbian government failed entirely to respond to the HRC’s decision for three years. In June 2008, however, the Petitions Section was informed through the United Nations Development Programme that the author had signed an agreement with the Serbian Ministry of Justice for reparations and restitution in the amount of 10,000 Euros.<sup>538</sup> Thus, even though the committee was effectively ignored by Serbia in the formal follow-up process, the decision itself was apparently not.

In light of these developments, some commentators have cautioned that it may not be productive to think of non-implementation as a categorical failure because, even though states might not concede the merits of a particular decision or formally engage with the follow-up process, that does not mean they are not influenced by them. A current member of the committee notes, for instance, that the HRC’s engagement with Iceland in a case involving fisheries quotas is important because, although Iceland has yet to implement the HRC’s recommendation that compensation be paid to the complainants, it provided a detailed, thoughtful response that demonstrated an appreciation of the committee’s conclusions and committed itself to, at a minimum, undertaking a review of the state’s fisheries management system.<sup>539</sup> Furthermore, Iceland’s response pressed the committee to offer more specific, practical guidance with respect to its proposed remedies.<sup>540</sup> As noted earlier, this sort of productive state-committee “dialogue”

suggests that, even in cases where states are technically regarded as non-compliant (as Iceland presently is), the committee's decision and its follow-up procedure have the potential to positively influence state behavior.

Despite these qualified successes, the failure to achieve a fuller measure of compliance with the Views of the UN treaty bodies is substantial. The cases in which implementation has been the least effective are those where the state party has failed to respond at all to the committee's Views or, indeed, failed to participate in the proceedings themselves. A review of the committee's 2009 report reveals that a number of states—Algeria, Cameroon, Guyana, Philippines, the Democratic Republic of Congo, Jamaica, Madagascar, Russia, Uzbekistan, Sierra Leone, and Trinidad and Tobago—have serially disregarded their obligations under the Optional Protocol by either failing to respond at all to the committee's decisions, or by doing so only after years of delay. Still other countries have responded to the committee (though often belatedly), yet have merely taken the opportunity to contest anew the basis for the application in question, or raise objections that they failed to raise when the case was first under the committee's consideration.<sup>541</sup> These failures are the most troubling for the treaty body system to confront, because they represent a fundamental refusal on the part of the state to engage in the communications procedure. Indeed, it would appear that certain states do not even understand the purpose of the communications procedures. For instance, the notes of a 2006 meeting with representatives from Equatorial Guinea, concerning that state's failure to reply to the three HRC decisions issued against it (two of which are twenty years old), indicate that the representatives were not aware of the committee's functions, or even that the communications existed.<sup>542</sup>

It is important to distinguish between cases of blatant disregard and other cases in which the state party at least makes an effort to give effect to the committee's decision. In such cases, advocates have played a key role in keeping the states, in Markus Schmidt's words, "engaged in the follow-up process as long as humanly possible."<sup>543</sup> Here, the position of the special rapporteur has had some success in moving states forward, even if full implementation has not been achieved. For instance, the Czech Republic and Colombia have both had a number of outstanding cases decided against them, many of which date back to the mid-1990s or earlier. Previous annual reports indicate that the special rapporteur(s) have met repeatedly with Czech and Colombian representatives over the years to follow-up on these cases, some of which have resulted in partial implementation, typically in the form of *ex gratia* payments.<sup>544</sup>

In light of these shortcomings, the CEDAW cases highlighted earlier stand out not only for their comparatively impressive record of responsiveness and implementation, but also because the special rapporteurs' follow-up appears to have been more rigorous and systematic than the follow-up achieved by the HRC Follow-Up Rapporteur. Undoubtedly, this is due, in part, to CEDAW's smaller caseload, which allows commit-

tee members to assume rapporteurship over individual cases on an ad hoc basis, rather than assigning one follow-up rapporteur for all outstanding cases. Moreover, A.S. was successful, in part, because the committee's decision and follow-up activities dovetailed with larger litigation efforts focusing on discrimination against Roma women.<sup>545</sup> For instance, the European Court of Human Rights also decided a case involving forced sterilization in 2009, which coupled with CEDAW's work, elevated the political visibility of the intersection between women's health rights and Roma rights.<sup>546</sup>

Perhaps one of the most crucial lessons to be learned regards resources. The lack of an independent budget to support follow-up severely limits the special rapporteur's role. Markus Schmidt notes that, since 1993, the Human Rights Committee "has asked for regular budget support to its follow-up activities in its Annual Report, but the request has fallen on deaf ears with the UN's budgetary authorities."<sup>547</sup> As a result, he contends, follow-up activities under the Optional Protocol "suffer from very scant Secretariat assistance" and, until 2003, "no staff member was assigned full-time to assist with follow-up ... under individual complaint procedures."<sup>548</sup> (Currently, the staff responsible for follow-up consists of "one half of one person.") Likewise, the committee has repeatedly emphasized the "reduction in the ability of staff to find resources and personnel to support [its] attempts to follow up on cases where violations have been found."<sup>549</sup> In addition to more administrative support, greater resources would also allow for *in situ* visits by the special rapporteur, more intersessional follow-up meetings, or more meeting time during committee sessions, a possibility favored by several of the treaty bodies.<sup>550</sup>

Unfortunately, it appears that the lack of funding is symptomatic not only of larger financial constraints on OHCHR, but a larger devaluation of the treaty bodies as well.<sup>551</sup> One HRC member noted, for instance, that the shifting of resources away from the treaty body system is part of a larger shift that has devalued the UN's supervisory bodies. Similarly, Dame Rosalyn Higgins, a former member of the committee, noted as early as 1996 that "Effective treaty bodies seem of less interest today to those who plan the UN's human rights [programs] and allocate its resources. The flavor of the moment is mega-conferences on human rights—whether in Vienna, or Stockholm or Beijing. They do indeed raise the public profile of human rights—but they also allow [s]tates to avoid all legal entanglement."<sup>552</sup>

## Conclusions and Recommendations

Like the regional human rights systems profiled in this report, the individual communications procedure used by UN treaty bodies suffers from an implementation deficit. Due in part to this concern, reform of the treaty monitoring bodies has been a topic

of debate for many years, and there is a general consensus amongst UN officials and civil society actors that, as currently constituted, the bodies are operating unsustainably. Consolidation of the treaty bodies, or at least of certain elements of their activities, continues to be discussed.<sup>553</sup> Indeed, in response to the UN Secretary General's renewed call for a "more effective and responsive" treaty system,<sup>554</sup> OHCHR published in 2006 a "Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body," which endorsed the view that integration of the treaty bodies was the only route to secure the system's objectives.<sup>555</sup>

Notably, support for this proposal has been varied, with much debate focusing on whether these changes would be implemented by legal or non-legal means—the latter being recognized as a difficult, time-consuming route, the former likely offering too limited a scope for reform.<sup>556</sup> Furthermore, specific unification models that have been proposed range from a "Super Human Rights Committee" combining the ICCPR and Covenant on Economic, Social and Cultural Rights, to the possibility of a World Court of Human Rights, whose jurisdiction "would encompass all communications received by existing [treaty bodies], and which might either substitute their adjudication functions, or operate as an appellate tribunal."<sup>557</sup> These models, it is argued, would pose both risks and rewards to the individual communications procedure (and to enforcement monitoring), insofar as unification might undermine the specialized, treaty-specific consideration of the bodies, while, on the other hand, a "unified [treaty body] might be able to act more powerfully on individual complaints."<sup>558</sup>

While it is clear that any framework for treaty body unification would have important consequences for the individual communications procedure, both operationally and in terms of the enforcement of treaty body findings, this debate has complexities that cannot be fully addressed here. These proposals continue to be debated, as they recently were in November 2009, and the strengthening of the treaty body system remains an OHCHR strategic priority for 2010-11, one which should be monitored closely.<sup>559</sup> Ultimately, whatever reform measures are pursued, it is essential that the treaty bodies themselves be actively engaged in broad-based consultation, in order to "complement and strengthen existing achievements in the harmonization of working methods."<sup>560</sup>

In the meantime, there are a number of other steps that can be undertaken under the treaty bodies' present institutional arrangement to improve implementation and follow-up of their decisions:

### **Enhance the Financing, Visibility, and Efficacy of the Follow-Up Mandate**

The ability of the special rapporteur to carry out his or her mandate is inhibited by a lack of funding and, in the context of the Human Rights Committee, a caseload of over 450 unimplemented cases—more than one individual can adequately address. As a result, despite some modest achievements owed to the follow-up efforts of the special rappor-

teur, the position remains poorly matched to the challenge that effective monitoring poses. Greater resources must therefore be allocated to support follow-up activities, and UN member states—particularly those that are party to the ICCPR Optional Protocol—should increase their voluntary contributions to OHCHR, as should other funding bodies. Ultimately, without increasing the capacity of OHCHR’s Treaties Division, follow-up continue to suffer and the entire communications procedure itself may wither.

With respect to the Human Rights Committee, it may be advisable to consider the appointment of several follow-up rapporteurs who could handle a smaller portfolio, perhaps on a country-by-country or thematic basis. An early article raised this possibility in the broader context of the treaty body complaints procedures, noting that the HRC has, in the past, appointed special rapporteurs for “particularly contentious cases or certain categories of cases,” although this practice had been “experimental and *ad hoc*.”<sup>561</sup> Certainly, there are limitations in the rapporteur approach—one can only remind a state of its obligations so many times—but, in the particular case of the committee, it is clear that one person alone cannot undertake the amount of follow-up that is required.

Improving the visibility and accessibility of information pertinent to implementation is also essential. While all of the treaty bodies should endeavor (in conjunction with their respective secretariats), to improve the methods by which they collect and make available follow-up data, the Human Rights Committee is particularly in need of reform given the sheer volume of cases it has adjudicated. Until recently, follow-up information on the implementation of individual communications was not prioritized in the annual reports, which are themselves dense, long, and difficult to digest. Fortunately, the HRC’s Secretariat has begun posting interim “Follow-Up Progress Reports on Individual Communications,” which are greatly improved in both format and content; it is recommended that these reports continue. At the same time, however, much of the statistical data as it is presented in the HRC’s annual report needs updating and revising, starting with more accurately classifying the character of state replies received, as well as clearer criteria for what constitutes satisfactory implementation. OHCHR should thus consider a new method for presenting follow-up data, one capable of centralizing all compliance-related information, but with greater detail on the status of implementation and the quality of state parties’ replies to the Follow-Up Rapporteur’s inquiries.<sup>562</sup> 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 also be a useful addition.<sup>563</sup>

Finally, several interviewees noted that the Human Rights Committee lacks any digest of its remedies jurisprudence, which would be a useful tool for improving what is too often a cursory treatment of remedies in the committee’s decisions. This is a project that the OHCHR (or perhaps an NGO, in cooperation with it) should carry out. Similarly, a compendium of best practices or “good news stories” on follow-up to individual

communications, such as the UN Special Procedures currently compiles, could serve as a useful resource for follow-up mandate holders moving forward.<sup>564</sup>

### **Promote a Sustained Approach to Follow-Up throughout the UN Protection System**

Both the OHCHR and human rights advocates should seek to create a more sustained approach to follow-up overall. For example, the High Commissioner for Human Rights should continue to raise the non-implementation of treaty-body Views in her meetings with state representatives as regularly as her functions permit. Where appropriate, advocates should also encourage members of the other treaty monitoring bodies to raise the issue of unimplemented decisions during the state reporting process as well, and devote greater attention to the failure to implement in their concluding observations. Liaison should likewise be established with OHCHR field offices in countries where there are a significant number of non-implemented judgments, so that communication may be made with officials on the ground as well as in Geneva.

More broadly, greater collaboration must also be built between the treaty-based bodies and the UN's charter-based bodies, particularly the UN Human Rights Council. As Manfred Nowak has argued, "One of the major shortcomings of UN human rights treaties is the missing link between independent expert bodies and political decision-making bodies."<sup>565</sup> To that end, OHCHR should provide the Human Rights Council with information on state compliance with individual communications and/or interim measures, as it currently does with respect to the state reporting procedures of the treaty bodies and the findings of the Special Procedures mandate-holders.<sup>566</sup> This information might inform the council's work in a number of ways, including during the Universal Periodic Review process, where it could serve as the basis for questions posed to the state under review and for future recommendations by the council. Similarly, there should be systematic coordination between the treaty bodies and the UN Special Procedures mandate-holders so that they can address the issue of implementation in the course of their duties.<sup>567</sup>

### **Examine Forum Desirability as a Tool to Increase Implementation**

Because there are numerous means by which individual complaints may be registered with the UN system, human rights advocates must approach the system with caution, having fully considered which forum could best secure the implementation of their desired ends. In light of the backlog of cases facing the HRC and the large number of decisions currently under follow-up review, advocates should carefully consider whether the committee, as well as the treaty body system generally, is the best forum for litigation. Although the HRC might have the advantage of being the oldest and best known of the treaty bodies, it simply cannot continue to function effectively under the weight of its caseload.<sup>568</sup> As noted, there are over 300 cases pending before the committee; by a conservative estimate, it takes at least three years for a merits decision to be issued.

By contrast, other treaty bodies have the comparative advantage of smaller caseloads (although the CAT's remains substantial) and, consequently, there is an increased chance that cases can be decided faster and monitored more rigorously. CEDAW and CERD, in particular, are forums worthy of consideration, provided the state in question has accepted the committees' jurisdiction over individual complaints. Consideration should also be given to the UN's Special Procedures, including the Working Group on Arbitrary Detention and Working Group on Enforced Involuntary Disappearances.<sup>569</sup> Although both of these working groups suffer from many of the same compliance-related challenges as the treaty bodies (and also lack a formal follow-up procedure), they have achieved successful results in a number of cases. In addition to having more flexible admissibility requirements, the working groups are generally able to adjudicate cases more quickly than treaty bodies can.<sup>570</sup>

### **Develop the Relationship between Domestic Enforcement Bodies and Treaty Bodies**

Just as the treaty bodies play a crucial role in nurturing and facilitating domestic support for human rights, so too is the strength of a state's domestic institutions crucial to determining the degree of compliance with treaty body decisions. To this end, "ways must be found to get the treaty norms and the treaty system on national agendas and to mobilize their logical domestic constituencies."<sup>571</sup> While this recommendation is taken up in greater detail in this book's concluding chapter, the fact that the treaty bodies possess little ability to enforce their own decisions underscores the importance of using national judicial systems, particularly those in monist states, as a way to enforce judgments and promote awareness of a state's international legal obligations. This is especially significant for victims because as domestic courts are more likely to obtain an effective remedy than the treaty bodies themselves.<sup>572</sup>

Advocates should therefore consider assisting or urging litigants to plead the decisions of the Human Rights Committee and other treaty bodies before their own domestic judiciaries, in order to press more aggressively for implementation at the national level. Even where this approach is not successful, it may serve to highlight deficiencies in a state's judicial apparatus, which can serve as a basis for additional advocacy and clarification.<sup>573</sup> At the same time, the HRC and other treaty bodies should endeavor to ensure thorough and comprehensive reasoning in their decisions and, where appropriate, rely on pertinent national jurisprudence. Such an approach would not only increase the credibility of the treaty bodies in the eyes of domestic judges, but would also encourage a "mutually-reinforcing dialogue" between national judiciaries and international bodies.<sup>574</sup> To this end, it remains incumbent on states to concentrate resources at the national level—in the training of judges, government officials, legislatures, lawyers, and through the development of effective national level institutions<sup>575</sup>—in order to give greater effect to international human rights norms at the domestic level.

## V. Next Steps

### Improving Implementation through Cross-System Dialogue

The European, American, and African human rights systems exist within distinct socio-political contexts, and the experience of each continent in crafting a legal framework for protecting international human rights has varied significantly. But despite their differences, the systems share a common element: the struggle to ensure full implementation of their decisions. If the systems are to successfully fulfill their mandates, they must address their respective implementation crises. One promising way to address these crises is cross-system dialogue: the sharing of information, experience, and best practice to ensure more thorough and effective implementation in all four systems.

Cross-system dialogue among international and regional human rights bodies is already underway. Several interlocutors, for instance, spoke approvingly of their experiences engaging in cross-system communication and collaboration, and described a number of productive exchanges between the professional staff, judges, and legal advocates of the systems surveyed in this report. In terms of collaboration between the OAS and the African Union, an important precedent was the jointly organized conference known as the “OAS-AU Democracy Bridge.”<sup>576</sup> Similarly, the United Nations has recently hosted international workshops on enhancing cooperation among the regional human rights systems and the UN treaty bodies.<sup>577</sup> Academic institutions, too, have a

crucial role to play in helping bring together human rights scholars and practitioners to address common issues of concern within and among the various systems.<sup>578</sup>

In this spirit, the Justice Initiative hopes that this report can serve as a basis for situating implementation-related discussions within a larger cross-system dialogue, particularly as many of these systems are themselves undergoing periods of significant reform. This chapter identifies three areas around which such implementation discussions should take place, and highlights particular points of difference and commonality as a basis for further dialogue.

