

Article

# Monitoring, Cajoling and Promoting Dialogue: What Role for Supranational Human Rights Bodies in the Implementation of Individual Decisions?

Clara Sandoval, Philip Leach, and Rachel Murray\*

## Abstract

This article analyses the role of supranational human rights bodies in the implementation of their orders and recommendations in individual cases. It elicits the means, roles and impact of supranational mechanisms in triggering implementation processes by looking at the practice of UN treaty bodies and the three regional systems, through the in-depth study of specific cases and semi-structured interviews with relevant stakeholders. The article argues that supranational bodies are doing more than monitoring implementation of orders and recommendations in individual cases despite the scarcity of resources. They use different tools, both persuasive and coercive. Dialogue is central to their work, a dialogue that at times is opened to other actors such as civil society organizations, national human rights institutions and others. However, supranational bodies could do more to enhance the role they have promoting implementation by states of their orders and recommendations.

**Keywords:** dialogue; implementation; hearings; monitoring; reparations

## 1. Introduction

Effective implementation of decisions of international human rights bodies remains a significant challenge, across the regional mechanisms and for UN treaty bodies (OSJI 2013: 15; Fox Príncipi 2017: 9). These bodies are meant to monitor, that is to say, to follow up on,

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\* Clara Sandoval is Professor at the School of Law and Human Rights Centre at the University of Essex and Co-Director of the Essex Transitional Justice Network. Philip Leach is Professor of Human Rights Law at Middlesex University, London and Director of the European Human Rights Advocacy Centre (EHRAC), also based at Middlesex University. Rachel Murray is Professor of International Human Rights Law at the University of Bristol and Director of its Human Rights Implementation Centre.

the actual implementation of their decisions, through different tools. However, our research project on Human Rights Law Implementation (HRLIP) has found that the role played by various international bodies going beyond monitoring is significant, as they trigger and facilitate implementation at the domestic level. This is possible not only because these bodies are aware of the impact they could have on the dynamics of implementation at the domestic level, but also because their institutional architecture can facilitate such impact. In this sense, our research underscores Çalı and Koch's argument that '[i]nstitutional design of supranational human rights bodies and the properties of respondent States . . . constitute key variables influencing outcomes' (Çalı and Koch 2011: 5; Hillebrecht 2017: 34).

This article seeks to analyse the role of the regional systems and UN treaty bodies to monitor, cajole and promote implementation of their decisions, to understand the architecture that has been developed to this end, the differences in approach that exist between them and, to a certain extent, how effective these institutional developments have been. While scrutiny of the role of international courts in international relations has taken place (Helfer and Slaughter 1997; Posner and Yoo 2005; Alter 2011), and Huneus has identified the mobilization of 'compliance constituencies' as a means by which courts can exert 'soft power' (Huneus 2014: 452), we make a further contribution to the literature by eliciting the means, roles and impact of supranational mechanisms in triggering and facilitating implementation processes. Further, this is the first article of its kind to provide a detailed analysis of the role played by the three regional systems in promoting implementation of their decisions, adding to existing research on specific institutions, particularly the European system. While we also consider the UN treaty bodies, their work on facilitating implementation is not comparable to that of the regional bodies, and although they have tools in place to monitor (and have untapped potential to facilitate implementation) they are yet to deliver on this front. This explains why we give greater attention to the other supranational bodies. This article may be read in conjunction with the article in this issue by Donald, Long and Speck on identifying and assessing implementation, which considers the ways in which such bodies track and measure implementation.

As the article in this special issue by Donald and Speck on the dynamics of domestic human rights implementation shows, the articles in this issue are the result of a three-and-a-half year project, funded by the Economic and Social Research Council (ESRC), that aimed to shed light on the dynamics of implementation of individual decisions of supranational human rights bodies—dynamics that have not been captured by previous research.

Our Project carried out qualitative research on these dynamics and considered in particular the role that supranational bodies play, not only in monitoring, but also in taking other steps to encourage implementation, by looking at the behaviour and interactions of relevant actors, and at their attitudes, the institutional design and capacity of the bodies to respond to implementation challenges, and the incentives present in these dynamics.

The Project used a process-tracing methodology whereby a small number of cases in each system (at the regional bodies and the UN treaty bodies) were selected, based on pre-established criteria, including: the nature of the human rights violations at stake; the identities of the victims, as well as the potentially identified perpetrators; the types of reparations ordered; the nature of the governmental system and structure; the extent of the state's engagement with the supranational bodies; and the date of the decisions (in order to include both older and more recent cases). We considered cases in nine states (three per region):

Belgium, the Czech Republic and Georgia, in Europe; Colombia, Guatemala and Canada, in the Americas; and Burkina Faso, Cameroon and Zambia, in Africa. They were chosen after considering how states in each region scored on the pre-established criteria. We did not include states in Asia as there is no regional human rights system in that part of the world. We did not include outliers, that is to say, states that do not comply and/or engage conscientiously with supranational human rights mechanisms to implement their recommendations or orders but that simply disregard the views of such bodies. (For more information on the selection of states, see the Introduction to this special issue.)

We put together a timeline for each of the selected cases in each of the countries, tracking *developments related to the judgment itself*, such as when it was issued, who were the victims, who litigated it, and what was requested by way of reparations; *developments related to implementation*, such as what had happened with each form of reparation since the decision was issued, why was that possible, what role did the international body play, and who were the members of the body; and *external developments* that could have an impact on implementation, such as changes in government, the impact of the media, and the influence of other supranational bodies. We identified relevant stakeholders, in the states at issue and in supranational bodies, civil society organizations, and national human rights institutions, as well as victims of human rights violations and academics.

We carried out more than 300 semi-structured interviews on these issues,<sup>1</sup> as well as at least two focus groups per country. We also carried out in-depth desk research prior to, and following, fieldwork in each country and carrying out interviews at the supranational bodies. This article is based on the qualitative data gathered during the Project, which is not limited to the interviews that were carried out (for a more detailed analysis of the methodology of our Project, see Donald and Speck, this issue, on the dynamics of domestic human rights implementation). When this article refers to ‘systems’, we refer not only to the courts and/or treaty bodies that have adopted the decisions, but also the political organs under which they sit and to whom they report.

The article is divided into four sections. Section 2 discusses the attributes and drawbacks of judicial, quasi-judicial and political bodies in carrying out monitoring, and the range of tools which have been adopted to date. Section 3 reflects on the potential for various forms of dialogue that can be fostered by monitoring bodies. Section 4 considers what further steps these bodies can take in especially intractable situations. Finally, Section 5 of the article discusses what more could be done by these bodies to foster alliances at the international and national levels to enhance implementation. The article argues that supranational bodies are doing more than monitoring implementation of orders and recommendations despite scarcity of resources, but it notes that there is an unused potential in the mandates of these supranational bodies as well as in their ability to bring other actors on board that cajole better implementation of reparation measures. The article concludes by suggesting ways in which their role could be strengthened in the future.

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1 The semi-structured interviews were conducted with a range of actors, including current and former state officials, members of human rights institutions, civil society organizations, victims, current and former staff of supranational human rights bodies, and other experts in the field. Most are anonymous unless the interviewee agreed for his or her identity to be known. Interviews have been coded by the Project team, using the location and date. If, however, the location risks identifying the interviewee, it has been omitted.

## 2. How to foster implementation: the toolkits of supranational bodies

Previous literature has tended either to advocate for an ‘enforcement approach’, arguing that clear procedures, consequences and sanctions enhance compliance (Downs 1998: 320) or it has contended that peer review mechanisms eliciting cooperation and persuasion are more likely to prove effective (Raustiala and Slaughter 2002). We argue, however, that there are many factors which impact upon the approaches adopted and developed by international human rights systems, and that a diverse range of tools—both persuasive and coercive—can be conducive to implementation in differing contexts. This section explores and analyses the toolkits employed by the UN treaty bodies and by the three regional systems as well as the impact such tools have on implementation.

### 2.1 Role of the supranational bodies

The implementation of decisions made by UN treaty bodies and by the African and Inter-American commissions and courts is in practice monitored, to a greater or lesser extent, by these bodies themselves, through processes which were not set out in their founding treaties, but which have been developed organically over time. The American Convention on Human Rights does not contain explicit rules as to how the Inter-American Commission on Human Rights (IACmHR) or the Inter-American Court of Human Rights (IACtHR) should monitor implementation, but this legal lacuna has given the opportunity to these bodies to set up various procedures to enhance implementation, using their rules of procedure (see Article 48, Rules of Procedure of the Inter-American Commission and Article 69, Rules of Procedure of the Inter-American Court). For one commentator, this represents the Inter-American Court having taken ‘affirmative steps’ to outline a framework for monitoring compliance by putting in place a set of procedures (Vannuccini 2014: 234). Within the African system it is the African Commission on Human and Peoples’ Rights (ACHPR) which has taken on the principal role of monitoring implementation—by default, as the African Union (AU) has to date contributed little in practice. This role includes collecting information, offering dialogue, and even naming and shaming recalcitrant states, albeit inconsistently. The two-tier nature of the African and Inter-American courts and commissions means that both the African Commission and the Inter-American Commission may decide to refer cases on to the respective courts—and such referrals may be predicated on the extent to which the decision has been implemented or not (see Section 4.1 below). The African Court on Human and Peoples’ Rights (ACtHPR) will order reparations, collect information from the parties on implementation of the measures, and will publish some (although it is not clear how much) of this information. However, it is far less apparent that it takes on the role of actually assessing the extent of implementation.

