

Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies

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The enforcement of judgments and decisions of regional and international human rights courts and treaty bodies constitutes a litmus test for the effectiveness of the international human rights system. Delays and non-compliance at the enforcement stage pose a continuous challenge that frustrates victims and threatens to undermine the impact of human rights treaty bodies' decisions. Victims, human rights lawyers, NGOs and the human rights treaty bodies themselves are increasingly aware of the need to develop strategies and mechanisms designed to speed up compliance with relevant decisions. This article draws on experiences of the international human rights organisation REDRESS, which has sought to challenge the lack of timely compliance in its case work before regional and international bodies and has engaged in a series of initiatives to strengthen compliance, including convening a conference and issuing a publication on enforcement.¹

Human rights treaty bodies fall into two broad categories: judicial bodies that pass judgments, such as the European Court of Human Rights (the European Court), the Inter-American Court of Human Rights (the Inter-American Court) and the African Court on Human and Peoples' Rights (the African Court), and quasi-judicial bodies that issue views or recommendations, such as the United Nations (UN) treaty bodies, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights (the African Commission). The respondent state in a given case is expected to comply with these judgments and decisions by virtue of being a party that has accepted obligations under the relevant treaty. Judgments of judicial bodies are often considered to carry

more weight because of their binding nature. Decisions of quasi-judicial bodies arguably also entail a duty of compliance for the state party concerned in as much as they are declaratory of a state party's obligation under the treaty in question.²

Compliance Record of States Parties

It is difficult to establish precisely states' actual compliance records under the various mechanisms but reports by treaty bodies and studies show that there are often serious delays or a total failure to comply.³ As a general rule, there appears to be a higher degree of compliance with judgments by judicial bodies, namely the European Court and the Inter-American Court. This can be attributed to the judicial and binding nature of judgments. The specificity with which the measures a state party ought to take are defined in the particular ruling also facilitates compliance.

A further factor is the more integrated nature of these regional human rights systems, which translates into greater acceptance by states parties. However, even here, compliance is often confined to paying compensation and in some instances making restitution and/or adopting measures to prevent recurrence, such as legislative reforms, albeit often only belatedly.

States parties' compliance with decisions of the African Commission and the UN treaty bodies has been comparatively weaker due to a number of factors, which include the fact that decisions are often vague, the lack of adequate national legal frameworks and institutional follow-up mechanisms and a lesser incentive to comply in face of limited political motivation to do so.⁴

A feature common to all systems is

that states have largely failed to investigate and prosecute those responsible for violations, which can be attributed to legal obstacles, such as statutes of limitations, practical difficulties of investigating crimes many years after the event and a lack of political will.

Nature and Impact of Delays and Non-enforcement

Delays are a source of immense frustration and injustice. They can be the cause of further suffering for the victims induced by uncertainty and are prone to undermine the satisfaction derived from a positive judgment or decision. Delays may hinder the efforts of victims of serious violations such as torture to rebuild their lives through resolving the legal aspects of their experiences; even worse, delays can actually contribute to the traumatising of victims.

All human rights treaty bodies are faced with delays, which denote an unreasonable length of time in complying with a judgment or decision. Most human rights treaty bodies specify the period within which states parties have to comply and to take certain measures (or inform the body of the measures taken).⁵ There may be circumstances that genuinely prevent the state party in question from complying with the indicated time period, such as the need for a change in legislation. In these cases, drawing on standards developed in international jurisprudence, factors such as the complexity of the measures in question, may be taken into consideration in determining what constitutes an unreasonable time in the given circumstances.⁶

Delays are a form of partial non-compliance in their own right and it is often difficult to determine whether

delays are due to genuine difficulties experienced by states parties or are a sign of non-compliance.⁷ The latter would appear to be the case where there is no prospect that the state party will take the required action, which may take the form of an outright refusal or apparent unwillingness to comply with the decision(s) in the particular case, or be a matter of habitual practice.

Lengthy delays are often an indication of a more fundamental problem of a state's systemic non-compliance with its treaty obligations. Systemic delays, including at the enforcement stage, produce invisible and pernicious, though not necessarily unintended, effects by sending a message to victims of human rights violations that it is not worthwhile pursuing cases. This may act as a powerful inhibitor that can make victims of violations think twice before bringing cases before a regional or international human rights treaty body and, in so doing, undermines the right to an effective remedy.