## The Structure and Resourcing of Human Rights Systems

Implementation is one part of an effective system for adjudicating human rights and it exists in relation to a variety of factors, such as the institutional design of these systems and their capacity to efficiently and fairly judge cases. To that end, it is interesting to note that each regional organization, first the Council of Europe, then the Organization of American States, and most recently the African Union, have at some point in their histories promoted a two-tier, commission-court model for adjudicating human rights complaints. In 1998, with the passage of Protocol 11 to the European Convention, Europe's commission and court model was dissolved and replaced with a permanent European Court, in order "to maintain and improve the efficiency of [the convention's] protection of human rights and fundamental freedoms."<sup>579</sup> Since that time, however, the court's docket has continued to swell, threatening the system's continued success. Moreover, many critics have noted that the sheer number of repetitive applications challenging the same state behavior is indicative of the extent to which the issue of successful implementation and caseload are now linked.<sup>580</sup> As a result of this dilemma, a number of European Court watchers have proposed a return to some version of the two-tiered filtering system, or for increased judicial discretion in dismissing inadmissible complaints.<sup>581</sup>

By comparison, the Inter-American system has retained the commission-court model and, while the court is purportedly up-to-date in its review of all cases under consideration, the commission has a backlog of hundreds of cases. The commission and court recently completed a coordinated reform of their respective rules of procedure, in part to minimize the role of the commission in court litigation.<sup>582</sup> This reform did not articulate any additional implementation activities for the commission. The court, however, used the same reform as an opportunity to codify numerous innovations in its implementation monitoring procedures. The different approaches demonstrate again

the link between caseload and implementation: the commission, burdened by its backlog, was simply not in a position to address implementation.

The African system is something of a hybrid of the European and Inter-American systems, in that it will maintain a two-tiered commission-court model, but the court's protocol also provides the possibility for victims of human rights violations to file cases directly with the court if the respondent state has acceded to direct action. This is one indicator that the African system is being proactive and taking prophylactic measures to address a possible future caseload crisis. For its part, the UN treaty body system differs substantially from the regional systems in structure but, like the other systems, the Human Rights Committee (and, to a lesser extent, the Committee Against Torture) shares the problem of an overwhelming caseload, one that will also have to be considered as debates over the institutional design of the treaty bodies continue.

Thus, even as the Council of Europe and OAS continue to grapple with balancing the number of cases coming in against those being successfully disposed of, their comparatively greater experience in managing expectations in this regard, and dealing with rapidly expanding caseloads, will likely prove valuable to the African Union and United Nations. For instance, in the context of the African system, new rules of procedure bring the hope of broader and more consistent follow-up powers for the commission, and are intended to herald a new era of consistent referrals to the African Court, allowing the tribunal to begin the fundamental work of issuing merits decisions. And yet, if this system develops along the lines of its European and American counterparts, it is likely that, as its caseload grows in both volume and complexity, it too will start to experience a backlog. As noted, certain UN treaty bodies have already reached that point. Similarly, as the European system contemplates a return to some process of filtering as a means of bringing its input and output into greater balance, it could benefit significantly from the experience of the Inter-American system as it works to make the communications and interactions between the commission and court more efficient.

## Assessing the Design of Implementation Mechanisms and Procedures

One of the most critical topics for cross-system dialogue is the design and structure of implementation procedures and mechanisms. In this regard, it is important to recognize that Europe's enforcement mechanism, which is widely considered to be one of the most effective to date, is quite different from those of the other systems. Most significantly, the monitoring and enforcement of European Court judgments is carried out almost exclusively by the Committee of Ministers, which reflects the fact

that implementation is often a political matter. While the general procedures that the Committee of Ministers follows with respect to implementation are understood, the committee meetings themselves are closed to the public. Moreover, other than recent amendments to the rules of procedure, which permit written submissions from victims and their advocates on certain measures, there has never been serious consideration of a proposal to open ministerial proceedings to the victims' representatives, much less to concerned civil society organizations or the public at large.

By contrast, in the Inter-American system, the vast majority of implementation activities is administered by the court and the commission, and relies on the active participation—if not initiative—of the victims' representatives. To collect data, both the court and the commission rely completely on the responsiveness of the parties. The interactions of the bodies with the political organs of the OAS on matters of implementation are almost exclusively limited to the transmission of this data in their annual reports to the General Assembly. Compliance hearings before each of the bodies are the principal way for interested parties in a case to confront the state about implementation shortcomings, and while these hearings are increasing in both frequency and complexity before the court, they are extremely rare at the commission level. Historically, there has been some success in appealing states' substantial compliance failures to the General Assembly of the OAS, but calls for a more systematized political response to implementation have generally gone unheeded.<sup>583</sup>

While it is unlikely that the Committee of Ministers will enlarge the scope of victims' participation, or that the political bodies of the OAS will take up the call to actively intervene in implementation proceedings in the near future, there is certainly value in addressing these topics. There is a need to identify the common elements in the European and Inter-American implementation mechanisms and generate dialogue about their specific successes and failures, so as to expand the pool of common experiences and identify best practices that may transcend systems. For example, the interim resolutions and recommendations of the Committee of Ministers could be compared with the reports and compliance orders of the Inter-American Court in order to provide guidance for other systems. Additionally, the Inter-American Court's practice of holding private compliance hearings, and the more recent practice of holding such hearings publicly, could be a useful model for the European Court as it begins work to implement Protocol 14's new provisions for "infringement proceedings."

While this discussion has thus far centered on the European and American experience, the African system and UN treaty bodies could also benefit from participating in a similar dialogue. First, there is some indication that unimplemented decisions of the African Court on Human and Peoples' Rights may be referred to the political bodies of the African Union. Communicating with the European Court system could help identify a proper procedure for such referrals. The Inter-American system has not yet taken up

the call for a method of referrals to the political domain of the OAS, but might find greater support for doing so if this becomes the trend among other systems. Similarly, there have been proposals, which this report supports, that the UN treaty bodies refer information on unimplemented decisions to the Human Rights Council, which many observers recognize as carrying more political influence than the treaty bodies themselves. The African Court should pay attention to the other regional systems' experience in developing designs for compliance proceedings, as there is little question that it too will face resistance to implementation from member states. Inter-American "compliance hearings," and perhaps European "infringement proceedings," will thus be very important experiences for the African Court to monitor; ideally, there should be a formal channel between the systems to carry out dialogue on such a topic.

The UN treaty bodies boast the important example of the Special Rapporteur for Follow-Up on Views, who is charged with monitoring implementation of treaty body decisions. While this rapporteurship, in the context of the Human Rights Committee, has not accomplished many marked gains, it seems likely that greater attention to its design and resourcing would yield better results. There have been similar calls for such a rapporteurship in the African Commission for some time, and while the new rules of procedure do not contemplate a permanent position in this regard, there is a mechanism by which individual commissioners could be assigned as implementation rapporteurs in specific cases. As this mechanism has yet to become operative, it is difficult to say whether this is a better model than having only one rapporteur, but both systems would do well to think comparatively about these models. Indeed, as this report noted, there may be an advantage for the Human Rights Committee in designating more than one individual to undertake implementation-related duties, given the magnitude of work that effective follow-up on recommendations requires.

As a separate but not unrelated matter, these discussions should also involve remedial frameworks, given that there is a general correlation between remedies and levels of implementation. Yet, as this report makes clear, each system approaches remedies in a different manner. The past decade has seen a rise in remedies of a general nature from the European Court, which has only recently begun to be more prescriptive in its approach to remedies; moreover, victims' representatives have little to no role in this process. This approach lies in stark contrast to the Inter-American Court, which offers a robust remedies phase to the litigation, through which victims' representatives can request a wide variety of individual monetary and symbolic remedies, as well as a range of general remedies that touch on social policy and legislation. Despite these differences, the relationship between the scale of remedies required and implementation is very similar between these two systems, and it would behoove them to explore their respective approaches more fully. For example, considering the high rates of states that pay pecuniary damage orders, the potential for ordering other types of monetary

sanctions for delayed implementation is a topic that is ripe for review. While the Inter-American system has rejected the punitive damages regime, and the European system ultimately discarded the possibility of fining states for non-compliance during negotiations over Protocol 14, many continue to argue that additional damages or other monetary sanctions should be imposed on states that fail to implement binding decisions.<sup>584</sup> Such a discussion could benefit the African Commission, which has not devised a set remedial framework, and the African Court, which has yet to issue a reparations decision; similarly, the approach of some UN treaty bodies to remedies is quite rudimentary.

## Elaborating Criteria for National Implementation Initiatives

A third topic for cross-system dialogue is how different countries, as member states of the relevant regional or international organizations, structure their implementation efforts domestically once a decision is issued by a human rights body. The interlocutor for the state in such interactions is often the foreign ministry; the issue, then, is how the ministry communicates the obligations arising from an international decision to the state apparatus. Inasmuch as the decisions of human rights bodies often include recommendations or orders directed to the executive, judicial, or legislative branches of a state's government, a lack of formalized channels of communication among these different branches in matters relating to implementation—combined with a lack of domestic political pressure—often results in inaction. Discussion about these communication challenges also represents, perhaps, a more productive way to talk about “political will,” the amorphous concept that provides an easy (sometimes too easy) response to the question of why states fail to fulfill their international legal obligations. To that end, the experiences of individual states in establishing a coordinator for the execution of judgments at the national level should be discussed, as should the development of better communication mechanisms, so states that have yet to devise such systems can better understand their importance to implementation.

Perhaps the most effective model for creating a national implementation mechanism is the Human Rights Act of the United Kingdom. Passed in 1998, it was enacted with the goal of giving effect to the European Convention by “engaging the responsibility of all three branches of government to act in a way compatible with fundamental civil and political rights.”<sup>585</sup> Moreover, an added provision of the Human Rights Act established the United Kingdom's Joint Committee on Human Rights, 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 ECHR.”<sup>586</sup> Other than the United

Kingdom, only five parliaments within the Council of Europe's member states possess a similar body for supervising the implementation of judgments, and fewer than half of Council member states have procedures that would at least ensure parliamentarians are informed of adverse ECHR judgments.<sup>587</sup>

In the Inter-American system, a number of countries have taken up the call to create some type of implementation mechanism, though their forms vary significantly. 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 decision to the courts that have jurisdiction over the matter.<sup>588</sup> 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 Inter-American Commission and the UN Human Rights Committee.<sup>589</sup> The Colombian law further provides an important example of why collaboration between the regional human rights systems and the United Nations is so important, since any law that provides a procedure for a state to implement the decisions of regional human rights courts can conceivably be modified to recognize the decisions of UN treaty bodies.

Thus, the regional and international human rights systems should analyze the extent to which national implementation laws have been useful in coordinating the implementation of decisions, and to what degree they have increased the rates of implementation. Because each system has a vested interest in identifying the most successful models for implementation, discussing how certain implementation laws can be modified and adapted to different legal systems and country contexts could be useful. While comparing laws from common law systems to those in civil law systems is not easy, the insights gained would aid implementation, even in those states whose human rights regimes remain embryonic.<sup>590</sup>

It is also important to note that there are many modes of ad hoc communication that can advance the implementation process. While such communications are more diffuse and harder to put into practice, there should nevertheless be an effort to incorporate these examples into discussions of more formalized mechanisms. Indeed, because ad hoc implementation activities are often easier to execute, they can serve as examples for certain state officials who may be committed to implementation in countries where the state apparatus itself is otherwise resistant.

Finally, an important topic of cross-system dialogue about implementation mechanisms is the potential role of national human rights institutions (NHRIs) and human rights ombudspersons. NHRIs vary enormously in structure and function but it is clear that the idea of NHRIs has moved forward at the international level, such that they have become key actors in bridging the gap between international standards and domestic implementation. Indeed, where an NHRI established in accordance with the Paris Principles exists within the national legal framework of a country, that institution

can be assigned a specific and perhaps central role in implementation.<sup>591</sup> Furthermore, the personnel who generally administer NHRIs often (or should) have a professional background in international human rights, and many of them come from other state agencies; therefore, they are knowledgeable about the challenges of implementing international court decisions. In this way, NHRIs are uniquely qualified to carry out implementation efforts and they should be consistent partners in any cross-system communication.

At the same time, however, precisely because of the diversity in form and function of NHRIs, their “status is often unclear at the national level.”<sup>592</sup> Therefore, states, both independently and in the context of their regional human rights systems, should exchange information about how NHRIs, given their hybrid nature, can best monitor the implementation of judgments. For instance, would it be desirable that the regional human rights treaties formally require national institutions to play a monitoring role in the implementation of judgments, as the Optional Protocol to the Convention Against Torture and the Convention on the Rights of Persons with Disabilities now do? Or is it best to endow NHRIs with the power of legislative initiative, so that they themselves might provide the catalyst for establishing domestic implementation laws? The answers to these questions may well be different depending on the state in question, but a process of inter-state and inter-system dialogue would do much to build an understanding of what implementation strategies have worked in different contexts.

Clearly, cross-regional collaboration is needed to address the implementation crisis currently afflicting human rights systems. The question is what shape such collaboration should take. As Philip Leach has written, “It is pertinent to question whether the set-piece conference model, with a small number of speakers delivering papers on pre-determined topics, with only minimal time for discussion amongst the other participations, is the most productive way of debating reform.”<sup>593</sup> Leach notes, for instance, that a significant flaw in the reform debates in Europe thus far has been their failure to meaningfully engage with the “users” of the court system, in addition to the failure of governments to welcome real civil society involvement. This approach cannot continue. Indeed, for the process of collaboration proposed herein to be meaningful, it will not be enough to only make speeches; rather, the focus must be on developing sustained exchanges between government officials and experienced representatives from across the civil society spectrum, premised on a genuine commitment to reform law, institutions, and practice. Making good on the promise of our evolving international human rights system demands no less.

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Jane Buchanan, Research Consultant, Human Rights Watch

Basak Cali, Lecturer in Human Rights, University College London

Andrew Drzemczewski, Head of the Secretariat, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe

Helen Duffy, Litigation Director, Interights

David Geer, European Commission Team Coordinator for Ukraine and Moldova, Directorate-General for External Relations, European Commission

Gisella Gori, Legal Officer, Department for the Execution of Judgments, Council of Europe

Yonko Grozev, Program Director, Legal Studies, Center for Liberal Strategies

Murray Hunt, Legal Adviser, United Kingdom Joint Committee on Human Rights

Philip Leach, Director, European Human Rights Advocacy Centre

Lord Anthony Lester of Herne Hill

Diederik Lohman, Senior Researcher, Human Rights Watch

Fernanda Nicola, Professor, American University, Washington College of Law

Michael O'Boyle, Deputy Registrar, European Court of Human Rights

Simon Palmer, Principal Administrator, Secretariat of the Committee of Ministers

Dinah Shelton, Manatt/Ahn Professor of International Law, The George Washington University Law School

Fredrik Sundberg, Deputy Head, Department for the Execution of Judgments, Council of Europe

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Gisella DeLeon, Senior Staff Attorney, CEJIL MesoAmerica

Ariel Dulitsky, Former Assistant Executive Secretary

Maria Clara Galvis, Due Process of Law Foundation Consultant

Robert Goldman, Professor of Law, Washington College of Law (former IACHR Commissioner)

Helen Mack, Executive Director, Mack Foundation

Juan Mendez, Professor, Washington College of Law (former IACHR Commissioner)

Alejandra Nuño, Director, CEJIL Meso America

Oscar Parra, Staff Attorney, Inter-American Court of Human Rights

Darian Pavli, Legal Officer, Open Society Justice Initiative

Francisco Quintana, Associate Director, CEJIL DC

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Robert Eno, Staff Attorney, ACHPR Secretariat

Julia Harrington, Senior Legal Officer, Open Society Justice Initiative

Ibrahima Kane, African Union Advocacy Director, Open Society Institute

Judy A. Oder, Lawyer, Interights

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Markus Schmidt, Senior Legal Adviser, Office of the Director-General, UN Office at Geneva (former Head of Petitions Unit, Human Rights Treaties Branch, Office of the United Nations High Commissioner for Human Rights).

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11. James L. Cavallaro and Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102(4) AM. J. INT'L L. 768, 769 (2008) (noting further that scholars and practitioners have “devoted far more energy to the study of jurisprudential aspects of the decisions of the Inter-American human rights system than to assessing the degree to which these decisions are implemented in practice”).

12. Kal Raustiala and Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS, 538, 539 (Walter Carlsnaes et al., eds., 2002).

13. In a seminal essay on why nations obey international law, Harold Koh helpfully elucidates four possible explanations for why states implement decisions of human rights bodies. The first is coincidence, wherein no causal relationship actually exists between a ruling and subsequent implementation by a state. See Harold Hongju Koh, *Who Do Nations Obey International Law?*, 106(8) YALE L.J. 599, 600–01, n. 3 (1997). The second is conformity, wherein states might abide by a rule but “feel little or no legal or moral obligation to do so.” *Id.* (For example, while states have satisfied the payment of damages to individuals based on the findings of the UN Human Rights Committee, many make clear that they do so only on an *ex gratia* basis, not because they consider themselves legally bound to do so.) The third is compliance, wherein entities “accept the influence of [a] rule, but only to gain specific rewards ... or to avoid specific punishments,” such as fines or reputational damage. *Id.* Finally, and most rarely, there is obedience, which occurs “when an entity adopts rule-induced behavior because it has *internalized* the norm and has incorporated it into its own internal value system.” *Id.*

14. See, e.g., Reports of the HRC, UN Docs. A/61/40 (2006), at 706–07 and A/62/40 (2007), at 671–72.

15. For instance, although the 2005 United States Supreme Court case, *Roper v. Simmons*, 543 U.S. 551 (2005), which ruled that the death penalty for juveniles was unconstitutional, brought the United States into “compliance” with a similar decision of the Inter-American Commission on Human Rights that had been decided three years earlier, the court did not even mention the commission’s ruling in its reasoning. See also UN Hum. Rts. Comm., Case No. 802/1998, *Rogerson v. Australia*; Case No. 455/1991, *Singer v. Canada*; Case Nos. 666/1995, *Foin v. France*, 698/1996, *Maille v. France*, 690/1996, *Venier v. France*, 691/1996, *Nicolas v. France* (noting that because the state party had already amended a law establishing differences between military and national alternative service, the finding of a violation was itself a sufficient remedy).