Amongst UN treaty bodies, the UN Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, and the Committee on the Elimination of Racial Discrimination have established ‘focal points’ to pursue implementation, such as special rapporteurs on follow-up or working groups, who gather information about implementation, and grade the degree of states’ compliance (see Donald, Long and Speck, this issue). These have been developed by the specific treaty bodies, not by the petitions team in the secretariat, suggesting less of a ‘system’ as such.

By contrast, in Europe it is the Committee of Ministers (CM), a political body, that monitors the execution of judgments of the European Court of Human Rights (ECtHR), as mandated by the terms of the European Convention on Human Rights (under Article 46(2)

of the Convention). This marks a fundamental difference between these treaties, as in Europe the supervision of the execution of judgments is carried out by state diplomats (the Ministers' Deputies who represent states at the Committee of Ministers), rather than by independent judges or decision-makers—a mechanism that has been characterized as 'foxes guarding the foxes' (Çalı and Koch 2014). The Committee of Ministers is supported in its supervision role by staff from the Department for the Execution of Judgments of the European Court of Human Rights (DEJ) who carry out much of the 'heavy lifting' in terms of liaising with government representatives and other state bodies, and to an extent with applicants' representatives and civil society. The Department for the Execution of Judgments exerts considerable control, both over the process of supervision (including classification and prioritization of cases), and in terms of assessing the adequacy of a state's response. Since 2011, prioritization in the supervision process has been addressed by way of a twin-track system according to which cases are allocated either to a 'standard' procedure or an 'enhanced' procedure (for cases which require urgent individual measures or which concern important structural problems, notably pilot judgments), but in either case states are required to provide an 'action plan' or 'action report' on the case within six months of a final judgment. For 'enhanced procedure' cases, the Department for the Execution of Judgments may engage the state authorities more directly, by providing assistance in the preparation or implementation of action plans, or providing expert assistance as regards the type of measures to be taken, or establishing bilateral or multilateral cooperation programmes (such as seminars or round tables). For Çalı and Koch, this represents 'a hybrid form of human rights monitoring in which the governments and a technocratic body jointly share competences under the shadow of a Court' (Çalı and Koch 2014: 314). Other commentators have acknowledged the limitations created by the 'political nature' of the Committee of Ministers which is considered to be 'ill-adapted' to dealing with adversarial issues (Palmer 2017: 150).

While in Europe the Committee of Ministers is the primary player as regards implementation, the European Court of Human Rights has also taken into account questions of implementation in processing cases and even in drafting its judgments (Keller and Marti 2015). The usual stance of the European Court has been to avoid taking on any role as regards the implementation of its decisions (ECtHR, *Bochan v. Ukraine*: para. 33),<sup>2</sup> mindful of the principle of subsidiarity, but also of the risk of being criticized for overstepping its treaty-defined boundaries as regards the distribution of powers and treading on the toes of the Committee of Ministers. However, its more recent position has arguably tended to blur the boundaries with the Committee of Ministers, as its stipulation of measures to be carried out by state authorities in responding to systemic violations, through both pilot judgments<sup>3</sup> and Article 46 judgments (see Section 4.1 below), are intended to facilitate the implementation of judgments (interview BE15, Brussels, 1 December 2016; Donald and Speck 2019). These developments suggest that the European Court has been moving further along the judicial review continuum, towards a stronger form of review when required (Gardbaum 2001; Tushnet 2003; Çalı 2018). They also indicate a perceived need, albeit exceptionally, for some degree of judicialization of the implementation process. Keller and Marti advocate a combination of political dialogue and legal accountability—with the Committee of

2 Details of cases mentioned in this article are listed at the end, after the References list.

3 In a pilot judgment, the European Court identifies the structural problem underlying repetitive cases and prescribes measures to resolve it, usually with a deadline.

Ministers initially retaining the power to supervise implementation, but if this proves to be unsuccessful after a set period, the Court would then have the power to review compliance (Keller and Marti 2015).

## 2.2 Tools

The supranational bodies employ a range of tools including written correspondence, meetings and hearings and use of other mechanisms that are available to them as part of their general mandate. These can facilitate and enable dialogue between the supranational body and one or more of the parties, between the parties themselves, and with others at the national level. They also are aimed at obtaining information about the steps taken, and identifying obstacles and challenges.

The basis of the monitoring process in all of the supranational bodies is written, enabling both states and applicants to file submissions or information on implementation, leading in some instances to a written assessment (of varying depth and detail) by the supervising body (Gamboa 2014; Donald, Long and Speck, this issue). Beyond that, the opportunities for an effective assessment process and genuine dialogue (involving the supervising body, the state, as well as the victim) vary significantly, because of the different approaches. The supervision process by the Committee of Ministers is conducted through closed quarterly meetings solely comprising state representatives—neither Court judges nor victims are present. The dialogue between the parties before the UN treaty bodies and the African Commission on Human and Peoples' Rights and the African Court is principally conducted through written correspondence, although the African Commission has dabbled in holding hearings (as discussed below). Among all the bodies, it is the Inter-American Court of Human Rights which has proved the most innovative and persistent in tackling problems of implementation. In addition to ordering various forms of reparation, it indicates in its judgments the means of compliance with the various measures ordered, including deadlines (see Murray and Sandoval, this issue). Moreover, the Inter-American Court employs a range of other tools to facilitate implementation, including issuing orders, carrying out private and public hearings, provisional measures, in-country visits, meeting informally with state delegations and requesting additional information from particular sources. It has also joined cases in which similar forms of reparations have been ordered against the same state, to streamline the monitoring process (Article 30(5) of its Rules of Procedure), and has carried out joint hearings and issued joint monitoring resolutions, in particular as regards structural issues (IACtHR 2014: 35). Nevertheless, given continuing challenges in securing effective implementation, a dedicated Unit for Monitoring Compliance with Judgments (Compliance Unit) was established within the Inter-American Court secretariat in 2015 (IACtHR 2015: 55).

The UN treaty bodies, the African Commission and the Inter-American Commission all have a range of functions which go beyond jurisdiction over individual petitions, and which could be employed in support of the implementation of cases. UN treaty bodies can seek information from sources other than the parties (for example, see Rule 101(2), Rules of Procedure of the Human Rights Committee), in particular as regards guarantees of non-repetition which address structural causes of human rights violations, including through shadow reports as part of the periodic state reporting process, by separate submissions to the treaty body secretariat, and also using the treaty bodies' dialogue with civil society during sessions (interview, Geneva, 18 November 2016). One treaty body member suggested

that while there is not always synchrony between the state reporting functions and the individual complaints procedure, synergies between the two have grown over the years (meeting with Human Rights Committee, Geneva, 22 October 2018). The Inter-American Commission has similar functions and has used them in an ad hoc fashion to monitor implementation of its decisions in individual cases. However, the adoption of its new strategic plan for 2017–2021 (IACmHR 2017a: 62) has created a unique opportunity for better coordination among the various functions of the Commission to monitor implementation of decisions. A new Recommendations Monitoring Section has been established to follow up on implementation of all recommendations made by the Commission, not only those made in the course of the individual petitions process, but also in country reports, on-site visits, thematic reports, and so on (IACmHR 2017a; interview IASHR034, Washington DC, 1 December 2017). Similarly, the African Commission takes advantage of its wider remit to monitor implementation. For example, during the state reporting process, and in the course of on-site visits, the Commission raises questions with states about individual decisions, and it has adopted resolutions highlighting a lack of implementation, albeit on an ad hoc basis.

While there is therefore considerable potential for supranational mechanisms to employ their broader mandates to foster the implementation of individual decisions, our research revealed that they are not employed to their fullest extent. Monitoring implementation is sometimes seen as a distinct task that should be carried out, but often with no additional resources available, nor indeed the promise of such (see Donald, Long and Speck, this issue: Section 2.1). For example, we were told that there was ‘a very strong disconnect’ between the Inter-American Commission’s thematic monitoring and the assessment of individual cases (interview IASHR033, Washington DC, 30 November 2017) and another interviewee from the Inter-American Commission acknowledged that ‘I don’t see that we’ve really worked out how those things would work together’ (interview IASHR030, Washington DC, 2 December 2017). Nevertheless, interviewees suggested that the new Recommendations Monitoring Section could help to enhance coordination between the two mandates at both the Inter-American Commission and the Inter-American Court (interviews IASHR033, IASHR031, Washington DC, 27 November 2017; focus group at Inter-American Commission, 2 December 2017). For example, the work of the Inter-American Commission in relation to guarantees of non-repetition (addressing structural problems) could be enhanced if there were better coordination between its protection and monitoring roles, since individual cases could benefit from the experience gained over the years by the Commission through its monitoring work not only in specific countries but also in the wider region.

Each of the supranational bodies has, to a certain degree, developed its approach to systemic problems, in the main by grouping together structural problems encountered within states, and to a certain extent across states. The Inter-American Court of Human Rights has pioneered a practice of holding joint hearings in relation to similar forms of reparation ordered against a particular state in different cases (discussed further below), and in Europe the Committee of Ministers has in recent years grouped similar cases together, an approach which has been broadly welcomed for helping to draw attention to the systemic nature of the problems (interviews GE01, GE02, London, 17 January 2017). Since 2018, the Committee of Ministers has started to hold thematic debates—on prison conditions (2018) and on the duty to investigate right to life and torture cases (2019)—but these have been

held within the closed hearings of the Committee of Ministers, with little information being made public, making it difficult to discern what impact they have had, if any.

There are three significant deficiencies which we detected across the range of supranational bodies. First, not all the tools already available are used to the best of their potential. For example, certain monitoring tools (such as asking questions during state reporting) are, in practice, inconsistently or rarely used. This deficiency is apparent not only with respect to the monitoring bodies' use of their own tools, but also their engagement with other actors at the regional and international levels (see Section 5). Second, there is persistent non-compliance by states with various procedures that are being employed. For example, treaty bodies often request the state concerned to report back on implementation, in writing, within a given time frame—usually within six months of the notification of the recommendations by the treaty body. However, states do not always comply with these time limits (interview D.14, 23 November 2017). Third, sufficient resources (human and financial) are not being made available to supranational bodies to monitor and promote implementation of their decisions. This is discussed further in Donald, Long and Speck (this issue).

### 3. Supranational bodies as enablers of dialogue

Supranational bodies take different approaches to dialogue, which affect when it takes place, who is involved in it, and what is its purpose. Some bodies, such as the African Commission on Human and Peoples' Rights, have yet to fully determine their own role. Accordingly, we refer to 'dialogue' in this article to describe the reviewing process carried out by supranational human rights mechanisms of the implementation of their decisions, which includes the utilization of tools to encourage the parties to explore ways of moving implementation forward, either between themselves or with the direct help of the monitoring body.

Constructive dialogue has been at the heart of the work of the UN treaty bodies, reflecting the fact that they are not courts, as such. They take advantage of the presence of state delegations in Geneva to have formal or informal meetings and to raise issues related to the implementation of individual communications (interview UN petitions team, Geneva, 18 November 2016). As noted above, the state reporting system is a further avenue for treaty bodies to promote a conversation through the 'constructive dialogue' that it envisages. The Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child, the Committee on the Rights of Persons with Disabilities, and the Committee on Economic, Social and Cultural Rights each has the express power to request a state party to include in their periodic reports information about the actions taken in response to individual decisions (see, for example, Article 7(5) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, or Article 11 of the Optional Protocol to the Convention on the Rights of the Child). The opportunities for the state authorities to acknowledge challenges and identify action that has been taken, and the questions and then recommendations that treaty bodies can make, help to promote a dialogue on implementation.

In the African system, the African Commission has offered its 'good offices' to the parties on occasion to facilitate implementation, and, more expansively, to 'forge dialogue and strategize with the Government and civil society' as it did, for example, in the *Endorois* case, related to violations against indigenous peoples in Kenya (ACHPR 2013a: para. 4),



through a hearing to which the parties were invited, thereby acting as an intermediary between the parties whereby practical steps and solutions could be proffered (Murray et al. 2017: 153; interview B.4, July 2017). It may also elicit information from those who are not parties to the case (as is permitted by Rule 112(6) of its Rules of Procedure). We also heard that, in one instance, the personal visit by a member of the African Commission to a state to encourage the implementation of a decision was followed by some activity by the government to implement the recommendations (interview D.1, 20 April 2017). But these are the exceptions rather than the rule.

Interlocutors confirmed that, in the European system, a process of dialogue and diplomatic means is critical, including acknowledging the positive measures taken by state authorities. Interactions between state officials and the Department for the Execution of Judgments are at the heart of the dialogue. Government representatives acknowledge that prompting or questioning by the Department for the Execution of Judgments exerts pressure (interviews BE03, BE04, BE05, Brussels, 8 November 2016). A Belgian foreign ministry official commented that this pressure can be used by officials ‘internally’ with other ministries or departments to move things forward, as happened when the Department for the Execution of Judgments raised the implementation of *RTBF v. Belgium*, a case concerning a court injunction imposed on a broadcaster, the implementation of which had been stalled (interview BE22, Brussels, 1 February 2017; interview SXB02, Strasbourg, 25 November 2016). The ministry official also emphasized that when states act in concert to highlight a problem, such collective action will be increasingly persuasive. Furthermore, officials recognize that the reputation of the state matters and they worry about ‘losing image’ (interview GE31, Tbilisi, 27 April 2017). Government officials additionally say that they appreciate the opportunity to have informal discussions with the Department for the Execution of Judgments, especially when there is a degree of uncertainty as to what implementation of a judgment would require, so that they can then work together to find a solution (interviews CZ16, CZ17, CZ18, CZ19, CZ20, Prague, 22 June 2017; interview GE06, Tbilisi, 24 April 2017). This helps them gain a better understanding of the Department for the Execution of Judgments’ expectations.

Tenacity in maintaining the dialogue—keeping going at an issue over a period of years—was also noted as important in Europe. Senior Council of Europe official Christos Giakoumopoulos suggests that this is effective even for more intransigent implementation issues, as it keeps the dialogue going until a future time when there is more potential to move things forward (see Conversation with Council of Europe Insiders, this issue). In the context of a discussion about the implementation of the case of *L. v. Lithuania* (2007) concerning the unavailability of gender reassignment surgery, a representative of the civil society organization ILGA-Europe also noted the benefits in persevering and continually pushing as it keeps the issue on the agenda (interview GE02, London, 17 January 2017).

Other interlocutors emphasized the need for diplomacy in persuading a state to make changes. Michael O’Boyle, the former deputy registrar at the European Court, suggested:

Successful implementation requires that you persuade a sovereign government to introduce reform of some sort. By setting up a body that simply gives the government instructions, you’re less likely to get a positive outcome. Setting up a body that is much smarter than that, and that seeks to put the emphasis on the techniques of diplomacy, persuasion or cajoling, is the only way of having some chance of convincing a government that doesn’t want to enforce a judgment. (See Conversation with Council of Europe Insiders, this issue)

These findings echo the conclusion reached by Çalı and Koch that it is the extent of ‘de-liberation, cooperation and continuous exchange’ which is the key strength of the European system (Çalı and Koch 2011: 22).

In the Americas, facilitating dialogue is also intrinsic to implementation processes. A representative of the Colombian National Agency for the Legal Defence of the State (Agencia Nacional de Defensa Jurídica del Estado) suggested that the Inter-American Commission and the Court should be instrumental in ‘opening spaces, listening to the parties, but always trying to get the parties to come up with agreements’ (interview COL05, Bogota, 26 July 2017). A senior lawyer at the Inter-American Court confirmed that Court hearings enable dialogue, and have been essential in inducing better implementation, citing the example of the *Awas Tingni* case (2009), regarding indigenous land demarcation and titling in Nicaragua, where a work plan was agreed at the hearing and within six months the whole judgment had been complied with: ‘just the fact of listening to the parties . . . generated a more creative dialogue’ (interview IASHR019, San José, 15 February 2018). This view was also confirmed by a member of the Compliance Unit at the Inter-American Court who suggested that dialogue between states and applicants (or their representatives) within the Inter-American system was pivotal (interview IASHR024, San José, 15 February 2018).