16. It is important to note is that the applicant in *Modise v. Botswana*, through his lawyers at INTERIGHTS, does not consider his case to be an implementation success, as they continue to press for full implementation. In *Modise v. Botswana*, the commission found that Botswana had arbitrarily deprived Modise of his nationality because of his political activity, and on several occasions deported him to South Africa without trial in violation of the rights to equal protection under the law. The commission urged Botswana to recognize Modise’s right to nationality, and it agreed to do so after protracted negotiations. However, no agreement has ever reached with regard to monetary

compensation; the commission did not specify an amount, and there is a substantial difference between what Modise believes he is entitled to and what the state is willing to pay.

17. Laurence Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19(1) EUR. J. INT'L L. 125, 126 (2008).

18. "The European Court of Human Rights Some Facts and Figures: 1959–2009," available at [www.echr.coe.int](http://www.echr.coe.int).

19. Committee of Ministers, *Implementation of Decisions of the European Court of Human Rights by Turkey Parliamentary Assembly Recommendation 1576* (2002), CM/AS (2003) Rec1576 (Mar. 31, 2003).

20. Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Implementation of Judgments of the European Court of Human Rights—Progress Report* ("Pourgourides Report"), para. 5 (Aug. 31, 2009).

21. Michael O'Boyle, *The Challenges Facing the European Court of Human Rights*, International Judicial Monitor (Winter 2010). Stated slightly differently, Professor Leo Zwaak has argued that the court is less a victim of its own success, "but a victim of a general reluctance of the member [s]tates to take the European Convention seriously." See Leo Zwaak, *Overview of the European Experience in Giving Effect to the Protections in European Human Rights Instruments*, "Working Session on the Implementation of International Human Rights Protections," at [www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf](http://www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf).

22. "High Level Conference on the Future of the European Court of Human Rights—Interlaken Declaration" (Feb. 19, 2010), at 2, para. 7, at [www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final\\_en.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf).

23. *Id.* at 3, Sec. B(4).

24. Until recently, the judicial work of the Court was performed by three bodies: Committees, comprised of three judges, which are empowered to reject, individual applications as inadmissible; Chambers, comprised of seven judges, which deal with remaining admissibility issues and the merits of most applications; and the Grand Chamber, comprised of seventeen judges, which may act as a tribunal of first instance in cases "raising serious questions of interpretation" or, in "exceptional cases," as an appellate tribunal over cases already decided by a Chamber. See generally Steven Greer, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* (2006). With Protocol 14 having taken effect in June 2010, a single judge can now decide on the admissibility of a case, while a committee of three judges alone may render a judgment on the merits, "if the underlying question in the cases concerning the interpretation of the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court." See "Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms," Strasbourg, 12.V.2004 (Arts. 7 & 8), at <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>.

25. Ed Bates, *Supervising the Execution of Judgments Delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers*, in *EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS* ("ECHR REMEDIES") 49, 51 (Theodora Christou and Juan Pablo Raymond eds., 2005).

26. See, e.g., R. Ryssdal, *The Enforcement System set up under the European Convention on Human Rights*, in COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 49–69 (M.K. Bulterman and M. Kuijre eds., 1996).

27. Andreas von Staden, SHAPING HUMAN RIGHTS POLICY IN LIBERAL DEMOCRACIES: ASSESSING AND EXPLAINING COMPLIANCE WITH THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS (Nov. 2009) (PhD Dissertation, Woodrow Wilson School of Public and International Affairs) (on-file), at 3.

28. Eric Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. R. 1, 65–66 (2005).

29. Significantly, this report does not examine compliance with interim measures ordered pursuant to Rule 39 of the Rules of the European Court on Human Rights. Under this procedure, the court can order a state to take measures to prevent a violation that is about to take place; these measures arise most often in extradition or deportation cases, where a state is ordered not to carry out transfers that would imperil an applicant's convention rights. The significance, however, of compliance with interim measures should not be overlooked. Indeed, although compliance with interim orders is generally considered to be good, there is little empirical data to support this assessment, nor is such data included in the Committee of Ministers' annual report. See, e.g., Alastair Mowbray, CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS ("ECHR CASES & MATERIALS") 32 (2007) ("It has been very rare for [s]tates to disregard interim measures indicated to them."). Moreover, several recent cases have highlighted a troubling failure on the part of some states to comply with Rule 39 measures. See, e.g., PACE Doc. 12216, *Repetitive Non-Compliance by Italy with Interim Measures Ordered by the European Court of Human Rights* (Written Question No. 571 by Mrs. Däubler-Gmelin) (Apr. 26, 2010) (noting the fourth instance, since 2005, in which Italian authorities failed to respect an interim measures order). Notably, such non-compliance is itself a violation of a state's obligation to not hinder the effective exercise of the right of individual application, which is protected by the convention. See ECHR, App. No. 46827/99 and 46951/99, *Mamatkulov and Askarov v. Turkey* (Feb. 4, 2005) (holding that failure to comply with interim measures "is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34"); ECHR App. No. 24668/03, *Olaechea Cahuas v. Spain* (Dec. 11, 2006).

30. *Fifty Years of Activity: The European Court of Human Rights Some Facts and Figures: 1959–2009* (ECHR Registry), at 4, at [www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresEN.pdf](http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresEN.pdf).

31. *Id.* at 5.

32. *Id.* at 4.

33. Committee of Ministers, 3RD ANNUAL REPORT—SUPERVISION OF THE EXECUTION OF JUDGMENTS 33–34 (2009). Notably, this figure excludes those cases that remain pending but are closed in principle, meaning that a final resolution has still not issued by the Committee of Ministers. Were these cases to be included, the number of pending cases rises to 8,661. *Id.*

34. *Id.* Of these 7,887 cases, 822 are "leading" cases, while 7,065 are "repetitive" or "clone" cases. "Leading cases" are those "which have been identified as revealing a new systemic/general problem," such that that will require the adoption of general measures to avoid repetition. *Id.* at 32. Relatedly, "clone" or "repetitive" cases relate to a systemic or general problem "already raised before the Committee of Ministers in one or several leading cases." *Id.*

35. *Id.*
36. *Id.* at 41.
37. Von Staden, at 83–85.
38. *Id.* at 85.
39. *Id.* at 92–93.
40. COM, 3RD ANNUAL REPORT, at 61.
41. *Id.* at 10.
42. See Von Staden, at 91 (noting that the “issue areas in which European democracies as a whole fail the most” include fairness of proceedings (Article 6) and the right to security and liberty of the person (Article 5)). See also Alastair Mowbray, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 9 (2004) (“Article 6 is the source of the largest number of complaints made to the Court.”).
43. See, e.g., ECHR, App. No. 56848/00, *Zhovner v. Ukraine* (29 Sept. 2004); ECHR, App. No. 58263/00, *Timofeyev v. the Russian Federation* (Jan. 23, 2004); ECHR, App. No. 36220/97, *Okyay and Others v. Turkey* (Oct. 12, 2005). These three are the leading cases concerning the failure or substantial delay in abiding by final domestic judgments; 445 judgments alone comprise those against Ukraine and Russia.
44. Christina Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT’L L. 195, 202 (2004) (comparing the Inter-American and European human rights systems).
45. Greer, at 40.
46. Mowbray, at 225–28. See also Jean-Francois Akandji-Kombe, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007).
47. See Pourgourides Report, paras. 54–55 (highlighting as one issue that “raises prevalent implementation problems” deaths or ill-treatment taking place under the responsibility of state forces and lack of an effective investigation).
48. Christian Tomuschat, in THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS 10 (Rudiger Wolfrum and Ulrike Deutsch eds., 2009).
49. Telephone interview with Diederik Lohman, Human Rights Watch, November 2009.
50. See, e.g., ECHR, App. No. 46221/99, *Ocalan v. Turkey* (Grand Chamber) (May 12, 2005).
51. James Goldston, “Three Strikes and You’re Out,” available at <http://blog.soros.org/2010/03/three-strikes-and-youre-out/> (citing ECHR, App. No. 57325/00, *D.H. and Others v. Czech Republic* (Grand Chamber) (Nov. 13, 2007) (endorsing and prohibiting the concept of indirect discrimination)).
52. See ECHR, App. No. 32526/05, *Sampanis v. Greece* (Jun. 5, 2008) (finding that local authorities violated Roma children’s rights by denying them enrollment in a primary school and placing them in special classes); ECHR, App. No. 15766/03, *Orsus v. Croatia* (Mar. 16, 2010) (finding the use of separate classes, in which only Roma children were enrolled, discriminatory).
53. James Goldston and Mirna Adjami, *The Opportunities and Challenges of Using Public Interest Litigation to Secure Access for Roma in Central and Eastern Europe*, in MARGINALIZED COMMUNITIES AND ACCESS TO JUSTICE (Yash Ghai and Jill Cottrell eds., 2009).

54. ECHR, App. Nos. 39221/98 and 41963/98, *Scozzari and Giunta v. Italy* (Jul. 13, 2000) (violation of Article 8 with regard to limitations on and delays in implementation of access to children in care).
55. Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements (“COM Rules”), R. 6(2).
56. Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”), as amended by Protocols No. 11 and No. 14 (Rome, 4.XI.1950), Art. 41 (“If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”).
57. Clare Ovey and Robin White, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 496–97 (2006).
58. Elizabeth Lambert-Abdelgawad, *THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS*, 2ND ED. (“EXECUTION OF JUDGMENTS”) 12 (2008).
59. COM, 2ND ANNUAL REPORT—SUPERVISION OF THE EXECUTION OF JUDGMENTS 51–55 (2008); COM, 3RD ANNUAL REPORT, at 50.
60. COM, 3RD ANNUAL REPORT, at 54.
61. ECHR, App. No. 15318/89, *Loizidou v. Turkey* (Jul. 8, 1993).
62. COM Interim Resolution DH(2000)105.
63. COM Interim Resolution DF(2001)80 (“Very deeply deploring the fact that, to date, Turkey has still not complied with its obligations under this judgment[.]”).
64. COM Interim Resolution CM/ResDH (2007)73 (“urg[ing]the authorities of the respondent State to take, without further delay, all necessary investigative steps in these cases in order to achieve concrete and visible progress”) (concerning, *inter alia*, ECHR, App. No. 28883/95, *McKerr v. United Kingdom* (May 4, 2001) (Article 2 violation)).
65. ECHR, App. No. 27798/95, *Amann v. Switzerland* (Grand Chamber) (Feb. 16, 2000).
66. ECHR, App. No. 45701/99, *Metropolitan Church of Bessarabia and Others v. Moldova* (Dec. 13, 2001).
67. ECHR, App. No. 1785/91, *Vogt v. Germany* (Sept. 2, 1996); COM Final Resolution DH(97)12.
68. *See, e.g.*, ECHR, App. No. 8692/79, *Piersack v. Belgium* (Oct. 26, 1984).
69. COM Recommendation (2000)2 *On the Re-Examination or Reopening of Certain Cases at a Domestic Level Following Judgments of the European Court of Human Rights* (Jan. 19, 2000).
70. ECHR, App. No. 31443/96, *Broniowski v. Poland* (Jun. 22, 2004).
71. COM Recommendation (83)1 *Of the Committee of Ministers to Member States on Stateless Nomads and Nomads of Undetermined Nationality*. Around this same time, the committee also began requiring states to show proof that ameliorative measures had, in fact, been enacted before a final resolution would be adopted. Similarly, where a state argued that the status of the European Convention in its case law would assure conformity with the court’s jurisprudence, the committee started requiring proof in the form of actual case law to that effect.

72. Ovey and White, at 498–99.
73. Greer, at 158. *See also* PACE Resolution 1226, *Execution of Judgments of the European Court of Human Rights* (Sept. 28, 2000) (noting that the committee “does not exert enough pressure when supervising the execution of judgments”).
74. Lambert-Abdelgawad, *EXECUTION OF JUDGMENTS*, at 30–31.
75. ECHR, App. No. 64812/01, *Alver v. Estonia* (8 Nov. 2005); COM Final Resolution DH(2007)32.
76. ECHR, App. No. 27751/95, *K.A. v. Finland* (14 Jan. 2003); COM Final Resolution DH(2007)34.
77. ECHR, App. No. 25803/94, *Selmouni v. France* (Jul. 28, 1999).
78. ECHR, App. No. 28054/95, *Mavronichis v. Cyprus* (Jul. 15, 1999), COM Final Resolution DH(99)465.
79. *See* Loukis G. Loucaides, *Reparation for Violation of Human Rights under the European Convention and Restitutio in Integrum*, EUR. HUM. RTS. L.R. 182, 189 (2008, No. 2) (“After many years of showing little interest in explaining and interpreting Article 41 and a reluctance to promote effectively the application of *restitutio in integrum* in practice, the European Court of Human Rights has recently begun to change its attitude on this matter.”).
80. Tom Barkhuysen and Michel L. van Emmerik, *A Comparative View on the Execution of Judgments of the European Court of Human Rights*, in *ECHR REMEDIES*, at 3.
81. Loucaides, at 186.
82. During the reflection period for Protocol No. 14, the Steering Committee for Human Rights (“CDDH”) had also contemplated the establishment of a pilot judgment procedure; however, the committee concluded that it was for the Court to identify the cases for which such a procedure would be appropriate. *See* CDDH(2003)006, *Final report containing proposals of the CDDH “Guaranteeing the long-term effectiveness of the European Court of Human Rights.”*
83. COM Resolution (2004)3 *Resolution on Judgments Revealing an Underlying Systemic Problem* (May 12, 2004).
84. ECHR, App. No. 31443/96, *Broniowski v. Poland* (Jun. 22, 2004).
85. *Id.*
86. ECHR, App. No. 31443/96, *Broniowski v. Poland* (Sep. 28, 2005), para. 36 (friendly settlement).
87. Helfer, at 148.
88. Greer, at 160–61.
89. Fernanda Nicola and Ingrid Nifosi-Sutton, *Assessing Regional Cooperation: New Trends before the European Court of Human Rights and the European Court of Justice*, 15(1) HUM. RTS. BRIF. 11, 12 (Fall 2007). *See also* ECHR, App. No. 35014/97, *Hutten-Czapska v. Poland* (2008) (Judges Zagrebelsky and Jaeger, diss.) (“The Court is not competent (and does not have the necessary knowledge) to express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants.”).

90. See *Korenjak v. Slovenia*, ECHR, App. No. 463/03 (May 15, 2007) (finding the new domestic scheme was “effective in the sense that the remedies are *in principle* capable of both preventing the continuation of the alleged violation of the right to a hearing without undue delay and of providing adequate redress for any violation that has already occurred”); ECHR, App. No. 35014/97, *Hutten-Czapska v. Poland* (Apr. 28, 2008), para. 43 (noting that “the Government ha[s] demonstrated an active commitment to take measures aimed at resolving the systemic problem identified in the principal judgment and will rely on their *actual and promised* remedial action”) (emphasis added in both) (concerning Polish housing legislation).

91. See ECHR, App. No. 35014/97, *Hutten-Czapska v. Poland* (Grand Chamber) (Jun. 19, 2006) (concerning Polish housing legislation).

92. In *Burdov*, the Court applied the pilot judgment procedure in January 2009, setting a six-month deadline for compliance. See ECHR, App. No. 33509/04, *Burdov v. Russia* (No. 2) (Jan. 15, 2009). However, in December 2009, the Committee of Ministers noted that, at the time, the court’s deadline had expired without the draft laws on implementation having even been submitted to the Russian Parliament. See COM Interim Resolution CM/ResDH(2009)158 (“strongly urg[ing] the Russian authorities to adopt without further delay the legislative reform required by the pilot judgment”)

93. See ECHR, App. No. 16492/02, *Lukenda v. Slovenia* (Apr. 13, 2006) (ordering Slovenia to amend existing legal remedies with respect to length of proceedings, where 500 cases were pending before the court; notably, however, the ECHR did not freeze other pending cases); ECHR, App. No. 46347/99, *Xenides-Arestis v. Turkey* (Dec. 22, 2005) (holding, post-*Loizidou*, that Turkey must introduce a remedy, available within three months from the date of judgment, capable of securing redress for applicants complaining denial of access to their property in northern Cyprus).

94. Helfer, at 148–49.

95. Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 57 *NOMIKO VIMA* (GREEK LAW JOURNAL) (2009).

96. Telephone interview with Vesselina Vandova, Interights, November 2009.

97. ECHR, App. No. 14556/89, *Papamichalopoulos and Others v. Greece* (Jun. 24, 1993) (compensation under Article 50).

98. *Id.*

99. See, e.g., ECHR, App. No. 32984/96, *Alfatli v. Turkey* (Oct. 30, 2003), para. 52 (“Where the Court finds that an applicant was convicted by a tribunal which was not independent and impartial within the meaning of Article 6(1), it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial by an independent and impartial tribunal.”); ECHR, App. No. 39748/98, *Maestri v. Italy*, para. 47 (Feb. 17, 2004) (“Article 41 empowers the Court to afford the injured party such satisfaction as appears to be appropriate.”).