Each of the regional systems issues resolutions, declarations or similar documents to maintain the dialogue on implementation. The Inter-American Court can issue ‘very punctual resolutions’ and can use them as a means of sustaining dialogue as well as setting out what is expected from states (interview IASHR004, San José, 9 February 2018). In cases like *Molina Theissen* (2009), concerning the disappearance of a child and the illegal detention and rape of his sister in 1981 and the lack of diligent investigation into the facts, the Court prescribed more explicit directions as to what Guatemala was expected to do—to report back to the Court to keep the dialogue going, and to conduct an effective investigation such as to

submit a schedule listing all steps to be taken, including the potential dates thereof and the institutions or persons in charge of them. In such schedule, the State shall even note the administrative and budgetary steps to be taken prior to any investigative action, and identify the problems detected to investigate the case, as well as a plan to address such difficulties within a defined deadline. (IACtHR, *Molina Theissen v. Guatemala* 2009: para. 25)

The Inter-American Commission will also issue press releases, in order to commend the progress made by states (e.g. IACmHR 2017b) or to criticize lack of compliance (e.g. IACmHR 2014).

Resolutions have also been issued by the African Commission on Human and Peoples’ Rights in response to states’ failures fully to implement its decisions, although the approach is ad hoc and has tended to be the result of consistent pressure from the litigants (as in the *Endorois* case—see ACHPR 2013a, 2013b), and civil society (as in the *Gunme* case, finding discrimination against the Anglophone population in Cameroon—ACHPR 2018). Such resolutions have urged compliance by reminding states of the action they should be taking (ACHPR 2013b), noting the deteriorating situation and reiterating the need for dialogue (ACHPR 2018). Where there are problems in implementing a judgment within the European system, the Committee of Ministers may take various steps to facilitate execution, such as declarations by the Chair, press releases, issuing decisions adopted as the result of a debate and issuing interim resolutions (Council of Europe 2010: 21). Recalcitrance may result in more strongly worded resolutions—for example, ‘deploring’ the failure to

implement and declaring a state to be in ‘flagrant conflict with its international obligations’ (CM 2014). Where there are continuing systemic problems, the Committee of Ministers may issue a series of resolutions calling for further action to be taken by the authorities (CM 2000).

It is clear, then, that dialogue can be promoted through different tools employed by the supranational bodies either to persuade or rebuke. The next section focuses on the use of hearings within the Inter-American system, which have further enhanced dialogue by generating new implementation dynamics across the parties to the litigation and other relevant actors.

### 3.1 The benefits of implementation hearings

The practice of holding a separate hearing to consider questions of implementation is common in the Inter-American system, and a possibility in the African system, but is unknown in Europe and among UN treaty bodies. The African Commission on Human and Peoples’ Rights has held hearings in just two cases, neither of which could be said to be indicative of a ‘practice’ or a coherent approach (Harrington and Bingham 2013). Prompted by the litigants and civil society organizations, on neither occasion was it clear who should be present, whether the hearing should be held in public or private, or what the purpose or outcome should be, resulting in a hearing that was, as one interviewee informed us, ‘so chaotic ... having no idea where we were going to start, how it was going to end’ (interview D.1, 20 April 2017).

In the Americas, in contrast, the utilization of hearings is not an ad hoc process and has had a positive effect on implementation, helping things move forward when states appear to be dragging their feet. Both the Inter-American Commission and the Inter-American Court are able to call implementation hearings, but they are more frequently used by the Court, which began to do so in 2007 (IACtHR 2007: 23). The majority of Inter-American Court hearings have been held in private, but it also has the capacity to hold public hearings (which are discussed in Section 4.3 insofar as they are used to apply pressure on uncooperative states). The parties may request a hearing, but there are no explicit criteria setting out when a hearing should be held. Private hearings are held before a delegation of three or four judges, together with the Inter-American Commission, the victims and their legal representatives, and the state delegation. They are conducted informally, lasting for about two hours. During the hearing, the Court delegation will hear submissions from the state and the victims, and it will ask questions, suggest solutions and seek to prepare ‘compliance schedules’ (IACtHR 2010: 5).

The Inter-American Court will hold hearings to attempt to activate compliance in especially problematic situations or when there are long delays, such as in the *Awas Tingni* case (mentioned above), or in the case of *La Rochela Massacre v. Colombia*, where members of a judicial investigation commission were massacred by paramilitaries with the acquiescence of state authorities while they were carrying out an investigation of the massacre of 19 tradesmen. In *La Rochela* a hearing was called in 2014, seven years after the judgment, to move implementation forward (interview COL017, Bogota, 28 July 2017). The Court may also hold hearings to exert greater influence on the state on a particular question, as happened in the case of *Fermín Ramirez and Raxcacó v. Guatemala* in 2008, to dissuade the state from allowing the death penalty by decree (IACtHR, *Ramirez and Raxcacó* 2008: 38–46; interview IASHR01, Bogota, 25 July 2017) and in the case of *Mapiripán Massacre v.*

Colombia in 2012, to deal with the problem of the ‘false victims’ who had been awarded compensation by the Court, but who turned out not to be victims of the violations concerned. It was suggested that hearings have been most effective where the Court has facilitated communication between the parties and allowed them to establish the way forward (interviews IASHR013, San José, 9 February 2018 and COL04, Bogota, 26 July 2017). It is also critical that key state representatives from institutions central to the implementation of certain forms of reparations (such as judges, prosecutors or ministry officials) are present at the hearing, as they can take responsibility for implementation and trigger important implementation dynamics at the domestic level within their own institutions and/or across different branches of power beyond the executive. This happened, for example, in February 2012 at the hearing on rehabilitation (medical and psychological care) in nine Colombian cases, where the Colombian Minister of Health, Beatriz Londoño, was present and explained to the Court the obstacles to making progress in the delivery of rehabilitation services to victims—obstacles which, according to her, were partly due to the failure to reach an agreement with the legal representatives of the cases on how to move things forward (IACtHR, Nine Colombian cases 2012; interview COL023, Bogota, 11 August 2017). According both to officials at the Ministry of Health, and to legal representatives in the cases, the Minister played a key role in moving things forward, as she understood the problems at stake and what was needed to unlock the discussion (interviews COL015 and COL016, Bogota, 28 July 2017). This dialogue (which was facilitated by the hearing) eventually led to the conclusion of an agreement in 2017 between the parties on rehabilitation for victims around specific issues which were agreed by the parties (interviews COL023, Bogota, 11 August 2017 and COL015, Bogota, 28 July 2017).

It has also been productive for the Inter-American Court to request information central to the implementation process from the state prior to the hearing or to make requests for information directed at particular state bodies, as it did for example from the national prosecutor of Guatemala, in relation to the duty to investigate in 12 cases against Guatemala (IACtHR, 12 Guatemalan cases 2015: 23). These appear to be productive methods to move implementation forward when the usual channels (often via ministries of foreign affairs or justice) break down. For other interlocutors, hearings are considered as most effective when they act as a pressure mechanism on the state and trigger a response from them (interviews COL010, Bogota, 27 July 2017 and COL014, Bogota, 28 July 2017).

Our research also suggests that hearings are more frequently employed by the Inter-American Court in respect of states which demonstrate some willingness to engage with further dialogue to implement the orders of the Court. Between 2007 and 2018, the highest number of private hearings were in relation to Colombia (32) and Guatemala (38). In contrast, the Court held only one hearing in a case concerning Venezuela (*Barrios Family* 2016), which had strongly contested the authority and legitimacy of the Inter-American Court, eventually denouncing the American Convention on Human Rights in 2012 (IACtHR 2015: p. 58).

Another influential factor on the practice of holding hearings has been the impetus provided by certain civil society organizations (CSOs) that have pushed for them (interview IASHR01, 25 July 2017). For example, in Colombia, the majority of cases in which hearings have taken place were litigated by experienced CSOs such as Comisión Colombiana de Juristas or Colectivos de Abogados Alvear Restrepo (Engstrom and Low 2019: 42). These CSOs, or others newer to the system, have also partnered with the Center for Justice and

International Law (CEJIL), one of the most experienced CSOs in the field (ibid: 28), which has evidenced a clear commitment to making progress on questions of implementation by advocating actively before the Inter-American Commission and the Court on how they should improve their ‘tools’, and by carrying out important studies on the subject in relation to specific measures such as the obligation to investigate, prosecute and punish (CEJIL 2007, 2009b, 2017).