100. ECHR, App. No. 71503/01, *Assanidze v. Georgia* (Grand Chamber) (Apr. 8, 2004).

101. *Id.*

102. ECHR, App. No. 48787/99, *Ilascu & Others v. Moldova and Russia* (Grand Chamber) (Jul. 8, 2004), para. 490.

103. Philip Leach, *Beyond the Bug River: New Approaches to Redress by the ECHR*, EUR. HUM. RTS. L.R. (2005).
104. Press Release, Council of Europe, “Council of Europe Secretary General Welcomes the Release of Tenguiz Assanidze” (Apr. 13, 2004).
105. Radio Free Europe/Radio Liberty, “Moldovan Separatists Release Last Political Prisoner” (Jun. 4, 2007).
106. See ECHR, App. No. 46468/06, *Aleksanyan v. Russia* (Dec. 22, 2008), paras. 238–29 (noting also that, “exceptionally, with a view to helping the respondent [s]tate to fulfill its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a systemic situation it has found to exist”). Similar arguments have not, however, prevailed before the court in a number of unresolved disappearance cases arising from the Chechen conflict, where applicants have unsuccessfully asked the court to order that an effective investigation be carried out. In these cases, the court concluded that because the effectiveness of the investigations had been compromised from the outset, it was “very doubtful that the situation existing before the breach could be restored.” See ECHR, App. No. 12703/02, *Musayeva v. Russia* (Jul. 3, 2008); ECHR, App. No. 7653/02, *Kaplanova v. Russia* (Apr. 29, 2008). See also Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, EUR. HUM. RTS. L. R. 732, 758–60 (2008, No. 6) (discussing oversight of Chechen cases generally).
107. ECHR Complaint, App. No. 23687/05, *Ivantoc, Popa, and Others v. Moldova and Russia* (Mar. 21, 2006). A final decision by the court on the petitioners’ complaint is still pending.
108. Murray Hunt, *State Obligations Following from a Judgment of the European Court of Human Rights*, in ECHR REMEDIES, at 25.
109. European Convention, Art. 46(1).
110. Darren Hawkins and Wade Jacoby, “Partial Compliance: A Comparison of the European and Inter-American Court for Human Rights,” at 20, available at [www.allacademic.com/meta/p278931\\_index.html](http://www.allacademic.com/meta/p278931_index.html). See also Barkhuysen and van Emmerik, at 3. (“[T]he Court is not competent to quash national legislation or decisions which are contrary to the ECHR, nor does it have the power to revise final decisions of national courts.”)
111. European Convention, Art. 46(2) (“The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”).
112. Greer, at 156.
113. *Id.*
114. Philip Leach, *On Reform of the European Court of Human Rights*, EUR. HUM. RTS. L.R. 725, 732 (2009, No. 6).
115. Andrew Drzemczewski, *The Work of the Council of Europe’s Directorate of Human Rights*, 11 HUM. RTS. L.J., 89–117 (1990).
116. Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements (“COM Rules”), 964th Meeting (May 10, 2006).
117. *Id.*, R. 7.

118. Lambert-Abdelgawad, *EXECUTION OF JUDGMENTS*, at 33.
119. *Id.* at 34.
120. Statute of the Council of Europe, Art. 21(a). Likewise, the Committee “shall determine what information shall be published regarding the conclusions and discussions of a meeting held in private.” *See* Art. 21(b).
121. *See* “Supervision of Execution—Implementation of judgments of the European Court of Human Rights,” available at [www.coe.int/t/dghl/monitoring/execution/Reports/Current\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Reports/Current_en.asp).
122. COM Rules, R. 9(1).
123. COM Rules, R. 9(2) and R. 9(3).
124. Leach, *On Reform of the European Court of Human Rights*, at 732; Telephone interview with Basak Cali, University College London, November 2009 (e-mail communication; on-file).
125. COM Rules, R. 16.
126. COM, 3RD ANNUAL REPORT, at 81–82.
127. CDDH, *Suggestions on Solutions in the Event of Slowness in the Execution of Judgments*, DH-PR (Apr. 2005).
128. Hunt, at 38–39.
129. *See, e.g.*, COM Memorandum, *Detention on Remand in the Russian Federation: Measures Required to Comply with the European Court’s Judgments*, CM/Inf/DH(2007)4 (Feb. 14, 2007).
130. Elizabeth Lambert-Abdelgawad, *The Execution of the Judgments of the European Court of Human Rights: Towards a Non-Coercive and Participatory Model of Accountability*, 69(3) HEIDELBERG J. INT’L L. (ZÄÖRV) 471, 504 (2009).
131. COM Deputies, *Human Rights Working Methods—Improved Effectiveness of the Committee of Minister’s Supervision of Execution of Judgments*, CM/Inf(2004)8Final (Apr. 7, 2004).
132. *Id.*, para. 2.
133. Interview with Gisella Gori, Department for the Execution of Judgments, December 2009.
134. Philip Leach, *The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights*, PUBLIC LAW (2006), 445–46 (citing *New Working Methods for Supervision of the Execution of the Court’s Judgments*, CM/Inf/DH(2005) (Jun. 30, 2005)).
135. *See* COM Rules, R. 4(1) (“The Committee of Ministers shall give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem in accordance with Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem.”).
136. COM Deputies, *New Working Methods for Supervision of the Execution of the Court’s Judgments*, CM/Inf/DH(2005)30 (Jun. 1, 2005), para.10.
137. COM Deputies, *Human Rights Working Methods*, CM/Inf(2004)8Final.
138. *See, e.g.* Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms—*Explanatory Report*, CETS No. 194 Agreement of Madrid (12.V.2009), para. 100. Among those states that have been suspended from the Council of Europe are Greece, following the instal-

lation of a military dictatorship in 1967 (in fact, Greece withdrew from the council before the committee voted for its suspension it was readmitted in 1974); Turkey, following a military coup in 1980 (it regained its membership in 1984, following the return of democratic elections); and Russia from 2000–01, as a result of its policies in Chechnya.

139. Lambert-Abdelgawad, EXECUTION OF JUDGMENTS, at 56.

140. Russia's refusal to ratify Protocol No. 14 had long delayed its coming into effect. Pending the ratification of Protocol 14 itself, a provisional Protocol 14*bis* was opened for signature in 2009, which allows the Court to implement revised procedures (largely relating to admissibility, not infringement or interpretation proceedings) in respect of those states that have ratified it.

141. *Id.* at paras. 97–100; see also Alistair Mowbray, *Protocol No. 14 to the European Convention on Human Rights*, (4)2 HUM RTS. L.R. 331–36 (2004).

142. *Protocol No. 14 Explanatory Report*, para. 99.

143. Lambert-Abdelgawad, EXECUTION OF JUDGMENTS, at 58. See also PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS (Paul Lemmens and Wouter Vandenhoele eds., 2005).

144. Mowbray, ECHR CASES & MATERIALS, at 885.

145. Other functions entrusted to PACE include the election of the Secretary General of the Council of Europe, the judges of the European Court, and the members of the European Committee for the Prevention of Torture.

146. See PACE Order No. 508; PACE Resolution 1155, *Progress of the Assembly's Monitory Procedures*, Doc. 8057 (Apr. 21, 1998).

147. PACE Order No. 485 (1993) and Order No. 488 (1993), extended by Order No. 508 (Apr. 26, 1995).

148. PACE Monitoring Committee, available at [www.assembly.coe.int/ASP/AssemblyList/Annuaire\\_03W\\_CommitteePolGroup.asp?ComID=4](http://www.assembly.coe.int/ASP/AssemblyList/Annuaire_03W_CommitteePolGroup.asp?ComID=4).

149. See, e.g., PACE Doc. 1124 (Mar. 15, 2007) (Rapporteur: E. Litner); PACE Doc. 11628 (Jun. 9, 2008) (Rapporteur: S. Holovaty).

150. Lambert-Abdelgawad, EXECUTION OF JUDGMENTS, at 59–61.

151. See PACE Resolution 1226, para. (11)(C)(iv).

152. Lambert-Abdelgawad, EXECUTION OF JUDGMENTS, at 60. See also PACE Resolution 1268 (2002), *Implementation of Decisions of the European Court of Human Rights* (Jan. 22, 2002).

153. See Pourgourides Report, paras. 48–51.

154. *Id.* at para. 52.

155. Andrew Drzemczewski, *The Parliamentary Assembly's Involvement in the Supervision of the Judgments of the Strasbourg Court*, NETH. Q. HUM. RTS. 1, 3 (March 2010) (on-file); see also Reply from the Committee of Ministers to PACE Recommendation 1764 (2006) Doc. 11230 (Apr. 2, 2007) (welcoming the Assembly's greater involvement in enforcement, but "recall[ing] that the supervision of the execution of the Court's judgments is the Committee's responsibility under Article 46 of the European Convention").

156. See, e.g., COM Declaration, *Sustained Action to Ensure the Effectiveness of the Implementation of the European Convention on Human Rights at National and European Levels*, Dec-19.05.2006E, (19 May 2006) (instructing the Ministers' Deputies "to draw up a recommendation to member states on efficient domestic capacity for rapid execution of the Court's judgments" and inviting representatives of the Parliamentary Assembly "to be associated with it").

157. Lambert-Abdelgawad, EXECUTION OF JUDGMENTS, at 63.

158. See PACE Legal Affairs Committee—Background Document, *Parliamentary Scrutiny of the Standards of the European Convention on Human Rights*, AS/Jur/Inf(2009)02 (Oct. 18, 2009), at Sec. B, para. 8 ("The 'double mandate' of parliamentarians—as members of PACE and of their respective national parliaments—can be of considerable importance when, in particular, legislative action is required to ensure rapid compliance with Strasbourg Court judgments.").

159. COM Resolution 99(50), *On the Council of Europe Commissioner for Human Rights* (May 7, 1999).

160. COM Declaration, *Sustained Action to Ensure the Effectiveness of the Implementation of the European Convention on Human Rights at National and European Levels*, Dec-19.05.2006E.

161. Greer, at 310–11.

162. *Protocol No. 14 Explanatory Report*, para. 87.

163. Lambert-Abdelgawad, EXECUTION OF JUDGMENTS, at 36.

164. Telephone interview with Simon Palmer, Committee of Ministers Secretariat, October 2009.

165. Telephone interview with Yonko Grozev, Centre for Liberal Strategies, November 2009. Grozev has written elsewhere that, "The first aspect of the enforcement of individual judgments of the ECHR, namely paying the compensation, works well. There are no delays and the [Bulgarian] Government fully respects its responsibilities." See Yonko Grozev & Rashko Dorosiev, JURISTRAS, "Enhancing the Role of the European Court of Human Rights in Bulgaria: Policy Recommendations" (April 2009), at [www.juristras.eliamep.gr/wp-content/uploads/2009/12/enhancing-the-role-of-the-european-court-of-rights-in-bulgaria.pdf](http://www.juristras.eliamep.gr/wp-content/uploads/2009/12/enhancing-the-role-of-the-european-court-of-rights-in-bulgaria.pdf).

166. Michael O'Boyle, *On Reforming the Operation of the European Court of Human Rights*, EUR. HUM. RTS. L.R. 1, 7 (2008, No. 1).

167. While space does not permit for a full accounting of these achievements here, the Department for the Execution of Judgments regularly updates a list of all the general measures that states have undertaken as a result of the Court's rulings. See [www.coe.int/t/dghl/monitoring/execution/Documents/MGindex\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Documents/MGindex_en.asp). Similarly, JURISTRAS, a project housed at the Hellenic Foundation for European and Foreign Policy, includes country-specific reports that highlight the domestic implementation record of a number of Council of Europe countries. See "The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, State Implementation and Domestic Reform," available at [www.juristras.eliamep.gr](http://www.juristras.eliamep.gr).

168. See PACE Resolution 1226, para. 8.

169. Telephone interview with Yonko Grozev, Centre for Liberal Strategies, November 2009.

170. ECHR, App. No. 18984/91, *McCann and Others v. United Kingdom* (Sep. 27, 1995).

171. ECHR, App. No. 74025/01, *Hirst v. United Kingdom* (Oct. 6, 2005).

172. Grozev, at 10.
173. *Id.*
174. Dinah Shelton, *Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 142 (2003).
175. See, e.g., COM Memorandum, *Violations of the ECHR in the Chechen Republic: Russia's Compliance with the European Court's Judgments*, CM/Inf/DH(2006)32 (12 June 2007); COM Memorandum, *Cases Concerning the Action of Security Forces in Northern Ireland*, CM/Inf/DH(2008)2 revised (19 Nov. 2008) (concerning six cases involving actions of security forces in Northern Ireland).
176. Human Rights Watch, "Who Will Tell Me What Happened to My Son?" *Russia's Implementation of European Court of Human Rights Judgments on Chechnya* (September 2009). The report notes, too, that, even in cases in which the ECHR has found that the perpetrators are known, and named in its judgments, no investigations have been undertaken by the Russian government. Other problems include: the state's failure to inform the aggrieved parties about the investigation; failure to provide access to criminal case files; inexplicable delays in investigation; and legal obstacles preventing investigators from accessing evidence held by Russian military or security services.
177. See, e.g., COM Recommendation (2010)3 *On Effective Remedies for Excessive Length of Proceedings* (Feb. 24, 2010).
178. Walter Schwimmer, *Towards a European Constitution? The European Convention on Human Rights and its Implementation* (May 30, 2003), para. 59; John Sims, *Compliance Without Remands: The Experience Under the European Convention on Human Rights*, 36 ARIZ. ST. L.J. 639, 658 (2004).
179. Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments*, Fifteenth Report of Session 2009–10 (Mar. 9, 2010), para. 168.
180. Interlaken Declaration, at 3, Sec. B(4).
181. See PACE Recommendation 1764(2006), *Implementation of the Judgments of the European Court of Human Rights* (2 Oct. 2006), para. 1.4 (urging member states to "improve and where necessary to set up domestic mechanisms and procedures—both at the level of governments and of parliaments—to secure timely and effective implementation of the Court's judgments through coordinated action of all national actors concerned and with the necessary support at the highest political level"); COM Recommendation (2008)2 *On Efficient Domestic Capacity for Rapid Execution of Judgments* (6 Feb. 2008) (recommending, *inter alia*, that members states "designate a coordinator—individual or body—of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process").
182. See Anthony Lester and Kay Taylor, *Parliamentary Scrutiny of Human Rights*, in HUMAN RIGHTS LAW AND PRACTICE (2ND ED.) 599–618 (Lord Lester of Herne Hill and David Pannick eds., 2004).
183. Telephone interview with Murray Hunt, Joint Committee on Human Rights, December 2009.
184. Lester and Taylor, at 611. Notably, the committee's authorities are not limited to the European Convention exclusively; it may, for instance, question ministers on compatibility questions arising from the UK's other human rights obligations, such as the International Covenant on Civil and Political Rights, and other specialized United Nations conventions.

185. *Id.*
186. Interview with Anthony Lester, Q.C., September 2009.
187. See ECHR, App. No. 28957/95, *Goodwin v. United Kingdom* (Grand Chamber) (Jul. 11, 2002).
188. Ukraine introduced a new law in 2006 that imposes various obligations on the “Office of the Government Agent” in the preparation and publication of ECHR judgments. It also imposes the responsibility on the office of proposing to the Cabinet of Ministers (within a month of a judgment becoming final) what general measures should be implemented. The government agent is also required to prepare an “analytical review” for the country’s Supreme Court, which should include proposals to bring national courts’ case law into conformity with the convention, and to draft proposals to be taken into account in the drafting of laws, which are submitted to the Ukrainian Parliament. See PACE Report, Doc. 11020, *Implementation of Judgments of the European Court of Human Rights* (Sep. 18, 2006), at 49–56.
189. Drzemczewski, *The Parliamentary Assembly’s Involvement in the Supervision of the Judgments of the Strasbourg Court*, at 7.
190. *Id.*
191. See Pourgourides Report, para. 29.
192. Interview with Gisella Gori, Department for the Execution of Judgments, December 2009.
193. “Response of the European Group of National Human Rights Institutions on the Draft Declaration of the Interlaken Ministerial Conference” (on-file; e-mail communication); see also PACE, *The Future of the Strasbourg Court and Enforcement of ECHR Standards: Reflections on the Interlaken Process* (Mrs. Herta Däubler-Gmelin), AS/Jur(2010)06 (Jan. 21, 2010), para. 3 (noting that, while circulating the draft Interlaken Declaration, “the potentially key role of national legislative organs and of the Assembly [was] not alluded to.”).
194. B. Lindsnoes and L. Lindholt, *National Human Rights Institutions: Standard-Setting and Achievements*, in HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 1, 3–10 (1998).
195. Greer, at 314.
196. Leach, *On Reform of the European Court of Human Rights*, at 728 (“Granting cases priority treatment should be much more meaningful than it is at present.”).
197. *Id.*
198. Costas Paraskeva, *Returning the Protection of Human Rights to Where They Belong, At Home*, 12(3) INT’L J. HUM. RTS. 415, 440 (June 2008). Notably, the Human Rights and Social Justice Research Institute at London Metropolitan University is currently carrying out a research project on the use and impact of pilot judgments at the national level. A seminar to disseminate the report’s findings was held in Strasbourg in June 2010. See “Responding to Systemic Human Rights Violations: An Analysis of ‘Pilot Judgments’ of the European Court of Human Rights and their Impact within National Systems,” available at [www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm](http://www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm).
199. Fredrik Sundberg, *Control of Execution of Decisions Under the European Convention on Human Rights—A Perspective on Democratic Security, Inter-Governmental Cooperation, Unification and Indi-*

*vidual Justice in Europe*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER, 2ND ED. 321, 334 (G. Alfredsson, et al. eds., 2009).

200. Leach, *On Reform of the European Court of Human Rights*, at 732.

201. Interview with Gisella Gori, Department for the Execution of Judgments, November 2009 (concerning ECHR, App. No. 15472/02, *Folgero and Others v. Norway* (Jun. 29, 2007)).

202. As a result of her interviews, Professor Cali has been undertaking a series of training seminars with NGOs in Croatia and Turkey, and is preparing a handbook entitled “How to Monitor Compliance with ECtHR Judgments? A Handbook for Compliance Constituents.” In January 2010, she also co-organized a workshop on the implementation of judgments and the ways in which members of civil society can monitor and influence the compliance process with the University of Ankara. See “The Legitimacy and Authority of Supranational Human Rights Courts” (project website), available at <http://ecthrproject.wordpress.com/>.

203. COM Resolution (2004)3 (“Considering that the execution of judgments *would be facilitated* if the existence of a systemic problem is *already identified in the judgment of the Court.*”) (emphasis added).

204. R. Harmsen, *The European Convention on Human Rights After Enlargement*, 5 INT’L J. HUM. RTS. 18, 34 (2001).

205. See, e.g., *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203 (Nov. 15, 2006), para. 105 (encouraging the Court to use the “pilot judgment” procedure as far as possible in future”).

206. Interview with Anthony Lester, Q.C., September 2009.

207. Sundberg, at 330–32.

208. Lambert-Abdelgawad, EXECUTION OF JUDGMENTS, at 55. For instance, in the case of ECHR, App. No. 32772/02, *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, (Jun. 30, 2009), the Court dodged the question, finding instead that the Swiss authorities’ failure to authorize the broadcasting of a commercial (previously held to violate Article 10), constituted a fresh Article 10 violation rather than a breach of an existing violation.

209. Press Release, “Launching of the Human Rights Trust Fund Project: Meeting with Local Project Officer,” at [www.coe.int/t/dghl/monitoring/execution/news/archive/news\\_hrtf\\_I\\_EN.asp](http://www.coe.int/t/dghl/monitoring/execution/news/archive/news_hrtf_I_EN.asp).

210. See, e.g., *Report of the Group of Wise Persons to the Committee of Ministers*, paras. 72–74 (noting that “responsibility for translation, publication and dissemination of case-law lies with the member states and their competent bodies”; further, the “basic principles of international and European law should be compulsory subjects in both secondary and university-level education”).

211. Paul Mahoney, *A European Judicial Training Institute on Human Rights*, EUR. HUM. RTS. L. R. 123, 130–34 (2009, No. 2).

212. The American Convention, the principal instrument of the Inter-American System, standardized the individual petitions procedure of the Inter-American Commission and established the Inter-American Court in 1978. See American Convention on Human Rights, O.A.S. Treaty Series No. 36, entered into force Jul. 18, 1978.

213. See Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31(4) HUM. RTS. Q. 856, 856–87 (2009); see also Claudio Grossman, *The Inter-American System of Human Rights: Challenges for the Future*, 83 IND. L. J. 1267 (SYMPOSIUM: LATINOS AND LATINAS AT THE EPICENTER OF CONTEMPORARY LEGAL DISCOURSES GENDER AND HUMAN RIGHTS) (Fall 2008).

214. See Cavallaro and Brewer, at 768.

215. Viviana Krsticevic, *Reflexiones sobre la ejecución de sentencias de las decisiones del sistema interamericano de protección de derechos humanos*, in IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS; JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES, CEJIL (Dec. 2007).

216. See Mark Toufayan, *Identity, Effectiveness, and Newness in Transjudicialism's Coming of Age* 31 MICH. J. INT'L L. 307 (Winter 2010).

217. IACHR Annual Report 2008, Legal Basis, Functions, and Powers.

218. *Id.*

219. IACHR Annual Report 2009, Statistics.

220. IACHR Annual Report 2009, Chapter III, Petitions and the Case System, Status of Compliance with the Recommendations of the IACHR. Specifically, the Inter-American Commission reported that of the 128 friendly settlement agreements and final merits decisions it had issued since 2000, 16 (or 12.5 percent) had reached “full compliance,” 23 (or 18 percent) were “pending compliance,” and 89 (or 69.5 percent) were in a state of “partial compliance.”

221. IA Court HR, *Loayza-Tamayo v. Peru*, Series C No. 33 (Sep. 17, 1997), paras. 79–80.

222. See American Convention, at Art. 62.

223. See Inter-American Court website, “Decisions and Judgments,” available at [www.corteidh.or.cr/casos.cfm](http://www.corteidh.or.cr/casos.cfm). The Court's 116 reparations decisions in the following proportions: Argentina (6), Barbados (2), Bolivia (2), Brazil (3), Chile (4), Colombia (10), Costa Rica (1), Dominican Republic (1), Ecuador (8), El Salvador (2), Guatemala (13), Haiti (1), Honduras (6), Mexico (3), Nicaragua (3), Panama (3), Paraguay (6), Peru (26), Surinam (4), Trinidad and Tobago (2), and Venezuela (10). The two cases in which the Court issued a merits decision but did not find a violation of the American Convention were IA Court HR, *Fairén-Garbi and Solís-Corrales v. Honduras*, Series C No. 6 (Mar. 15, 1989) and IA Court HR, *Nogueira de Carvalho et al. v. Brazil*, Series C No. 161 (Nov. 28, 2006).

224. See IA Court HR Annual Report 2009, at 79–82.

225. Summary of the IACtHR 2007 Annual Report, Submitted to the OAS Commission on Juridical and Political Affairs, at [www.corteidh.or.cr/docs/discursos/medina\\_03\\_04\\_08\\_ing.pdf](http://www.corteidh.or.cr/docs/discursos/medina_03_04_08_ing.pdf).

226. See, e.g., Kali Wright-Smith, “The Decision to Comply: Examining Patterns of Compliance with Inter-American Human Rights Bodies” (2009); Darren Hawkins and Wade Jacoby, “Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights” (2008); Courtney Hillebrecht, “Domestic Politics, International Human Rights Adjudication, and the Problem of Political Will: Cases from the Inter-American Human Rights System” (2009); Gwyneth McClendon, “Commitment Without Compliance: Settlements and Referrals of Human Rights Cases in the Inter-American System” (2009).

227. Asociación por los Derechos Civiles, *The Effectiveness of the Inter-American System for the Protection of Human Rights: Quantitative Approach on the System's Operation and the Compliance with its Decisions* ("ADC Study") (2009), available at [www.adc-sidh.org/documentos.php?idsec=3&idsubo=460](http://www.adc-sidh.org/documentos.php?idsec=3&idsubo=460).
228. *Id.* at Sec. III.4.
229. See generally Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).
230. See IA Court HR, *Velásquez-Rodríguez v. Honduras*, Series C No. 4 (Jul. 29, 1988).
231. See Grossman, at 1271–74.
232. IA Court HR, *Velásquez-Rodríguez v. Honduras*, Series C No. 7 (Jul. 21, 1989), Resolutions 1–4.
233. *Id.* at Resolution 5.
234. *Id.* at para. 32.
235. *Id.* at paras 34–35.
236. *Id.*
237. See Cavallaro and Brewer, at 791.
238. In an interview with former Inter-American Commissioner Juan Mendez (2000–03), he indicated that for a variety of political reasons, one of which was the pressure generated as a result of the *Velásquez Rodríguez* decision, forced disappearances had likely ceased in Honduras by the time the decision was issued.
239. See IA Court HR, *Plan de Sánchez Massacre v. Guatemala*, Monitoring Compliance with Judgment (Jul. 01, 2009); IA Court HR, *Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment (Jul. 08, 2009).
240. See IA Court HR, *Baena-Ricardo et al. v. Panama*, Monitoring Compliance with Judgment (Jul. 01, 2009); IA Court HR, *"Five Pensioners" v. Peru*, Monitoring Compliance with Judgment, (Nov. 24, 2009).
241. See IA Court HR, *López-Álvarez v. Honduras*, Monitoring Compliance with Judgment (Feb. 6, 2008); IA Court HR, *Yean and Bosico v. Dominican Republic*, Monitoring Compliance with Judgment (Nov. 28, 2007).
242. See Antkowiak, at 368.
243. See IA Court HR, *Villagrán-Morales et al. v. Guatemala*, Monitoring Compliance with Judgment (Nov. 11, 2008).
244. See IA Court HR, *Myrna Mack-Chang v. Guatemala*, Monitoring Compliance with Judgments (Aug. 14, 2009).
245. See IA Court HR, *Huilca-Tecse v. Peru*. Monitoring Compliance with Judgment (Feb. 7, 2008).
246. See ADC Study, at Graphs 2, 6.
247. See IA Court HR, *Blanco-Romero et al v. Venezuela*, Monitoring Compliance with Judgment (Jul. 7, 2009); IA Court HR, *Yean and Bosico v. Dominican Republic*, Monitoring Compliance with Judgment (Nov. 28, 2007).

248. See IA Court HR, *Moiwana Community v. Suriname*, Monitoring Compliance with Judgment (Nov. 21, 2007).
249. See ADC Study, at Graph 6.
250. Viviana Krsticevic, Implementación de las Decisiones del Sistema Interamericano de Derechos Humanos; Aportes para los Procesos Legislativos, Anexo I.7, CEJIL (2009) (citing *General Gallardo v. Mexico* (IACHR), *Guillermo Maqueda v. Argentina* (IA Court), *San Agustín v. Mexico* (IACHR), *De La Cruz Flores v. Peru* (IA Court)).
251. See Antkowiak, at 369–70.
252. IA Court HR, *Loayza-Tamayo v. Peru*, Monitoring Compliance with Judgment (Feb. 06, 2008).
253. IA Court HR, *Ivcher-Bronstein v. Peru*, Series C No. 74 (Feb. 6, 2001).
254. IA Court HR, *Ivcher-Bronstein v. Peru*, Monitoring Compliance with Judgment (Nov. 24, 2009), operative para. 3(b).
255. *Id.* at operative para. 3(a).
256. IA Court HR, *El Amparo v. Venezuela*, Series C No. 28 (Sep. 14, 1996).
257. IA Court HR, *El Amparo v. Venezuela*, Monitoring Compliance with Judgment (Jul. 4, 2006); see also IA Court HR Annual Report 2008.
258. See IA Court HR, *Castillo-Páez v. Peru*, Monitoring Compliance with Judgment (Apr. 3, 2009).
259. See ADC Study, at Graph 6.
260. See Krsticevic, at 52–55.
261. IA Court HR, *Castillo-Páez v. Peru*, Series C No. 43 (Nov. 27, 1998).
262. See Krsticevic, at 53.
263. See IACHR, *Alicia Consuela Herrera et al. v. Argentina* (Law N° 23,492), Report N° 28/92 (Oct. 2, 1992).
264. See Julieta Di Corleto, *El Reconocimiento de las Decisiones de la Comisión y la Corte Interamericana en las Sentencias de la Corte Suprema de Justicia de Argentina*, in IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS; JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES, CEJIL (Dec. 2007).
265. Interview with Ariel Dulitzky, UT Law Human Rights Clinic, November 2009.
266. See Krsticevic, at 56–57.
267. See IA Court HR, *Bulacio v. Argentina*, Monitoring Compliance with Judgment Order (Nov. 26, 2008); see also IA Court HR, *La Cantuta v. Peru*, Monitoring Compliance with Judgment (Nov. 20, 2009).
268. See Krsticevic, at 58–61.
269. See IA Court HR, *Barrios Altos v. Peru*, Monitoring Compliance with Judgment (Aug. 04, 2008).
270. *Loayza-Tamayo*, at operative para. 5.

271. IA Court HR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Series C No. 94 (Jun. 21, 2002), operative para. 8.
272. *Yean and Bosico*, at operative para. 8.
273. See Press Release, “Dominican Constitution Reform Threatens to Increase Number of Stateless Persons,” Robert F. Kennedy Center for Human Rights and Justice (Feb. 5, 2010), available at [www.rfkcenter.org/node/426](http://www.rfkcenter.org/node/426).
274. See ADC Study, at Graphs 2, 6.
275. In August 2006, President Luiz Inácio Lula da Silva signed the “Lei Maria da Penha” (Lei 11.340/2006) into law. The law was named after Maria da Penha, the victim of domestic violence in a case before the commission, as symbolic reparation for the harm she had suffered and in recognition of her twenty-year battle to bring her case to justice. The state reported to the commission in 2008 that “the Maria da Penha Law incorporates major gains in the protection of women: the criminalization of domestic and family violence against women in their various forms of expression; the creation of Courts on Domestic and Family Violence; and the creation of the Offices of Ombudspersons for Women, among other measures.” See IACHR Annual Report 2008, Chapter III, Petition and Case System, Status of Compliance with the Recommendations of the IACHR, Case 12.051, Report No. 54/01, *Maria da Penha Maia Fernandes v. Brazil* (noting that the petitioners had not provided information on compliance).
276. On June 4, 2003, Guatemala adopted the Integral Protection of Children and Adolescents Act, which protects the rights of childhood in a way that is more in keeping with the terms of Article 19 of the American Convention than the legislation previously in force. See IA Court HR, “*Street Children*” (*Villagrán-Morales et al.*) v. *Guatemala*, Monitoring Compliance with Judgment (Nov. 27, 2003).
277. See ADC Study, at Graphs 2, 6.
278. IA Court HR, *Mapiripán Massacre v. Colombia*, Series C No. 134 (Sep. 15, 2005), operative para. 13.
279. IA Court HR, *Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment (Jul. 08, 2009).
280. IA Court HR, *Tibi v. Ecuador*, Series C No. 114 (Sep. 7, 2004), operative para. 13.
281. *Id.*
282. IA Court HR, *Tibi v. Ecuador*, Monitoring Compliance with Judgment (Jul. 1, 2009).
283. IA Court HR, *Plan de Sánchez Massacre v. Guatemala*, Series C No. 116 (Nov. 19, 2004), operative para. 9.
284. IA Court HR, *Plan de Sánchez Massacre v. Guatemala*, Monitoring Compliance with Judgment (Jul. 1, 2009).
285. IA Court HR, *Moiwana Community v. Suriname*, Series C No. 124, (Jun. 15, 2005), operative para. 3.
286. *Id.*
287. *Id.* at operative paras. 4–5.

288. IA Court HR, *Moiwana Community v. Suriname*, Monitoring Compliance with Judgment (Nov. 21, 2007).

289. IA Court HR, *Godínez-Cruz v. Honduras*, Series C No. 8 (Jul. 21, 1989).

290. See Cavallaro and Brewer, at 791.

291. IA Court HR, *Aloboetoe et al. v. Suriname*, Series C No. 15 (Sep. 10, 1993).

292. IA Court HR, *Gangaram-Panday v. Suriname*, Series C No. 16 (Jan. 21, 1994).

293. On September 1, 2010, the Inter-American Court issued a resolution announcing the full implementation of its decision in *Tristán Donoso v. Panamá*. See IA Court HR, *Tristán Donoso v. Panamá*, Monitoring Compliance with Judgment (Sep. 1, 2010). However, because this chapter covers the activities of the court through 2009, this very significant was not incorporated into the following analysis.

294. See Alvarado, Leonardo J., *Prospects and Challenges in the implementation of Indigenous Peoples' Human Rights in international law: Lessons from the case Awas Tingi v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. LAW 609 (2007).

295. It is worth noting that this law was promulgated in part because the World Bank had conditioned the disbursement of aid on such a law to provide clarity on the title to certain lands for investment interests.

296. IA Court HR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Monitoring Compliance with Judgment (Apr. 3, 2009).

297. See Cavallaro and Brewer, at 791.

298. IA Court HR, *Moiwana Community v. Suriname*, Monitoring Compliance with Judgment (Nov. 21, 2007); see IA Court HR, *Saramaka People v. Suriname*, Series C No. 172 (Nov. 28, 2007). The court has not issued a decision on monitoring compliance with the *Saramaka* decision, but because it reports that case to the OAS in its annual report as being non-complaint, it is assumed that the state has not complied with its order. See IA Court HR Annual Report 2008.

299. IA Court HR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment (May 20, 2009); IA Court HR, *Yakye Axa Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment (Feb. 08, 2008).

300. IA Court HR, *"The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, Monitoring Compliance with Judgment (Nov. 28, 2003).