The Inter-American Court also holds joint hearings, to monitor compliance with the same or similar reparation measures ordered in various cases against the same state, which can then lead to the publication of joint resolutions. This was first done in relation to orders of rehabilitation for victims in Colombia in May 2010 (referred to above), apparently as a result of a request made by the applicants’ representatives (interview IASHR01, Bogota, 25 July 2017). The Court joined nine cases in which it had ordered rehabilitation: *Manuel Cepeda Vargas*, *Escué Zapata*, *Valle Jaramillo et al.*, *Ituango Massacres*, *La Rochela Massacre*, *Pueblo Bello Massacre*, *Gutiérrez Soler*, *Mapiripán Massacre* and *19 Tradesmen*. Civil society has been active and influential in calling for joint hearings where structural problems are an issue, such as the failure to comply with the duty to investigate, prosecute and punish (interview IACHR06, San José, 12 February 2018). Interviewees noted their importance in improving the visibility of structural problems (interview GUA01, Guatemala City, 3 August 2017), and the benefits of procedural economy, particularly with respect to states found to be frequent violators, such as Guatemala, Colombia and Peru (interview IASHR05, San José, 9 February 2018). However, other interviewees were critical of the limitations and rigidity of joint hearings, because the short time available did not allow detailed discussions to take place (interview IASHR05, San José, 9 February 2018). We were unable to find a clear causal relationship between the use of joint hearings and developments in implementation in the cases we considered. However, our case-tracing process shows that these joint hearings helped to keep important forms of reparation on the agenda and to maintain dialogue, as the joint hearing on rehabilitation in Colombia shows. Nevertheless, selecting just one form of reparation in practice means prioritizing it over other forms of reparation, which could be detrimental for the implementation of the other measures.

Holding hearings *in situ*, as the Inter-American Court has done since 2015, can enable it to ‘take the supervision to the country’ which may ensure the attendance of state officials who have the authority to execute the orders, as well as enabling the attendance of victims and their representatives (interview IASHR022, San José, 15 February 2018). The criteria used by the Court to conduct such hearings *in situ* is unclear but it has mainly used them in relation to cases about indigenous peoples’ rights, probably given their vulnerable situation, but also to better comprehend their culture and views, as happened in 2017 when the Court visited Plan de Sánchez in Guatemala, the village where more than 250 indigenous people were massacred in 1982. While it is premature to assess their effectiveness given their relatively recent occurrence, it is clear that hearings can assist the Court in understanding the problems and challenges arising for the state in attempting to comply with its orders, as well as giving the opportunity to state authorities to put human faces to cases and better understand victims’ views and situation (interview IASHR013, San José, 9 February 2018; and Saavedra, this issue). Equally, they can assist in maintaining the focus of the state on the cases (including old cases), which can aid implementation, as happened in *Plan de Sánchez* where the Court’s visit helped to keep the case on the state’s agenda, 13 years after the judgment had been handed down.

## 4. Facilitating implementation when the going gets tough

Supranational mechanisms that monitor and induce implementation are designed fundamentally using a non-confrontational framework. From this perspective, they support the managerial theory of compliance, which posits that states have a tendency to comply with international law and with individual rulings where they have the capacity to do so (Chayes and Chayes 1995). However, when dialogue to promote implementation does not yield results, supranational bodies also have other tools which can be deployed to ‘up the ante’ to promote implementation. Supranational bodies cannot as such enforce implementation using these tools or impose specific sanctions on states, but they can generate more attention on an issue, exert additional pressure on states, and take conversations about compliance into other constituencies (including other states or inter-governmental bodies). As measures of last resort, they may be utilized to ‘name and shame’ states. Interestingly, this ratcheting up involves both the decision-making bodies themselves and/or the political organizations which oversee them. Whether these tools are effective has been questioned by some. Our research offers mixed views on their overall effectiveness.

### 4.1 Referral to a judicial organ

In 2010, the European system introduced ‘infringement proceedings’, a new mechanism which entitles the Committee of Ministers to refer a case back to the European Court of Human Rights where it considers that a state has refused to comply with a judgment (Article 46(4), European Convention on Human Rights; de Londras and Dzehtsiarou 2017). While the mechanism does not lay down any specific sanction (financial or otherwise), it is seen as a more feasible measure than expulsion from the Council of Europe (Article 8, Statute of the Council of Europe), a sanction which has never been invoked. However, it took seven years before it was first used in December 2017 (its only use to date), in respect of Azerbaijani opposition politician, Ilgar Mammadov, who remained in prison in Baku, in spite of the persistent calls by the Committee of Ministers for him to be released (Remezaite and Dahlsen 2018; ECtHR, *Ilgar Mammadov v. Azerbaijan* 2019). Does Mammadov’s subsequent release—in August 2018—signify that the decision by the Committee of Ministers to invoke the infringement proceedings mechanism represented a success? The mechanism appears to have been used effectively, but we would also acknowledge that there was significant contributory pressure being exerted on the Azerbaijani authorities from a range of Council of Europe institutions, including the Secretary General who had instigated an Article 52 inquiry into the case (see also Section 5.1 and Jagland 2018).

Both the Inter-American and African Commissions can refer decisions to their respective Courts on the basis of non-implementation. The African Commission has only used this procedure twice with respect to non-implementation of its provisional measures (Rule 118(2), Rules of Procedure of the African Commission on Human and Peoples’ Rights; Application 002/2013, *African Commission on Human and Peoples’ Rights v. Libya*; Application 006/2012, *African Commission on Human and Peoples’ Rights v. Kenya*), but never for the non-implementation of a decision. As to why this is so underutilized, it can be attributed to numerous factors including the African Commission’s inability to identify criteria for referral; difficulties gathering evidence on implementation; and the risk that in so doing it will give the impression that the Commission has failed to be taken seriously by the state and that the African Court, being a judicial as opposed to a quasi-judicial body, will

be more effective in ensuring implementation (Murray and Long 2015). Furthermore, it should be noted that the African Court on Human and Peoples' Rights has only relatively recently been established and the relationship between the African Commission and the Court is in a constant state of flux. The Inter-American Commission can refer cases to the Inter-American Court in relation to states that have accepted the latter's jurisdiction (Article 44, IACmHR Rules of Procedure), if 'the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention' and weighing other factors, such as the position of the petitioner. The Inter-American Commission regularly refers cases to the Court, even where it has given various opportunities to a state to implement its recommendations. For example, in *Las Dos Erres Massacre v. Guatemala*, the parties signed a friendly settlement agreement when the case was at the Commission stage in 2000 but the Commission continued to monitor its implementation. In 2006 the victims' legal representatives petitioned the Commission to discontinue the settlement as Guatemala was not complying with it, in particular with the duty to investigate and the obligation to provide collective reparations. The Commission referred the case to the Inter-American Court in July 2008 (IACmHR, *Las Dos Erres Massacre* 2008) even though Guatemala had complied (or partially complied) with other elements of the agreement (CEJIL 2009a).

These mechanisms could help to put pressure on states in situations of non-compliance, as local constituencies (states and CSOs) often recognize the greater authority and legitimacy of supranational tribunals. Equally, they could generate greater awareness of the negligent or bad faith attitude of states regarding implementation of certain decisions. However, it is to be regretted that infringement proceedings in Europe have not been used more often, despite calls from within the Council of Europe for their greater use (PACE Committee on Legal Affairs and Human Rights 2015: para. 34). It is an obvious anomaly that there has been such reluctance by the Committee of Ministers to use this new mechanism. Equally, it is surprising that the African Commission has not referred a single case on non-implementation of its decisions to the African Court, thereby neglecting a potentially powerful tool to ensure that justice is secured for victims of human rights abuses. In contrast, the Inter-American Commission regularly refers cases to the Inter-American Court.

Finally, and of recent occurrence, the victims in the case of *Chichupac* asked the Inter-American Court to grant provisional measures on various grounds but particularly to order Guatemala to discontinue consideration of an amnesty law that was before Congress and would have impeded Guatemala from complying with the orders of the Court (in that case and other cases) to investigate gross human rights violations. The Court granted the measures and extended this to 12 other cases where the Court had ordered Guatemala to investigate, prosecute and punish perpetrators. Thus, the provisional measures tool enabled the Court to prevent a state from taking regressive measures that would have precluded implementation of its orders (IACtHR, *Chichupac* and 12 other cases 2019). In this particular case, Guatemala has not subsequently been able to move forward with the reform of its National Reconciliation Law. Indeed, in July 2019 the Guatemalan Constitutional Court ordered the suspension of any discussion on this reform as a result of the use of the *amparo* writ as a means of preventing irreparable harm to victims. Nevertheless, this remains a disputed and contentious issue in Guatemala and the study of the legislative reform has been suspended but not permanently closed, up to the time of writing of this article.

## 4.2 Referral to a political organ

As an alternative to judicial involvement, the referral of a problematic implementation situation to a political organ, as shown by the experience of the Americas and Africa, often yields little response—representing simply ‘a salute to the flag’—meaning an action without any consequences (interview IASHR014, San José, 14 February 2018) or, frustratingly, maintaining the decision in a ‘political vacuum’, where no action is taken by the relevant domestic body to trigger implementation (interview IASHR035, Washington DC, 1 December 2017). The Inter-American Court can report to the General Assembly of the Organization of American States (OAS) about the lack of implementation of its orders, as well as issue recommendations (Article 65, American Convention on Human Rights). This measure has only exceptionally been invoked, in relation to intractable situations in states such as Venezuela, Haiti, Nicaragua, Trinidad and Tobago, or Ecuador, when the Court considers that it may be beneficial to bring in other constituencies, or simply that it may have more impact by resorting to ‘naming and shaming’ within a political context involving other states. However, none of these cases prompted the OAS General Assembly to take any measures with the states concerned. We suggest that this is likely to reflect the fact that it is a political body, dominated by the views of states, and which does not benefit from the contribution of technical bodies like the Department for the Execution of Judgments in the Council of Europe, which carry out a more ‘neutral’ consideration of implementation issues.

Within the African system, the African Commission on Human and Peoples’ Rights also has the power to request the African Union (AU) organs to take measures in response to states’ inaction, and it is mandated to inform a Sub-Committee of the Permanent Representatives Committee (which is yet to be created) and the Executive Council of the AU about the implementation of its decisions, including situations of non-compliance (Rule 112(7), ACHPR Rules of Procedure). The African Court on Human and Peoples’ Rights under its Protocol (Article 29(2)) is similarly expressly mandated to give notification of its judgments to the Executive Council, which in turn ought to monitor their execution on behalf of the Assembly of Heads of State and Government (Murray et al. 2017). The African Court has proposed a ‘hybrid approach to monitoring’ in which the Court itself assesses the level of implementation, holds hearings and adopts a compliance judgment where necessary, but where its reports on compliance will be considered by the political bodies, the Permanent Representatives Committee and Executive Council of the AU, ultimately enabling the Assembly of Heads of State and Government to engage with the state (ACtHPR 2019: Annex I).

While political channels remain an option to help implementation, any referral to such bodies should be done with considerable caution, particularly in regional organizations where the commitment to human rights promotion and protection remains questionable. For example, recent attempts by the AU political organs to undermine the independence of both the African Commission and the African Court through the adoption of decisions that underline that they do not have independence from the organs that created them (AU Executive Council 2018), suggest that greater engagement at this level at this juncture could put the system in jeopardy.

## 4.3 Increasing visibility and publicity

Greater pressure on states may result from increasing visibility, which may ‘provide compliance incentives by publicizing non-compliance and by giving discursive tools to civil society and other states interested in pressuring for compliance’ (Huneus 2014: 451).



Some of the supranational human rights bodies use publicity as a tool to encourage implementation. As an exceptional measure, the Inter-American Court of Human Rights may hold hearings in public, in cases where there is a manifest failure of compliance by the state, where it considers that decisions taken at the domestic level are a complete affront to its rulings and orders on reparation (interview IASHR032, Washington DC, 5 December 2017), or in response to exceptional developments at the national level that put at stake the very foundations of the Inter-American system (such as the pivotal obligation to investigate, prosecute and punish). The first public hearing took place in the case of *Sawhoyamaxa Indigenous Community v. Paraguay*, a case relating to the state's failure to acknowledge the community's rights over ancestral land. According to a former senior lawyer at the Inter-American Court, the decision to hold a hearing was an ad hoc response to the fact that 'people were dying' and the Court took the view that further publicity was needed (interview IASHR01, Bogota, 25 July 2017 and IACtHR, *Sawhoyamaxa v. Paraguay*, 2009). Another public hearing was held in February 2019 in the case of *Molina Theissen* as Guatemala was in the process of approving an amnesty law that could have had the effect of hampering investigations of gross human rights violations committed during the internal conflict and so could have led to impunity for senior military commanders (CEJIL 2019, and Section 4.1 of this article).

Public hearings involve all seven judges, follow very formal protocols and are adversarial in nature. Judges can question the state and the victims during the hearing, allowing the Court to examine and expose the state position. Furthermore, the hearings can be attended by anyone, and are broadcast on the Inter-American Court website. Third party interventions can also be presented to the Court. Accordingly, as well as exerting additional pressure on states, the hearings can also be seen as promoting dialogue in new ways, as they bring diverse constituencies together, which can have a positive impact in generating further implementation dynamics at the domestic and international level (see Section 4.1).

## 5. Fostering alliances—international and national

Given the high levels of non-implementation within all the systems, the restraints imposed by limited resources, and the varied nature of forms of reparation, the role played by external actors in processes of implementation may be of particular benefit, especially in relation to systemic or structural problems. Our research suggests that two types of alliances are of pivotal importance for supranational bodies. The first is at the international level—both with other entities within the system itself and with other international organizations—and the second is with actors at the national level.

### 5.1 The supporting role of international organizations

Each of the supranational bodies at the regional level that we examined engaged with other organs within their own systems to facilitate the monitoring of implementation to a certain extent, with the European institutions leading on this front. Indeed, in the European context, the thrust of many of our interviewees concerned the limitations of Council of Europe entities acting alone, and the importance of their collaboration. The former deputy registrar of the European Court, Michael O'Boyle, referred to a sophisticated, 'multi-layered' system 'with many different actors taking part in the process' (see Conversation with Council of Europe Insiders, this issue). This 'system' has a number of different elements, each of which adds weight. For instance, the political know-how of the rapporteurs in the Parliamentary

Assembly of the Council of Europe (PACE) Committee on Legal Affairs and Human Rights (which monitors European Court decisions through the publication of reports, in-country visits and by holding hearings) was said to be of particular importance. They often have prior ministerial experience at the national level, and, as the former head of secretariat of the Committee underlined ‘They are not just simple backbenchers—they know what the game is about, and that is a value-added’ (interview SXB07, Strasbourg, 19 June 2018).

In addition, the Commissioner for Human Rights of the Council of Europe has taken up a number of thematic issues, some of which dovetail with issues raised by European Court judgments. More directly, the Commissioner has sought to encourage Council of Europe states to adopt a systematic approach to implementation at the national level, notably through incorporating baseline studies into national human rights action plans, together with regular monitoring and independent evaluation (Commissioner for Human Rights 2009 and 2017). The Commissioner is in a position to raise implementation questions directly during bilateral meetings with government representatives, and to make submissions directly to national bodies. The implementation of European Court judgments is also supported indirectly through decisions, which are mutually reinforcing, issued by other Council of Europe entities such as the European Committee for the Prevention of Torture (CPT). Beyond that, the Secretary General of the Council of Europe can institute inquiries (Article 52, European Convention on Human Rights) into the domestic implementation of European Convention standards, although the power has only rarely been invoked (for example, concerning the practice of ‘extraordinary rendition’, and egregious violations committed by the Russian security forces in Chechnya). The Article 52 inquiry instigated in 2015 into Azerbaijan’s imprisonment of political activist Ilgar Mammadov represented a novel development in that its focus was a single case (see Section 4.1).

The role played by the European Union has been significant in certain contexts, by increasing visibility, lending political weight and providing funding. For example, in 2014 the European Commission launched infringement proceedings against the Czech Republic for its failure to implement the Racial Equality Directive (2000/43/EC), because of systemic discrimination and segregation of Roma children in schools (Chopin et al. 2017). This process was considered to have helped maintain the momentum of inclusive education reforms, and the Commission used the *D.H.* judgment of the European Court of Human Rights in its negotiations with the Czech government. The proceedings also helped civil society representatives put pressure on the Ministry of Education to further advance the implementation of the European Court’s judgment (interview CZ10, Prague, 21 June 2017; HRLIP Workshop, Prague, 17 November 2017). Interlocutors from Georgia made a wider point about the respect which is generally accorded to the EU and European institutions (interview GE25, Tbilisi, 26 April 2017). A CSO representative argued that much of the Georgian authorities’ response following the *Identoba* judgment, concerning the violent disruption of a peaceful demonstration to mark the International Day against Homophobia and Transphobia (including the development of more comprehensive anti-discrimination legislation) was primarily a result of the influence of Georgia’s EU integration and association agreement, rather than merely reflecting the Strasbourg proceedings (interview GE01, London, 17 January 2017, see also Donald, Long and Speck, this issue, Section 3.1). A member of parliament from the ruling Georgian Dream coalition acknowledged a perception that failures of implementation would hinder Georgia’s European integration and even its economic growth (interview GE31, Tbilisi, 27 April 2017). A number of our interlocutors referred to the availability of EU funds as a means of easing financial burdens on states

(interview CZ05, Brno, 20 June 2017). For example, in the context of the implementation of the *Muskhadzbiyeva* case, an official at the Belgian Ministry of Interior recognized the significance of EU funding in supporting families held in immigration detention (interview BE13, Brussels, 10 November 2016).