301. *Id.*

302. IA Court HR, *Claude-Reyes et al. v. Chile*, Monitoring Compliance with Judgment (Nov. 24, 2008).

303. Interview with Darian Pavli, OSJI Legal Officer, December 2009.

304. IA Court HR, *Ricardo Canese v. Paraguay*, Series C No. 111 (Aug. 31, 2004).

305. See IA Court HR, *Ricardo Canese v. Paraguay*, Monitoring Compliance with Judgment (Feb. 6, 2008).

306. IACHR, *Alejandra Marcela Matus Acuña et al. v. Chile*, Report N° 90/05 (2005).

307. IACHR Annual Report 2008.
308. IA Court HR, *Palamara-Iribarne v. Chile*, Monitoring Compliance with Judgment (Nov. 30, 2007).
309. *Id.*
310. Interview with Liliana Tojo, CEJIL, November 2009.
311. See AG/RES. 1716 (XXX-O/00).
312. See AG/RES. 1827 (XXXI-O/01).
313. See AG/RES. 1918 (XXXIII-O/03).
314. See AG/RES. 2043 (XXXIV-O/04).
315. See AG/RES. 2129 (XXXV-O/05).
316. See AG/RES. 2500 (XXXIX-O/09).
317. See Antônio Augusto Cançado Trindade, *Fragmentos de Primeras Memorias de la Corte Interamericana de Derechos Humanos*, JORNADAS DE DERECHO INTERNACIONAL 19–26 (2007).
318. See IACHR Annual Report 2001, Chapter III, Petitions and the Case System, Status of Compliance with the Recommendations of the IACHR.
319. See IACHR Annual Report 2002, Chapter III, Petitions and the Case System, Status of Compliance with the Recommendations of the IACHR.
320. See IACHR Annual Reports 2003–2006.
321. See IACHR Annual Reports 2007–2008.
322. See IACHR Annual Reports 2009.
323. Under the working meeting model, the commission will call the parties into a closed session to discuss case related developments; in contrast to admissibility, merits, and thematic hearings, such sessions are closed to the public.
324. See IACHR Press Release, N° 84/09 rev., “CIDH Published its New Rules of Procedure,” available at <http://cidh.org/Comunicados/English/2009/84-09reveng.htm>.
325. Veronica Gomez, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: New Rules and Recent Cases*, 1(1) HUM. RTS. L. R. (2001), at <http://hrlr.oxford-journals.org/cgi/reprint/1/1/111.pdf>.
326. Some have criticized that the focus on output has led to shorter hearings and written decisions, which in turn has allowed less space for advocacy, which is often what creates the pressure for genuine compliance. The same critics argue for a more deliberate balance between the issues taken up by the high Court, and the time allocated to public hearings and open deliberation of the human rights violations at issue. See Cavallaro and Brewer at 785.
327. IA Court HR, *Baena-Ricardo et al. v. Panama*, Series C No. 104, (Nov. 28, 2003), para. 90.
328. See Krsticevic, at p. 32, note 73 (citing specifically Resolutions on Compliance in *Castillo Partruzzi y otros* and *Loyaza Tamayo*).

329. Compare the list of final decisions and judgments issued by the Inter-American Court and the list of Inter-American Court orders on monitoring compliance with judgments, *available at* [www.corteidh.or.cr/casos.cfm](http://www.corteidh.or.cr/casos.cfm) and [www.corteidh.or.cr/supervision.cfm](http://www.corteidh.or.cr/supervision.cfm).

330. *See generally* “Rules of Procedure of the Inter-American Court of Human Rights,” adopted June 1, 2001, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/1.4 rev.9 (2003), *available at* [www1.umn.edu/humanrts/iachr/ruler12-03.html](http://www1.umn.edu/humanrts/iachr/ruler12-03.html).

331. IA Court HR, *Barrios Altos v. Peru*, Series C No. 87, (Nov. 30, 2001), operative para. 7; IA Court HR, *Durand and Ugarte v. Peru*, Series C No. 89 (Dec. 3, 2001), operative para. 5.

332. IA Court HR, *Cantoral-Benavides v. Peru*, Series C No. 88 (Dec. 3, 2001), operative para. 12.

333. Notably, while the timetables associated with specific reparations have become increasingly specific over time, in the past two years, the court has become less consistent in establishing timetables for State compliance reporting, actually declining to do so in a handful of recent decisions.

334. *See* *Trinidad*, at 19–26.

335. IA Court HR, Resolution of June 29, 2005, “Supervisión de cumplimiento de sentencias (Aplicabilidad del Artículo 65 de la Convención Americana sobre Derechos Humanos),” *at* [www.corteidh.or.cr/docs/supervisiones/general\\_29\\_06\\_05.pdf](http://www.corteidh.or.cr/docs/supervisiones/general_29_06_05.pdf).

336. *Id.* at paras. 1–9.

337. *Id.* at operative paras. 1–2.

338. *See* *Krsticevic*, at 33.

339. IA Court HR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Series C No. 146 (March 29, 2006).

340. IA Court HR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment (Feb. 8, 2008).

341. IA Court HR, *Molina Theissen v. Guatemala*, Monitoring Compliance with Judgment (November 16, 2009).

342. *Id.* at operative paras. 3(a)–(d).

343. *Id.* at operative paras. 4–5.

344. Interview with Francisco Quintana, CEJIL, December 2009.

345. *See* AG/RES. 2500 (XXXIX-O/09).

346. *See* IACtHR Annual Report 2009, p. 65.

347. *See* IACtHR Annual Report 2009, p. 65.

348. IACtHR, Resolution April 29, 2010, *at* [www.corteidh.or.cr/docs/asuntos/8casos\\_29\\_04\\_10.pdf](http://www.corteidh.or.cr/docs/asuntos/8casos_29_04_10.pdf).

349. *See* Rules of Procedure of the Inter-American Court for Human Rights, Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009, *at* [www.corteidh.or.cr/regla\\_eng.pdf](http://www.corteidh.or.cr/regla_eng.pdf).

350. *See* IA Court HR, “Statement of Motives for the Reform of the Rules of Procedure,” *at* [www.corteidh.or.cr/regla\\_eng.pdf](http://www.corteidh.or.cr/regla_eng.pdf).

351. Supreme Decree 014-2000-JUS, Regulate the Procedure to Follow-Up on the Recommendations of International Human Rights Bodies (Dec. 22, 2000).
352. *Id.* at Art. 1.
353. *Id.* at Art. 2.
354. *Id.* at Art. 3.
355. Supreme Decree No 015-2001-JUS, Approve the Regulations of the National Human Rights Advisory and Create the Special Commission to Follow-Up on International Procedures (Apr. 27, 2001).
356. *Id.* at Art. 21.
357. *Id.* at Art. 22 and 23(a).
358. *Id.* at Art. 23(b).
359. *Id.* at Art. 23(c), (d).
360. *Id.* at Art. 23(d), (e), (f).
361. Law No 27.775, Regulate the Procedure for the Execution of Judgments Emitted by Supranational Tribunals (Jun. 27, 2002) (unofficial translation; law not available in English).
362. *Id.* at Art. 2.
363. *Id.* at Art. 2(a).
364. *Id.* at Art. 2(b).
365. *Id.* at Art. 2(c).
366. *Id.* at Art. 2(d), 3–5.
367. Interview with Maria Clara Galvis, DPLF, November 2009.
368. Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention*, 22(3) NETH Q. H.R. (2004).
369. Rodrigo Uprimny, *La fuerza vinculante de las decisiones de los organismos internacionales de derechos humanos en Colombia: un examen de la evolución de la jurisprudencia constitucional*, in IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS; JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES, CEJIL (December 2007).
370. Law 288/96, Regulate the Procedure for the Indemnity of Victims of Human Rights Violations, (Jul. 5, 1996) (unofficial translation; law not available in English).
371. *Id.* at Art. 2.
372. *Id.* at Art. 2–14.
373. Interview with Michael Camilleri, CEJIL, November 2009.
374. *Id.*
375. *Id.* (noting that Colombian organizations are usually party to the domestic proceedings and will have access to the files for the investigation).
376. Law 6889, Agreement between the Government and Inter-American Court of Human Rights (1983).

377. See IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS; JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES, CEJIL (Dec. 2007).

378. *Id.*

379. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

380. Communications by individuals alleging human rights violations by states parties to the charter are processed under Article 55, which are called "other communications," a practice discussed in more detail below.

381. Protocol to the African Charter of Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, *available at* [www.achpr.org/english/\\_info/court\\_en.html](http://www.achpr.org/english/_info/court_en.html).

382. Ibrahima Kane and Ahmed C. Motala, *The Creation of a New African Court of Justice and Human Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1989-2006*, 2ND ED. 406-08 (2008).

383. *Id.* at 408-409

384. See "Host Agreement between the Government of the United Republic of Tanzania and the African Union on the Seat of the African Court on Human and Peoples' Rights in Arusha, Tanzania," *at* [www.african-court.org/fileadmin/documents/Court/Host\\_agreement/agreement-Tanzania%20and%20AU.pdf](http://www.african-court.org/fileadmin/documents/Court/Host_agreement/agreement-Tanzania%20and%20AU.pdf).

385. See Institute for Human Rights and Development in Africa, *COMPILATION OF DECISIONS ON COMMUNICATIONS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, EXTRACTED FROM THE COMMISSION'S ACTIVITY REPORTS 1994-2001; ACHR Activity Reports 10-26* (The African Commission did not begin to make its work on individual communications public until its 10th Activity Report).

386. See "List of Countries that Have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights," *available at* [www.achpr.org/english/ratifications/ratification\\_african%20charter.pdf](http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf). Those cases involved AU member states in the following proportions: Angola (2), Benin (1), Botswana (1), Burkina Faso (1), Burundi (2), Cameroon (3), Chad (1), Democratic Republic of Congo (1), Republic of Congo (1), Côte d'Ivoire (2), Eritrea (2), the Gambia (2), Ghana (1), Guinea (1), Kenya (1), Madagascar (2), Mauritania (3), Nigeria (19), Rwanda (2), Sudan (4), Sierra Leone (1), Swaziland (1), Uganda (1), Zaire (1), Zambia (2), and Zimbabwe (4). Because one of these cases was filed against Burundi, Rwanda, and Uganda, and is counted here as one case for each country; accordingly, the numbers do not add up to 60.

*Id.* at Art. 30.

387. See "Judgment in the Matter of Michelot Yogogombaye vs. The Republic of Senegal," App. No. 001/2008, *available at* [www.african-court.org/en/cases/latest-judgments/](http://www.african-court.org/en/cases/latest-judgments/).

388. See Frans Viljoen and Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004*, 101 AM. J. INT'L L. 1 (2007); see also Obiora Chinedu Okafor, *The African System on Human and Peoples' Rights, Quasi-Constructivism, and the Possibility of Peacebuilding within African States*, 8(4) INT'L J. HUM. RTS. 413-450 (2004); Obiora Chinedu Okafor, *THE AFRICAN HUMAN RIGHTS SYSTEM: ACTIVIST FORCES AND INTERNATIONAL INSTITUTIONS* (2007).

389. It is worth noting that this statistic would be substantially lower if it were calculated based on the number of “communications” resolved on the merits. This is because all six cases of full compliance arose from single communications, where a number of cases resolved during that same period included multiple communications that had been consolidated during some point throughout the proceedings. *See, e.g., Malawi African Association, et. al. v. Mauritania* (consolidating 36 communications).

390. The Communications Reform Report entered into the record during the Commission’s 40th Session in Banjul.

391. *See* The Danish Institute for Human Rights, *African Human Rights Handling Mechanisms: A Descriptive Analysis* (“Danish Report”) (2008), at 48. The Expertise Program was made possible with the support of the Danish Institute for Human Rights and the Center for Human Rights at the University of Pretoria.

392. Also worth mentioning is a body of critical scholarship exploring the impact of the African System on domestic affairs generally, which recognizes the difficulty of demonstrating causality, but argues that implementation of the recommendations of the African Commission is only part of the assessment of the importance of the work of that body, and emphasizes the significance of reference to the African Charter in the work of national judiciaries, legislatures, and the executive branches. *See* Okafor, *The African System on Human and Peoples’ Rights* (discussing the impact of the African system in Nigeria and South Africa specifically).

393. Abiola Ayinla and George Mukundi Wachira, *Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples’ Rights: A Possible Remedy*, 6 *AF. HUM. RTS. L. J.* 456 (2006).

394. Chidi Anselm Odinkalu, *The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment*, 8 *TRANSNAT’L L. & CONTEMP. PROBS.* 359, 369–72 (1998).

395. *See* Danish Report, at 39.

396. Ayinla and Wachira, at 6.

397. *See* The African Commission on Human and Peoples’ Rights Information Sheet No. 3, “Recommendations (or Decisions) of the Commission,” available at [www1.umn.edu/humanrts/africa/achpr-infosheet3.html](http://www1.umn.edu/humanrts/africa/achpr-infosheet3.html).

398. *See* Danish Report, at 48.

399. *See* African Court Protocol, Art. 30.

400. “Adopted Rules of the ACHPR After Meeting with the Court,” provided by Robert Eno, African Commission Secretariat (copy on-file with OSJI).

401. ACHPR, *Pagnouille v. Cameroon*, Comm. No. 39/90 (1997).

402. ACHPR, *Constitutional Rights Project v. Nigeria*, Comm. No. 153/96 (1999).

403. ACHPR, *Centre for Free Speech v. Nigeria*, Comm. No. 206/97 (1999).

404. ACHPR, *Forum of Conscience v. Sierra Leone*, Comm. No. 223/98 (2000).

405. ACPHR, *Modise v. Botswana*, Comm. No. 97/93 (2000).

406. ACPHR, *Amnesty International v. Zambia*, Comm. No. 212/98 (1999).
407. See Okafor, *The African System on Human and Peoples' Rights*, at 424 (2004); see also Okafor, *THE AFRICAN HUMAN RIGHTS SYSTEM* (2007).
408. ACHPR, *Constitutional Rights Project v. Nigeria*, Comm. No. 153/96 (1999).
409. See Viljoen and Louw, at 10.
410. ACHPR, *Centre for Free Speech v. Nigeria*, Comm. No. 206/97 (1999).
411. See Viljoen and Louw, at 10.
412. See Okafor, *The African System on Human and Peoples' Rights*, at 424.
413. ACHPR, *Forum of Conscience v. Sierra Leone*, Comm. No. 223/98 (2000).
414. ACHPR, *Pagnouille v. Cameroon*, Comm. No. 39/90 (1997).
415. See Viljoen and Louw, at 8.
416. ACPHR, *Modise v. Botswana*, Comm. No. 97/93 (2000).
417. Interview with Chidi Odinkalu, OSJI Senior Legal Officer, October 2009.
418. ACPHR, *Amnesty International v. Zambia*, Comm. No. 212/98 (1999).
419. Note that there is a fair amount of overlap between categories (1) and (2), and that (2) was used primarily to group cases involving political parties and journalists.
420. Chidi Anselm Odinkalu, *Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986–2000* 209 (2002).
421. *Id.* at 210.
422. *Id.* at 211–12.
423. ACPHR, *The Social and Economic Rights Action Center and the Center for Social and Economic Rights v. Nigeria*, Comm. No. 155/96 (2001).
424. See Viljoen and Louw, at 19–21.
425. ACHPR, *Rights International v. Nigeria*, Comm. No. 215/98 (1999).
426. ACPHR, *Huri-Laws v. Nigeria*, Comm. No. 225/98 (2000).
427. ACHPR, *Interights et. al v. Islamic Republic of Mauritania*, Comm. No. 242/01 (2003).
428. ACPHR, *Forum of Conscience v. Sierra Leone*, Comm. No. 223/98 (2000).
429. ACPHR, *Amnesty International v. Zambia*, Comm. No. 212/98 (1999).
430. ACPHR, *Purohit and Moore v. the Gambia*, Comm. No. 241/01 (2003).
431. ACPHR, *The Social and Economic Rights Action Center and the Center for Social and Economic Rights v. Nigeria*, Comm. No. 155/96 (2001).
432. Interview with Chidi Odinkalu, OSJI Senior Legal Officer, October 2009.
433. *Id.* (discussing the *Modise v. Botswana* case).
434. *Id.*

435. See Okafor, *THE AFRICAN HUMAN RIGHTS SYSTEM*, at 91–154.
436. While this case did result in implementation, it is difficult to refer to a case about the execution of 34 people without due process as a “success story.”
437. See Viljoen and Louw, at 9–11.
438. *Id.* at 5, n. 54.
439. *Id.* at n. 38.
440. ACHPR, *Malawi African Association, et al. v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97-196/97, 210/98 (2000).
441. “Resolution On The Creation Of A Working Group On Specific Issues Relevant To The Work Of The African Commission On Human And Peoples’ Rights,” ACHPR /Res.77(XXXVII)05.
442. “Final Communiqué of the 38th Ordinary Session of the African Commission on Human and People’s Rights,” Banjul, The Gambia, Nov. 21–Dec. 5, 2005.
443. See 23rd Activity Report.
444. See Danish Report, at 48.
445. *Id.*
446. Final Communiqué of the 40th Ordinary Session of the African Commission on Human and People’s Rights, held in Banjul, the Gambia, Nov. 15–19, 2006.
447. This Resolution was referenced by Viljoen in an interview, who indicated that it incorporated many of the suggestions outlined in the study, but it does not appear in the public record.
448. Interview with Robert Eno, ACHPR Secretariat, December 2009.
449. *Id.*
450. Under Article 5(1) of the African Court Protocol, the following entities are entitled to submit cases before the Court: (a) The Commission; (b) The state party which has lodged a complaint to the Commission; (c) The state party against which the complaint has been lodged at the Commission; (d) The state party whose citizen is a victim of human rights violation; (e) African Intergovernmental Organizations. Further, a state can petition to join a case in which it has an interest, and individuals can submit cases if the state named in the petition has recognized the capacity of the court to hear such direct petitions. See African Court Protocol at Art. 5(2), (3).
451. *Id.* at R. 121(2), (3).
452. *Id.* at R. 121(4).
453. See Rebecca Wright, *Finding an Impetus for Institutional Change at the African Court on Human and Peoples’ Rights*, 24 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 463 (2006).
454. Rules of Procedure of the African Court of Human and Peoples’ Rights, R. 64.1.
455. *Id.* at R. 64.2.
456. In addition to individual communications, four of the treaty bodies are empowered to consider inter-state complaints; however, to date, no state has ever made use of this procedure. Certain treaty bodies may also conduct confidential, on-site inquiries when they have reason to believe that

a state party is committing serious or systematic violations of a treaty provision, but such inquiries have been infrequent.

457. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. A/54/4; Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106.

458. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX).

459. The Human Rights Committee is composed of 18 independent experts who meet three times a year for four-week periods; to date, 113 of the 165 states parties to the ICCPR are also parties to the Optional Protocol.

460. Report of the HRC, UN Doc. A/64/40 (Vol. I) (Oct. 2008–Jul. 2009), para. 232.

461. *Id.* (emphasis added). Those states in which satisfactory responses were received include Australia, Bolivia, Burkina Faso, Cameroon, Canada, Central African Republic, Colombia, Czech Republic, Denmark, Dominican Republic, Ecuador, Finland, France, Georgia, Ireland, Latvia, Lithuania, Mauritius, Namibia, The Netherlands, New Zealand, Norway, Peru, Philippines, Poland, Senegal, Serbia and Montenegro, Slovakia, Trinidad and Tobago, Ukraine, Uruguay, and Zambia. Another statistical survey compiled by the Petitions Section, current as of April 2010, indicates that the Committee has adjudicated 716 cases on the merits and found violations in 574, not 546. This discrepancy likely reflects the number of additional violation findings that the committee made between when the Annual Report was released, in October 2009, and April 2010. See “Statistical Survey of Individual Complaints Dealt with by the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights” (Apr. 7, 2010), available at [www2.ohchr.org/english/bodies/hrc/procedure.htm](http://www2.ohchr.org/english/bodies/hrc/procedure.htm).

462. Report of the HRC, UN Doc. A/64/40 (Vol. I), para. 232.

463. *Id.* at paras. 232–33.

464. “Miscellaneous” encompasses cases where the Petitions Section indicated that the state party’s response was not yet due, or cases in which it is unclear whether the committee considered follow-up measures to be necessary. For instance, of the latter, 60 of these miscellaneous cases concern representations made by Jamaica in response to complaints that had been filed by individuals sentenced to death, who complained of violations of their right to a fair trial and conditions on death row. It is also apparent that nearly all of the “response not yet due” cases need to be updated, as none of them were decided later than 2007; thus, the deadline for a response has long since expired.

465. See, e.g., UN Hum. Rts. Comm., Case No. 802/1998, *Rogerson v. Australia* (Apr. 3, 2002); Case No. 455/1991, *Singer v. Canada* (Apr. 8, 1993); Case Nos. 666/1995, *Foin v. France*, 698/1996, *Maille v. France*, 690/1996, *Venier v. France*, 691/1996, *Nicolas v. France* (Nov. 9, 1999) (noting that because state party had already amended law establishing differences between military and national alternative service, the finding of a violation was sufficient remedy).

466. Report of the HRC, UN Doc. A/54/40 (Vol. I) (1999), paras. 458–59.

467. Anne Bayefsky, “The UN Human Rights Treaty System: Universality at the Crossroads” (April 2001), at 33, *available at* [www.bayefsky.com/report/finalreport.pdf](http://www.bayefsky.com/report/finalreport.pdf).
468. Worthy of note is that more than half of the cases registered before the Human Rights Committee are declared inadmissible, which does not constitute a judgment on the merits. As of April 2010, the Petitions Section had recorded 551 cases that the Committee had dismissed on admissibility grounds, as well as another 270 that were discontinued. *Id.*
469. Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* (Philip Alston and James Crawford eds., 2000).
470. Report of the CAT, UN Doc. A/64/44 (Nov. 2008–May 2009), at 137–139.
471. *Id.* The Committee also noted that “for various reasons no further actions should be taken under the follow-up procedure” in four cases. *Id.* at para. 92.
472. Committee Against Torture Open Forty-Fourth Session in Geneva (Apr. 26, 2010).
473. Telephone interview with Markus Schmidt, OHCHR Treaty Bodies Division, October 2009.
474. Report of CEDAW, UN Doc. A/64/38 (Nov. 2008–Feb. 2009), at 110–111. *See also* “Optional Protocol to the Convention on the Elimination of Discrimination Against Women—Jurisprudence,” *available at* [www2.ohchr.org/english/law/jurisprudence.htm](http://www2.ohchr.org/english/law/jurisprudence.htm)
475. Report of CERD, UN Doc. A/63/18 (Mar.–Aug. 2008), at 107–109.
476. *Id.*
477. Markus G. Schmidt, *Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond*, in *THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY*, at 233–249. Notably, the decision to establish follow-up procedure was not without controversy, as considerable debate focused on whether the HRC was acting *ultra vires* in creating a Special Rapporteur to address the problem of enforcement, when its Views were not legally binding. Ultimately, the committee reasoned that, under the doctrine of implied powers, it had the legal authority to create the position. *Id.* This has been the legal basis for other committees’ establishment of the Special Rapporteur role as well.
478. *Id.*
479. Report of the HRC, UN Doc. A/45/40 (1990) Vol. I, at 144–45 and Vol. II, Appendix XI, at 205–06.
480. Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev.8 (Sep. 22, 2005), R. 101(2).
481. *Id.*, R. 102.
482. CAT’s follow-up procedure came into effect in 2002, while CERD instituted a follow-up procedure in 2005. The committee formalized CEDAW’s procedure in 2008; however, its Working Group on Communications undertook follow-up activities on an *ad hoc* basis for some years prior to that time. *See* Report of CEDAW, A/64/38, at 110.
483. Rules of Procedure of the Committee Against Torture, CAT/C/3/Rev/ 4 (Aug. 9, 2002), R. 114–15; Rules of Procedure of the Committee on the Elimination of Racial Discrimination (adopted

Aug. 15, 2005), R. 95(6)–(7), at [www2.ohchr.org/english/bodies/cerd/docs/newruleprocedure-augusto5.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/newruleprocedure-augusto5.pdf).

484. Optional Protocol to CEDAW, Arts. 7 and 13; “Rules of Procedure of the Committee on the Elimination of Discrimination Against Women,” UN Doc. A/56/38, Appendix I, R. 73.

485. States were previously given 90 days to respond, but this was recently extended to 180 days because states complained that three months was insufficient time to prepare a response.

486. Markus Schmidt, “The Follow-Up Activities by the UN Human Rights Treaty Bodies and the OHCHR,” Meeting on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals (Turku, Finland, Sep. 26–27, 2003). Where this is the case, the HRC has noted that, if a state party fails to respond during the course of its consideration of a case, the state “puts itself at a disadvantage, because the Committee is then compelled to consider the communication in the absence of full information,” and “may conclude that the allegations contained in the communication are true, if they appear from all the circumstances to be substantiated.”

487. Report of the HRC, UN Doc. A/61/40 (Vol. II) (2006), at 685–86.

488. CEDAW previously operated under the auspices and financial support of the Division for the Advancement of Women; however, responsibility for servicing that committee was transferred to OHCHR in January 2008.

489. See “Follow-Up Progress Report of the Human Rights Committee on Individual Communications,” UN Doc. CCPR/C/95/4 (Feb. 17, 2009) (in English, French and Spanish); see also UN Doc. CCPR/C/98/3 (May 21, 2010) (updates on Algeria, Belarus, Cameroon, Canada, Colombia, Croatia, Germany, Kyrgyzstan, New Zealand, Norway, Paraguay, Philippines, Russian Federation, Spain, Tajikistan, Uzbekistan, Zambia).

490. UN Doc. A/61/40, at 686.

491. E-mail communication with Darian Pavli, OSJI Legal Officer, November 2009.

492. Report of the HRC, UN Doc. A/60/40 (Vol. II) (2006), at 491.

493. Telephone interviews with Markus Schmidt, OHCHR Treaty Bodies Division, October 2009 and Professor Ivan Shearer, September 2009.

494. Schmidt, *Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond*, at 239, n. 30 (“More recently and regrettably, these meetings have taken place with much less frequency.”).

495. Report of the HRC, A/55/40, at 99. The committee further states that it “considers that staff resources to service the follow-up mandate remain inadequate, despite the Committee’s repeated requests, and that this prevents the proper and timely conduct of follow-up activities, including follow-up missions and follow-up consultations.”

496. *Id.*

497. Professor Shearer notes that he met with representatives from Tajikistan, against whom there are a number of unenforced cases, during the committee’s 92nd session in 2008, which resulted, unusually, with the state accepting an in country follow-up visit, to “facilitate better cooperation with officials ... and to contribute to better understanding of the [communications] procedure.”

*Id.* at 543–46 (concerning UN Hum. Rts. Comm., Case No. 1042/2001, *Boymurodov v. Tajikistan*) (expressing agreement to receiving a visit, in Tajikistan, of the Committee’s Special Rapporteur)). However, the trip ultimately fell through.

498. In May 1998, Trinidad and Tobago also withdrew from the ICCPR’s Optional Protocol and then immediately re-acceded with a reservation purporting to deny any prisoner under sentence of death from petitioning the committee. *See, e.g.*, Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COL. L. R. 1832 (2002) (discussing why, in the late 1990s, three Commonwealth Caribbean governments denounced human rights agreements and withdrew from the jurisdiction of international human rights tribunals).

499. Schmidt, *Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond*, at 233.

500. Steiner, at 23. At the same time, as other commentators have noted, the HRC “has taken steps toward imbuing its views with a tone that suggests [its views] are de facto legally binding in character,” articulating “an interpretation of the ICCPR strongly suggesting that its views must be obeyed.” *See* Laurence Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107(2) YALE L.J. 273, 341–42 (1997).

501. Gerd Oberleitner, GLOBAL HUMAN RIGHTS INSTITUTIONS 99 (2007).

502. UN Hum. Rts. Comm., General Comment No. 33, UN Doc. CCPR/C/GC/33 (2008). *See also* UN Hum. Rts. Comm., General Comment No. 31, UN Doc. CCPR/C/GC/21/Rev/1/Add/13 (May 26, 2004) (“Nature of the General Legal Obligation Imposed on States Parties to the Covenant”).

503. *Id.*

504. Interviews with members of the Human Rights Committee, October–November 2009.

505. For instance, Manfred Nowak, until recently the Special Rapporteur on Torture, has argued that, while it “would be desirable if the decisions of UN treaty monitoring bodies were legally binding ... this is not the major lacuna.” *See* Manfred Nowak, *The UN High Commissioner for Human Rights: A Link Between Decisions of Expert Monitoring Bodies and Enforcement by Political Bodies*, in THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY, at 251.

506. David Kretzmer, *Commentary on Complaint Processes by Human Rights Committee and Torture Committee Members*, in THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY, at 164–65 (“However imperfect the present legal structure may be, it is better to work within the existing legal constraints, rather than trying to change them.”).

507. David Kretzmer, “The UN Human Rights Committee and International Human Rights Monitoring,” at 46, at [www.iilj.org/courses/documents/2010Colloquium.Kretzmer.pdf](http://www.iilj.org/courses/documents/2010Colloquium.Kretzmer.pdf).

508. Report of the HRC, UN Doc. A/51/40 (concerning UN Hum. Rts. Comm., Case No. 488/1992, *Toonen v. Australia*); UN Hum. Rts. Comm., Case No. 24/1977, *Lovelace v. Canada* (Jul. 30, 1981). In *Lovelace*, Canada amended its Indian Act and, in 1985, the Canadian Charter of Rights and Freedoms was enacted, which affirms the “right to the equal protection and equal benefit of the law without discrimination ... based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

509. UN Hum. Rts. Comm., Case No. 1011/2001, *Madafferi v. Australia* (Jul. 26, 2004).
510. UN Doc. A/61/40, at 687–89.
511. *Id.*
512. *Id.* at 708–09 (concerning UN Hum. Rts. Comm., Case No. 1222/2003, *Byahuranga v. Denmark*) (“The Committee regards the State party’s response as satisfactory and does not intend to consider this case any further under the follow-up procedure.”).
513. UN Hum. Rts. Comm., Case No. 1155/2003, *Leirvag v. Norway* (Nov. 3, 2004). *See also* UN Doc. A/61/40, at 715–17 (commending the state party on its “prompt response” and the measures taken to remedy the infringements on religious freedom identified in the committee’s Views). The European Court of Human Rights decided a similar case in 2007. *See* ECHR, Application No. 1572/02, *Folgero and Others v. Norway* (Jun. 29, 2007).
514. *See, e.g.*, UN Hum. Rts. Comm., Case No. 387/1989, *Karttunen v. Finland* (“In accordance with the provisions of [A]rticle 2 of the Covenant, the State party is under an obligation to provide the author with an effective remedy for the violation suffered.”).
515. *See* D. McGoldrick, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 199* (1991) (noting that “[t]he necessity for consensus inevitably reduces clarity and precision”).
516. *See, e.g.*, UN Doc. A/61/40, at 511 (noting that Belarus’ diplomatic representative “expressed the need for more guidance from the Committee on the remedies expected with respect to its Views”).
517. *See* UN Doc. A/64/40, at 134–36 (concerning, *inter alia*, UN Hum. Rts. Comm., Case Nos. 46/1979, *Fals Borda v. Colombia*; 64/1979, *Salgar de Montejo v. Colombia*; 181/1984, *Sanjuan Arevalo v. Colombia*; 514/1992, *Fei v. Colombia*) (“Given the absence of a specific remedy recommended by the Committee, the Ministerial Committee set up pursuant to Act No. 288/1996 did not recommend that compensation be paid to the victim.”).
518. UN Hum. Rts. Comm., Case No. 1159/2003, *Sankara v. Burkina Faso* (Mar. 28, 2006).
519. UN Hum. Rts. Comm., Case No. 1493/2006, *Williams v. Spain* (Aug. 17, 2009).
520. *See* Report of the HRC, UN Doc. A/63/40 (Vol. II) (2008), at 522–24 (concerning, *inter alia*, UN Hum. Rts. Comm., Case No. 45/1979, *Suarez de Guerrero v. Colombia*, (killing by deliberate police action); UN Hum. Rts. Comm., Case No. 181/1984, *A. and H. Sanjuan Arevalo v. Colombia* (disappearances)).
521. *Id.* at 516–18
522. *Id.*
523. UN Hum. Rts. Comm., Case No. 630/1995, *Mazou v. Cameroon* (Jul. 26, 2001).
524. Reports of the HRC, UN Doc. A/57/40 (Vol. II) (2002), para. 235 and UN Doc. A/59/40 (Vol. II) (2004), at 133 (noting that the Special Rapporteur “recommended that this case should not be considered further under the follow-up procedure as the State party had complied with the Views”).
525. CEDAW Comm., Case No. 2/2003, *A.T. v. Hungary* (Jan. 26, 2005).
526. *Id.* at para. 9.6 (setting out remedies for the author of the communication and general measures).

527. UN Doc. A/64/38, at 123–26.
528. *Id.* at 126.
529. CEDAW Comm., Case No. 4/2004, *A.S. v. Hungary* (Aug. 29, 2006).
530. *Id.* at 18.
531. UN Doc. A/64/38, at 118–23 (meetings held in June 2007, January 2008, and October 2008).
532. *See, e.g.*, Reports of the HRC, UN Docs. A/56/40-A/61/40 (2001–06) (concerning, *inter alia*, UN Hum. Rts. Comm., Case Nos. 526/1993, *Hill v. Spain*; 701/1996, *Gomez Vasquez v. Spain*; 864/1999, *Ruiz Agudo v. Spain*; 1073/2002, *Teron Jesus v. Spain*) (Article 14 violations). Professor Natalie Molinero has noted that Spain’s poor implementation record is due, in part, to a “lack of mechanisms for implementation of the Committee’s views by domestic courts”; in particular, the recourse to *amparo*, which has otherwise been a useful method for securing implementation, is “only possible in limited cases.” *See* Natalie Molinero, “Implementation of the Views of the UN Human Rights Committee in Spain: New Challenges,” *available at* [web.abo.fi/institut/imr/research/seminars/ILA/Alvarez.doc](http://web.abo.fi/institut/imr/research/seminars/ILA/Alvarez.doc).
533. *See, e.g.*, UN Doc. A/60/40, at 493 (concerning UN Hum. Rts. Comm., Case No. 941/2000, *Young v. Australia*) (refusing to accept committee’s determination on grounds of sexual orientation in provision of social security benefits in 2007, Australia informed the committee that “further dialogue on this matter would not be fruitful and declines the offer to provide more information”); UN Doc. A/61/40 at 690–92 (concerning UN Hum. Rts. Comm., Case No. 1036/2001, *Faure v. Australia*) (rejecting the HRC’s view that Australia breached Article 2 on the basis that it is an accessory right that cannot be invoked in isolation from other covenant rights); UN Doc. A/63/40 at 507–08 (concerning UN Hum. Rts. Comm., Case No. 1050/2002, *D. & E. v. Australia*) (informing the HRC that it did not accept its view that there had been an Article 9 violation and stating that the state party “does not accept the Committee’s view that it should pay compensation to the authors”).
534. *See, e.g.*, Reports of the HRC, UN Docs. A/55/40-A/61/40 (concerning UN Hum. Rts. Comm., Case No. 641/1996, *Waldman v. Canada*) (“express[ing] concern” that Canada had not complied with its Views, and reiterating its call that the state “adopt steps in order to eliminate discrimination on the basis of religion in the funding of schools in Ontario”); UN Doc. A/63/40, at 519–21 (concerning UN Hum. Rts. Comm., Case No. 1052/2002, *N.T. v. Canada*) (declining to consider the communication any further because the committee can “see no useful purpose in pursuing a dialogue” with the state party based on its unwillingness to accept the committee’s Views).
535. UN Hum. Rts. Comm., Case Nos. 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004, 1288/2004, *Shams, Atvan, Shahrooei, Saadat, Ramezani, Boostani, Behrooz, Sefed v. Australia* (Jul. 20, 2007).
536. UN Doc. A/63/40, at 508–10.
537. UN Hum. Rts. Comm., Case No. 1180/2003, *Bodrozic v. Serbia and Montenegro* (Oct. 31, 2005).
538. UN Doc. A/63/40, at 540 (“On July 25 2008, the author informed the Committee that he had accepted compensation of 800,00 dinars for the violation of his rights under the Covenant.”).
539. Telephone interview with Professor Michael O’Flaherty, October 2009 (concerning UN Hum. Rts. Comm., Case No. 1306/2004, *Haraldsson v. Iceland* (finding Article 26 violation)). *See*

also UN Doc. A/63/40, at 529–30 (noting that the state party provided a “detailed response” and that the Committee “welcomes the fact that [Iceland] is conducting a review of its fisheries management system and looks forward to being informed of the results as well as the implementation of the Committee’s Views”).