There has been some engagement between the African Commission on Human and Peoples' Rights and the other organs of the African Union, including the African Peer Review Mechanism (APRM), whereby states voluntarily commit to self-assessment of their compliance with goals around good governance and development. This has resulted in, for instance, the appointment of one of the African Commission's members as focal point for engagement with the APRM and a commitment to sharing of reports, among other things (ACHPR 2010). While members of the ACHPR occasionally participate in APRM visits (Killander and Abebe 2012: 219), which could provide a further tool for in-country follow-up, there is little evidence that this process has been used to monitor implementation of decisions. Similarly, Article 19 of the AU's Peace and Security Council's Protocol enables 'close cooperation' to be sought with the African Commission and for information to be brought to its attention, as well as encouraging CSOs and others to address it, thus providing opportunities for it to monitor implementation of African Commission decisions (Wachira and Ayinla 2006: 486–7). The Pan-African Parliament (PAP), with respect to facilitating implementation of AU policies, can hold public hearings, undertake fact-finding missions and adopt resolutions, yet none of these mechanisms have been used to monitor implementation of African Commission or African Court decisions.

Given the range and specificity of orders and recommendations on reparations made by the Inter-American Commission and the Inter-American Court, the specialized bodies in the OAS could carry out an important complementary role in relation to implementation, however this has been the exception rather than the rule. For example, the Inter-American Commission of Women (Comisión Interamericana de Mujeres, CIM) could be engaged in the implementation of judgments concerning women's rights or cases of sexual violence, given that the Belém do Pará Convention recognizes its role in the prevention, punishment and eradication of violence against women, and that there is a particular body established to this end (the Follow-up Mechanism to the Belém do Pará Convention, MESECVI). A senior staff member at the Inter-American Commission confirmed that the Commission works closely with the MESECVI, but that the MESECVI lacks the resources to monitor implementation, suggesting that it does what it can with the resources it has (interview IASHR033). This was apparent to us in one of the cases in our study, *Véliz Franco v. Guatemala*, concerning the disappearance of a 15-year-old girl. REDNOVI, one of the CSOs that litigated the case, said that the MESECVI had not played a role in the implementation of the measures, although REDNOVI recognized its expertise on the matter (interview GUA02, Guatemala City, 3 August 2017). Other specialized bodies exist in the OAS such as the Pan American Health Organization (PAHO) that could provide expertise and technical assistance to states and the Inter-American human rights system to address the challenges involved in implementing rehabilitation for victims of gross human rights violations.

It is encouraging that relationships between the three regional courts have been consolidated with the establishment of an International Human Rights Forum. This provides further opportunities for engagement and sharing of best practices on implementation, and indeed, at its first meeting in October 2019, the Kampala Declaration was signed by the three courts aiming, among other things, to enhance dialogue and contribute 'to the

enforcement of . . . judgments in the long run' (ACtHPR, ECtHR, IACtHR 2019—Kampala Declaration).

In the case of UN treaty bodies, it is apparent that they have learned from each other's experiences (with the Human Rights Committee leading the way) in adopting similar tools, such as the appointment of special rapporteurs for follow-up and by stipulating specific time limits for the delivery of states' reports on implementation. The meetings of chairpersons of the treaty bodies offer a further opportunity to share experience on the follow-up to individual communications, although those meetings are at times more about formalisms rather than substance (UN Human Rights Council 2014: 47). Certainly, more could be done by the treaty bodies in connecting their promotion and protection mandates, as well as integrating their work with the Human Rights Council, the Universal Periodic Review (UPR) process, and the special procedures, with their thematic or country and with the full 'UN archipelago', meaning all other UN bodies dealing with human rights issues (Hunt 2017).

We also found out that while both Colombia and Guatemala have in-country field offices of the UN High Commissioner for Human Rights (OHCHR), there was very little connection between their mandates and the follow-up of individual decisions by supranational bodies, whether from the Inter-American system or UN treaty bodies (even as regards systemic problems). This is due, in part, to limited human and financial resources within the OHCHR offices (interview IASHR02, Bogota, 1 August 2017) but also as a result of a narrow institutional view that depicts the UN treaty bodies as having different functions to that of the OHCHR. We encountered similar limitations in Cameroon, where we found some evidence that the regional office of the OHCHR did not see it as its role to monitor communications, perhaps because working on politically contentious cases might negatively impact on their relations with the government (interview B5, Yaoundé, 26 February 2018).

There is, however, evidence of productive collaboration between the regional systems and the UN. For instance, interviewees in Europe emphasized this positive influence, both in improving state mechanisms and in exerting additional pressure in certain fields. A member of the Council of Europe's Venice Commission, an independent consultative body on democracy, rule of law, and fundamental rights, suggested that the introduction of the UN Human Rights Council's Universal Periodic Review (UPR) process led to improved coordination by the Czech ministries in responding to the various international human rights bodies (interview CZ13, Prague, 21 June 2017). Discussing the problem of prison overcrowding, officials at the Belgian Ministry of Justice noted the impact of the convergence of statements made, over a period of years, not only by the European Committee for the Prevention of Torture (CPT), but also through the UPR process (interviews BE03, BE04, BE05, Brussels, 8 November 2016). An official at the Department for the Execution of Judgments suggested that 'it is very efficient sometimes when you have all this different encouragement, pressure, when all the lights are on an issue' (interview CZ26, Strasbourg, 8 November 2017). In addition, the OHCHR has sought to draw lessons from, and strengthen cooperation with, the European human rights system, by adopting a joint declaration with the Council of Europe in 2013, including in relation to recommendations in concluding observations (UN Human Rights Council 2014: 78). Similarly, government officials in one African state noted the considerable visibility that UPR recommendations received at the national level (interview, 28 February 2018).



that they also enable more informal communication between CSOs and the Department for the Execution of Judgments (interview SXB05, Strasbourg, 19 June 2018).

Nevertheless, the greatest deficiency as regards accessibility is the fact that implementation meetings of the Committee of Ministers remain confidential, meaning that interested (non-state) parties, such as litigants, victims, third party intervenors, NHRIs or CSOs cannot assess their tenor or content. The Committee of Ministers supervision mechanism is not, of course, an adversarial process requiring equality of arms, as such; instead it involves inter-governmental engagement and debate. But it can be questioned whether the confidentiality of meetings is a necessary and immutable aspect of this procedure, or whether there are circumstances in which the process could be opened up with the aim of exerting additional, public pressure on a recalcitrant state.<sup>5</sup> This would be justifiable (even if only exceptionally) if it might mean that diplomats respond in different ways as regards especially intractable issues, and if civil society and the media could then stimulate further debate at the national level about the adequacy of a government's response. The experience in the Americas with public hearings (see Section 4.3) suggests there is a strong case in favour of opening up the Committee of Ministers process in certain circumstances.

In the Americas region, both the Inter-American Commission and the Court offer opportunities to CSOs to be involved in the various mechanisms they have at their disposal, to promote or protect human rights, including implementation, and have been very proactive in bringing them on board, much more so than the other systems discussed in this article. At the Commission stage, there are various opportunities for CSOs to engage—such as country or thematic hearings and country visits, and meeting with thematic rapporteurs. For example, in 2018 the Inter-American Commission carried out 25 visits to 12 states in the Americas to follow up on particular issues, to promote human rights or to monitor the human rights situation. During these visits to each of these countries, the Commission met with CSOs and victims (IACmHR 2018: Chapter III).

In relation to follow-up of their recommendations in individual cases, the Inter-American Commission took the initiative in 2018 to hold telephone conversations with victims and those petitioning the Commission in the cases (in many instances CSOs) to gain a better picture of implementation in individual cases. As a consequence, the Commission received in 2018 a significant number of responses by states regarding implementation of recommendations in individual cases (IACmHR 2018: p. 173). The Commission can also hold working meetings in specific cases to try to move implementation forward. In 2018 the Commission organized 15 such meetings where victims and CSOs involved in the cases were able to present their views to states. Still, the Commission could be more proactive in ensuring that thematic hearings take place on key issues of concern which it has identified in the implementation process of individual cases, for example on specific guarantees of non-repetition or the provision of rehabilitation services. Written submissions should also be encouraged, especially from those with particular expertise on specific issues. When assessing reports from states regarding implementation of its recommendations, the Commission could also request specific information from state institutions or CSOs in order to fill any lacunas, or to assess the veracity of information provided by the parties to the case. Academic institutions could also be mobilized, as exemplified by the call issued by the Commission in April 2019 for universities to become members of its Specialized Academic

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5 The Co-Director of EIN, George Stafford, has argued for greater public accessibility of the Committee of Ministers process (Stafford 2019).

Network for Technical Cooperation, whose goals include the provision of support for the monitoring of Inter-American Commission recommendations (see [IACmHR 2019](#)).

In recent years the Inter-American Court has also become more proactive with NHRIs, as illustrated in the case of *Artavia Murillo et al. 'In Vitro Fertilization' v. Costa Rica*. The case concerns a decision by the Constitutional Court of Costa Rica establishing the prohibition of in vitro fertilization (IVF), arguing that there was a violation of the right to life. The Inter-American Court found Costa Rica responsible for various violations and ordered the state, among other measures, to lift the prohibition of IVF treatment. The Defensoría de los Habitantes, the NHRI in Costa Rica, saw its role as also including monitoring implementation of the measures and keeping the Court informed. It presented two reports to the Court on the implementation of the orders, and, in view of lack of compliance by the state with the orders of the Court, was proactive and suggested to the Court that it should call a public hearing. The NHRI was then invited by the Court to provide its views at a public hearing in 2015. A few hours before the hearing, the President of Costa Rica signed an executive decree lifting the prohibition of IVF and regulating its provision by the health system in the country (see Solano, this issue).

In the case of Colombia, the Defensoría del Pueblo, its NHRI, has also shown that other types of alliances can be built between the Court and such institutions. Indeed, during a visit of the Court to Colombia in December 2018, to hold the second Inter-American Forum on Human Rights, the NHRI organized a high level meeting to assess the level of compliance of orders given by the Inter-American Court in 19 cases decided against Colombia, with the participation of the judges from the Court, members of the Inter-American Commission, ministers, CSOs and others, to consider how to move forward implementation in those cases. Both the Inter-American Commission and the Court have signed technical cooperation agreements with Colombia's NHRI. The Court has also signed cooperation agreements with various other NHRIs in the region to support its implementation role, such as that with the Ibero-American Federation of Ombudsmen in relation to compliance with structural measures ([IACtHR 2016](#)).

There are also opportunities for NHRIs and CSOs to be active players in the implementation of Inter-American Court decisions, such as the possibility of presenting *amicus curiae* submissions during the monitoring process (Article 44, Rules of Procedure of the Inter-American Court). This tool could be used more often and more strategically. The Court could ensure that in cases where CSOs' expert views would be of particular importance, a public and open call is issued inviting specific views or information on key issues. This could prove particularly relevant in relation to forms of reparation where the Court has joined various cases, to ascertain the progress of implementation of forms of reparation that address systemic issues (see also Donald, Long and Speck, this issue: Section 2.2.2). The Court has acknowledged the importance of such interventions, even if it can still do more in this regard. In 2019, the Court started to publish on its website information presented to the Court at the stage of monitoring compliance on the implementation of guarantees of non-recurrence, recognizing 'the interest shown by academia, non-governmental organizations and other members of civil society in participating in the execution of the judgments' ([IACtHR 2019](#)).

While the African Court on Human and Peoples' Rights sees its role as engaging with the parties to the cases (interview D5, 13 May 2017), a report from the November 2016 colloquium on the African Court noted that 'the Court should develop constituencies at the national level such as National Human Rights Institutions and Civil Society Organizations

which can undertake follow-up on compliance with its decisions at the national level and also rely on them for their advocacy work' (ACtHPR 2016: 5). For its part, the African Commission has a strong history of engagement with CSOs and NHRIs, formally through its observer and affiliate status respectively, but also given that the majority of its communications have been submitted by or with the involvement of CSOs. One might expect them therefore to be closely involved in the implementation of the Commission's decisions and indeed some have continued to engage with the Commission beyond the adoption of the decision. NHRIs, while not active litigators before the Commission, have recognized the role they can play in monitoring implementation of its decisions, reflected by the adoption by the Network of African National Human Rights Institutions (NANHRI) of Guidelines on the role they could have in helping the Commission and the Court to implement their decisions (NANHRI 2015). These include suggestions that NHRIs, for example, provide accurate information to the African human rights bodies, through regular reports, on the extent to which the state has implemented a decision or judgment. As with the Americas, NHRIs and CSOs can submit amicus briefs to the African Commission and African Court and although they have done so while communications are pending, this is less apparent post-decision or judgment and in the context of implementation. Thus, whilst various opportunities exist for NHRIs and CSOs to engage in implementation processes, they have done so inconsistently and on an ad hoc basis.

Before UN treaty bodies, victims could present shadow reports, as part of the state reporting process, on the implementation of recommendations in individual cases, and could offer regular updates to the relevant body on what action the state has or not taken. CSOs such as the Centre for Civil and Political Rights (<http://ccprcentre.org>) have taken the innovative step to support on-site visits by UN treaty body members to member states, thus providing them with opportunities for the treaty body to understand more about the implementation of recommendations, the national context, and to gather views directly from victims and state authorities.

All the systems, while offering opportunities for, and encouraging the participation of, CSOs and NHRIs in monitoring implementation of their decisions, have faced diverse obstacles to that end, some related to lack of human and financial resources, others related to the design of their implementation tools and also as a result of their competing mandates. However, CSOs and NHRIs could themselves push for greater involvement and seize available opportunities (see also Donald, Long and Speck, this issue). When they have done so, as in the case of the NHRI in Costa Rica in the *In Vitro* case, it has been possible to move implementation of orders/recommendations in the right direction.

## 6. Conclusions

What are the most effective features of supranational human rights bodies which best foster or cajole implementation? They have a number of different tools at their disposal, depending on their mandate, and each of the supranational bodies has differed in the extent to which they have developed these tools into a coherent process as such.

Dialogue is critical—taking a number of forms, and involving different stakeholders, such as through private hearings or meetings, on the basis that such an environment may be more conducive to triggering dynamics that might foster agreement or plans of action to achieve implementation. However, dialogue may not be enough in certain situations, such as when recalcitrant states fail to take the requisite steps. This is where supranational



bodies invoke stronger measures, which enable other actors to be brought into the frame, whether it be through wider exposure (as with public hearings in the Inter-American system) or a more judicialized approach (as with referral of cases back to the Court via the infringement procedure in the European system, or from the Commissions on to the Courts in the Inter-American and African systems or through the use of provisional measures by the Inter-American Court when monitoring implementation). These can be seen as more coercive steps which add focus and ratchet up the pressure.

All of the supranational human rights bodies have, to a greater or lesser degree, attempted to enhance implementation among relevant domestic constituencies by creating additional opportunities and spaces for dialogue between the parties to the cases, as well as by allowing others, such as CSOs, NHRIs and victims to play a role in the process and to help to follow up. In some instances, particularly in the Americas and Europe, the mechanisms have not stood still, but have creatively responded to the challenge of ever-increasing numbers of cases and to intractable problems of non-implementation with new tools and procedures. While these bodies have tried to be proactive, it is unlikely that this will continue to be the case if they remain underfunded, as lack of resources to do effective monitoring work will only negatively affect the role they will be able to play in the future. One way to promote their involvement further in the European system would be to amend the mandate of the Department for the Execution of Judgments, which, at present, refers to its roles in advising and assisting the Committee of Ministers and providing support to member states, but makes no mention of any function vis-à-vis civil society (see DEJ mandate: <https://www.coe.int/en/web/execution/presentation-of-the-department>). Another possibility would be for the Committee of Ministers and the Department for the Execution of Judgments to insist that governments submit action plans which explain how they have consulted or involved relevant CSOs, identifying who was involved and the methodology adopted.

A number of these bodies (in particular the African and Inter-American and the UN treaty bodies) are under-resourced, but, at the same time, fail to mainstream implementation through their other mandates, or to maximize the potential collaborative opportunities with other organs. This is not only detrimental for implementation. Indeed, if there is a failure to coordinate protection and monitoring mandates, there is a missed opportunity to address structural causes of human rights violations and facilitate the requisite response by relevant actors, to try to ensure that such violations do not happen again. This absence of mainstreaming work on implementation is exacerbated by a tendency to see implementation of individual decisions as something distinct from, and less important than, the rest of the complaints procedure or these bodies' other monitoring roles.

The methods and tools highlighted in this article as enabling dialogue between state authorities, victims, civil society, national human rights institutions and other national interlocutors suggest that supranational bodies are playing a variety of roles to trigger implementation, albeit unevenly and inconsistently—driven, in essence, by dialogic processes. They all do more than mere monitoring of state reports, depending on the violations committed and reparations stipulated, the response of the state, and the role played by victims both at the international and domestic levels. None of these tools enabling dialogue appears to be pre-eminent in leading to better implementation. Rather, implementation is seen as a continuing process, which requires different tools at different junctures. However, hearings, at times private and other times public, as in the Inter-American system, have yielded positive results, at the very least keeping issues on the agenda and making

implementation gaps clearly visible, and constitute a practice that might be emulated by other supranational bodies, including the Committee of Ministers.

The future contribution of these bodies to a more effective implementation process would rest not only on their ability to be creative with the dialogical tools they have at hand to monitor and promote implementation in an environment of scarce resources, but also on their capacity to exploit as much as possible existing mandates, national and international networks and domestic constituencies so that a more holistic approach to human rights protection is possible.

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