540. UN Doc. A/63/40, at 529 (noting that it “could not infer” from the Committee’s Views “how far it should go for its measures to be considered effective,” and seeking further guidance as to whether “minor adaptations and changes in the ... fisheries management system will suffice or whether more radical changes are needed”).

541. See, e.g., UN Doc. A/61/40, at 694–99 (concerning UN Hum. Rts. Comm., Case No. 1207/2003, *Malakhovsky and Pikul v. Belarus*) (stating in follow-up that the state party “disagrees with the Committee’s conclusion and reiterates its arguments made on the admissibility and merits of the case”); Report of the HRC, UN Doc. A/62/40 (concerning UN Hum. Rts. Comm., Case No. 889/1999, *Zheikov v. Russian Federation*) (“The Committee regrets the State party’s refusal to accept the Committee’s Views and considers the dialogue ongoing.”).

542. UN Docs. A/61/40, at 709–10 (concerning UN Hum. Rts. Comm., Case No. 414/1990, *Primo Essono v. Equatorial Guinea*; Case No. 468/1991, *Olo Bahamonde v. Equatorial Guinea*; Case Nos. 1152/2003 & 1190/2003, *Ndong et al. and Mic Abogo v. Equatorial Guinea*) (“The State party representatives were not aware of the Committee’s functions (which they seemed to mix up with those of the Commission), no[r] of the above communications.”).

543. Telephone interview with Markus Schmidt, OHCHR Treaty Bodies Division, October 2009.

544. See, e.g., UN Docs. A/61/40, at 706–07 and A/62/40, at 671–72.

545. Telephone interview with Markus Schmidt, OHCHR Treaty Bodies Division, October 2009.

546. ECHR, Application No. 32881/04, *K.H. and Others v. Slovakia* (Apr. 28, 2009) (holding that the refusal to provide photocopies of medical records to women, who suspected they had been involuntarily sterilized, violated their right to privacy and family life).

547. Schmidt, “The Follow-Up Activities by the UN Human Rights Treaty Bodies and the OHCHR,” at 5.

548. *Id.*

549. UN Doc. A/53/40, paras. 430–32 and UN Doc. A/54/40, paras. 394–97.

550. See, e.g., Committee Against Torture Opens Forty-Fourth Session in Geneva (Apr. 26, 2010) (“Mr. Grossman also noted the serious need to have more meeting time, observing that if the 50 or so [s]tates parties whose reports were late were to submit those reports, the Committee would not have the time to consider them.”).

551. “High Commissioner’s Strategic Management Plan, 2010–11,” United Nations Human Rights Office of the High Commissioner,” at 136–39.

552. Rosalyn Higgins, *Opinion: Ten Years on the UN Human Rights Committee: Some Thoughts Upon Parting*, 6 EUR. HUM. RTS. L. REV. (1996), 581.

553. An early effort towards treaty body reform resulted in three reports authored between 1988 and 1996 by Philip Alston (until recently the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), which addressed long-term approaches for “enhancing the effective operating

of existing and prospective,” in part by harmonizing and consolidating reporting guidelines. See UN Doc. E/CN.4/1997/74, *Final Report of the Independent Expert on Enhancing the Long-Term Effectiveness of the UN Human Rights Treaty System* (March 1997). In 2001 Ann Bayefsky also published, in collaboration with the Office of the UN High Commissioner for Human Rights, an extensive report on the treaty bodies whose primary conclusion was that, in the long term, a new optional protocol to the UN human rights treaties should establish two consolidated treaty bodies,” one for considering state reports and one for “examining communications and ... conducting inquiries.” See Bayefsky, “The UN Human Rights Treaty System: Universality at the Crossroads” (April 2001).

554. UN Doc. A/59/2005, *In Larger Freedom: Towards Development, Security and Human Rights for All* (March 2005), para. 147 (requesting that “harmonized guidelines on reporting to all treaty bodies should be finalized and implemented so that these bodies can function as a unified system”).

555. UN Doc. HRI/MC/2006/2, *Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body* (Mar. 22, 2006), at [www.nhri.net/pdf/ConceptPaper\\_HRI\\_MC\\_2006\\_CRP\\_2.pdf](http://www.nhri.net/pdf/ConceptPaper_HRI_MC_2006_CRP_2.pdf).

556. See, e.g., Dublin Statement on the Process of Strengthening of the United Nations Human Rights Treaty Body System (“Dublin Statement”), para. 3, at [www.nottingham.ac.uk/hrhc/documents/specialevents/dublinstatement.pdf](http://www.nottingham.ac.uk/hrhc/documents/specialevents/dublinstatement.pdf) (noting that the 2006 “concept paper” of a single unified treaty body was “not widely supported”).

557. The University of Nottingham Human Rights Law Centre: Expert Workshop on Reform of United Nations Human Rights Treaty Monitoring Bodies (Feb. 2006), 31, available at [www.nottingham.ac.uk/shared/shared\\_hrhcprojects/Projects\\_Current\\_Projects\\_Nottingham\\_TB\\_Workshop\\_Report.pdf](http://www.nottingham.ac.uk/shared/shared_hrhcprojects/Projects_Current_Projects_Nottingham_TB_Workshop_Report.pdf).

558. *Id.* at 33.

559. Interview with Markus Schmidt, OHCHR Treaty Bodies Division, October 2009. The Dublin Statement referenced above, which was signed by a number of current and former members of the treaty bodies, was the result of this November 2009 conference, hosted by the University of Nottingham’s Human Rights Law Center and funded by Ireland’s Department of Foreign Affairs.

560. See Dublin Statement, para. 14.

561. See Markus Schmidt, *Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform*, 41(3) BRITISH INST. OF INT’L AND COMP. L. 645, 652 (1992).

562. In devising such a revised method, reference could be made to the reporting work of several UN Special Rapporteurs. In particular, Professor Philip Alston has designed a useful tabulation that monitors his communications with states against whom complaints have been registered; it includes a classification scheme as to the type of violations alleged, the number of communications sent by the Rapporteur and responses received, and a five-part typology for evaluating the character of the state’s reply (ranging from “no response” to “largely satisfactory response.”) See UN Doc. A/HRC/11/2/Add.1, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions—Summary of Cases Transmitted to Governments and Replies Received* (May 29, 2009), at 6–11.

563. For instance, the HRC recently issued a press release in March 2010 “deploring” the execution by Belarus of two individuals whose cases were pending before the committee on allegations that they had not received a fair trial, despite the fact that requests for interim measures of protection

had been issued by the Committee. Such instances of non-compliance, the Committee noted, amount to a “grave breach of the Optional Protocol.” See “Human Rights Committee Deplores the Execution of Two Individuals in Belarus” (Mar. 30, 2010).

564. See, e.g., *United Nations Special Procedures: Facts and Figures 2009*, “Human Rights Stories,” available at [www.ohchr.org/english/bodies/chr/special/docs/Facts\\_Figures2009.pdf](http://www.ohchr.org/english/bodies/chr/special/docs/Facts_Figures2009.pdf).

565. Nowak, at 253.

566. See, e.g., UN Doc. A/HRC/WG.6/7/AGO/2, *Compilation Prepared by the Office of the High Commissioner for Human Rights—Angola* (delivered to Working Group on the Universal Periodic Review) (Nov. 11, 2009) (including sections on “cooperation with special procedures” and “cooperation with treaty bodies,” but limiting latter to state reporting obligations only). A review of other OHCHR reports prepared for the UPR reveals a consistent failure to include implementation data with respect to treaty body Views.

567. See Dublin Statement, para. 6 (noting that the “constituency for the strengthening of the treaty body system includes ... UN human rights special procedures and other UN actors”).

568. See, e.g., Sandy Ghandhi, *The Human Rights Committee and Interim Measure of Relief*, 6 *Canter. L. R.* 203 (2007) (describing the Human Rights Committee as the “premier UN human rights treaty body”).

569. See, e.g., Jared M. Genser and Margaret K. Winterkorn-Meikle, *The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice*, 39 *COLUM. HUM. RTS. L. REV.* 101, 104, 121–54 (2008) (describing Working Group as providing a “politically viable alternative to treaty-based human rights enforcement mechanisms,” but noting it could “develop a more robust follow-up procedure”).

570. *Id.* at 154–63.

571. Christof Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 *HUM. RTS. Q.* 483, 517–18 (2001) (noting that an “enabling domestic environment is required”).

572. Steiner, at 33–34.

573. For instance, this strategy was used in the case of a petitioner, Nallaratnam Singarasa, a Sri Lankan citizen who had been convicted of terrorism-related offenses; the HRC, however, held that a number of ICCPR violations had occurred during the conduct of his criminal trial. See UN Hum. Rts. Comm., Case No. 1033/2001, *Singarasa v. Sri Lanka* (Aug. 23, 2004). Singarasa sought relief before the Supreme Court of Sri Lanka, using the HRC’s Views as a basis for asking the court to exercise its inherent powers of revision. In a baffling opinion, the court rejected Singarasa’s claim, in part on the basis that Sri Lanka’s accession to the ICCPR’s Optional Protocol was unconstitutional. See *Singarasa v. Attorney General*, S.C. SPL (LA) No. 182/99 (2006). While the court’s opinion was damaging to Singarasa, it has received widespread attention for its poor reasoning and “complete misunderstanding of the international legal significance of accession to the Protocol,” further underscoring the need to enhance implementation at the national level. See Nigel Rodley, *The Singarasa Case: Quis Custodiet ...? A Test for the Bangalore Principles of Judicial Conduct*, 41 *ISR. L. R.* 500–21 (2008).

574. “Judicial Colloquium on the Domestic Application of International Human Rights Norms, Outcome Documents” (Mar. 23–25, 2009).

575. See, e.g., UN CERD., General Comment No. 17, *Establishment of National Institutions to Facilitate Implementation of the Convention* (Mar. 25, 1993) (recommending that states parties “establish national commissions or other appropriate bodies” to monitor compliance with the provisions of the Convention on the Elimination of Racial Discrimination); UN Hum. Rts. Comm., General Comment No. 31, UN Doc. CCPR/C/21/Rev/1/Add.13 (May 26, 2004), para. 15 (“Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.”).

576. See “Democracy Bridge: Multilateral Regional Efforts for the Promotion and Defense of Democracy in Africa and America,” at [www.oas.org/sap/docs/BRIDGE\\_20-12-07\\_complete.pdf](http://www.oas.org/sap/docs/BRIDGE_20-12-07_complete.pdf)

577. See “Enhancing Cooperation Between Regional and International Mechanisms for the Promotion and Protection of Human Rights: Developments Regarding the Cooperation Between the International Human Rights Systems and regional Human Rights Mechanisms,” at [http://bangkok.ohchr.org/files/International\\_Workshop\\_Geneva\\_May\\_2010.pdf](http://bangkok.ohchr.org/files/International_Workshop_Geneva_May_2010.pdf). This event, which brought together some 300 representatives from international human rights organizations in Geneva, fostered important dialogue about proposals for cooperation between UN mechanisms and regional human rights bodies, and specifically identified enhanced follow-up to decisions and recommendations of regional human rights mechanisms and the international human rights system as a main area for potential cooperation. As part of the same initiative, conferences were also held to promote regional consultation within Europe and the Americas as well.

578. See, e.g., “Reparations in the Inter-American System: A Comparative Approach,” 56 AM. U.L. REV. 1375 (August 2007) (record of conference proceedings); “Advocacy before Regional Human Rights Bodies: A Cross Regional Agenda,” 9 AM. U. L. REV. 163 (October 2009); see also “Facing the Past: International Conference on the Effectiveness of Remedies for Grave Historical Injustices,” International Center for Transitional Justice (March 2010), available at [www.ictj.org/en/news/event/3564.html](http://www.ictj.org/en/news/event/3564.html).

579. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 155.

580. Marie-Aude Beernaert, *Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And At What Price?* EUR. HUM. RTS. L. R. 544, 546 (2004, No. 5).

581. See Secretary General of the Council of Europe (Mr. Terry David), “Some Starting Points for our Reflection on the Future of the Court,” in *Future Developments of the European Court of Human Rights in Light of the Wise Persons’ Report: San Marino Colloquy, March 22–23, 2007* (2007), at 14. See also Philip Leach, *On Reform of the European Court of Human Rights*, at 727 (“It seems highly likely that we will need to return to a process of filtering, possibly akin to the role played by the European Commission of Human Rights prior to the Protocol No. 11 change in 1998.”).

582. See IA Court HR, “Statement of Motives for the Reform of the Rules of Procedure,” Rules of Procedure of the Inter-American Court for Human Rights, Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009, at [http://www.corteidh.or.cr/regla\\_eng.pdf](http://www.corteidh.or.cr/regla_eng.pdf).

583. See Antônio Augusto Cançado Trindade, *Fragmentos de Primeras Memorias de la Corte Interamericana de Derechos Humanos*, JORNADAS DE DERECHO 19–27 (2007).

584. See, e.g., Laplante, *Bringing Effective Remedies Home*; see also Yves Haeck and Johan Vande Lanotte, *Desperately Trying to Keep the Titanic Afloat: The Reform Proposals Concerning the European Convention on Human Rights after Protocol No. 14: The Report of the Group of Wise Persons... and some Further Proposals*, INTER-AM. & EUR. HUM. RTS. J. 87, 120 (2008, No. 1) (“The Court needs not only to be empowered ... as the European Court of Justice can, to ‘impose’ financial damages in case a state does not comply with its judgment, but it should, more generally, be made competent to ‘order’ and ‘impose’ any kind of a compensatory measure when a state clearly violates the ECHR.”).

585. Anthony Lester Q.C., *The Human Rights Act 1998—Five Years On*, EUR. HUM. RTS. L.R. 258, 261 (2004, No. 3).

586. Drzemczewski, *The Parliamentary Assembly’s Involvement in the Supervision of the Judgments of the Strasbourg Court*, at 7.

587. *Id.*

588. “Law No 27.775, Regulate the Procedure for the Execution of Judgments Emitted by Supranational Tribunals” (June 27, 2002) (unofficial translation).

589. See “Law 288/96, Regulate the Procedure for the Indemnity of Victims of Human Rights Violations” (Jul. 5, 1996) (unofficial translation).

590. One such example was a symposium recently organized by the International Network for Economic, Social and Cultural Rights, Dejusticia, and the Norwegian Centre for Human Rights, entitled “Enforcement of Judgments on Economic, Social and Cultural Rights: Towards a Theory and Practice.” Held in Bogota, Colombia in May 2010, the symposium sought to analyze the reasons for implementation or non-implementation of particular decisions in the regional and international bodies, as well as domestic experiences of the same in North America and Europe, Latin America, South Asia, and the Middle East and Africa. To view abstracts for the papers commissioned from the project, see [www.escr-net.org/actions/actions\\_show.htm?doc\\_id=1156637](http://www.escr-net.org/actions/actions_show.htm?doc_id=1156637).

591. See Principles Relating to the Status of National Institutions (“The Paris Principles”), G.A. Res. 48/134 (Dec. 20, 1993), at [www2.ohchr.org/english/law/parisprinciples.htm](http://www2.ohchr.org/english/law/parisprinciples.htm) (setting forth proposed competences and responsibilities of NHRIs, as well as methods of operation, composition, and guarantees of independence and pluralism).

592. Richard Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 HUM. RTS. L.R. 1, 32 (2010).

593. Leach, *On Reform of the European Court of Human Rights*, at 727.

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## Open Society Foundations

The Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. Working with local communities in more than 70 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education.

[www.soros.org](http://www.soros.org)





International and regional human rights systems have the potential to provide powerful rights protections to individuals while compelling states to live up to their legal obligations. Yet too often, the decisions of human rights bodies suffer from a lack of implementation. In fact, it is fair to say that an implementation crisis currently afflicts the regional and international bodies charged with protecting human rights.

*From Judgment to Justice* examines the challenges of implementing the decisions of international and regional human rights bodies, with separate chapters focusing in detail on the European, Inter-American, and African systems, as well as on the UN treaty body system. The book notes where implementation has succeeded and where it has fallen short, examining specific cases, rulings, and remedies. *From Judgment to Justice* concludes by offering timely recommendations on specific steps to improve implementation and to ensure that human rights bodies fulfill their potential.