Seeking Enforcement

The human rights treaty body concerned commonly specifies the adequate remedies a state ought to take within a given timeframe in response to the violations found.⁸ For a remedy to be effective, therefore, there should be no unreasonable delays in any proceedings, including at the enforcement stage, and in providing the requisite reparation measures. In spite of their right to an effective remedy,⁹ which entails that a decision is complied with, and the corresponding obligation of states parties, individuals often do not obtain the reparation awarded within the timeframe set by the treaty bodies. If faced with such a situation, individuals and lawyers acting on their behalf need to develop a strategy on how best to seek implementation of the ruling in question.

In addition to continuously informing the relevant treaty body itself about the status of compliance and requesting it to follow-up with the state party, individuals may approach the

responsible government bodies of the state party directly. Anecdotal evidence suggests that individuals stand a higher chance of obtaining timely compliance, or any compliance for that matter, in particular with regard to compensation, where: the decision of the treaty body specifies the remedies to be taken;¹⁰ the decisions of the treaty body commands sufficient respect; there is adequate follow-up; human rights lawyers and NGOs are involved, including by using litigation as 'an advocacy tool';¹¹ and, crucially, the state authorities are in principle willing to comply with the ruling, at least in parts.

Where this direct approach fails, individuals may have to seek recourse to domestic courts. This will inevitably add another layer of delays to proceedings but may prove to be an effective avenue where domestic legislation is in place that either recognises the decisions of human rights treaty bodies as binding or allows enforcement for such types of cases. It may also be effective where domestic courts are receptive to interpreting domestic legislation in line with a state party's international obligations. Actual state practice in this respect is patchy. Several states in Latin America and Europe have passed legislation that provides for special procedures for the implementation of judgments of the respective regional treaty bodies.¹²

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National and international human rights lawyers and NGOs have arguably paid insufficient attention to the importance of compliance with human rights treaty body decisions in the past, both in terms of seeking justice in the individual case and in ensuring the effectiveness of the system concerned at the domestic level.

States such as Italy, Poland, Turkey and Russia have passed legislation aimed at providing effective domestic remedies in relation to specific violations of the

European Convention on Human Rights that may also benefit individuals who had previously obtained a favourable judgment or whose cases are pending.¹³ However, a number of domestic courts have been reluctant to recognise the binding nature of decisions by UN treaty bodies. In a glaring example, Nallaratnam Singarasa, who had been convicted under the Prevention of Terrorism Act in Sri Lanka on the basis of a confession extracted under torture, was denied a retrial by the Sri Lankan Supreme Court in spite of a UN Human Rights Committee decision to release him or grant him a retrial.¹⁴

Where the state party is not responsive to formal approaches and there are no effective legal or judicial domestic avenues, individuals may have to resort to publicity and advocacy. Such efforts may concern the individual case but may also include systemic issues, such as the lack of legal avenues to comply with human rights treaty body decisions and the need for reforms. Human rights lawyers and NGOs that represent victims of violations or work to strengthen the effectiveness of international human rights treaty bodies at the domestic level play an important role in taking up these issues. National and international human rights lawyers and NGOs have arguably paid insufficient attention to the importance of compliance with human rights treaty body decisions in the past. However, there is a growing awareness of the need to strengthen efforts and to become more strategic in following-up decisions and in raising the issue.¹⁵

Individuals may also bring new cases before the human rights treaty body in question to challenge domestic non-enforcement. This may appear to be a futile exercise given that the state party has already failed to comply; why should a different outcome be expected following a new decision in the same vein? However, from a policy and advocacy perspective, such a complaint may be highly significant. It can result in a judicial or quasi-judicial

condemnation of the lack of compliance. It can also expose a state party that repeatedly fails to comply with decisions as a 'persistent offender' that denies remedies and reparation to the victims of violations even where a regional or an international human rights treaty body has requested or ordered it to do so. The European system has responded to systemic violations and lack of domestic remedies by applying the so-called pilot judgment procedure (further explained below) and by empowering the European Court to find a violation where the subject-matter of the case 'is already the subject of well-established case-law of the Court'.¹⁶ A favourable decision in such a case may prompt the treaty and political bodies in charge of monitoring human rights compliance to bring pressure to bear on the state party concerned; it may also provide an impetus for domestic advocacy efforts to induce the state party to change its conduct or even legislation with regard to compliance with treaty body decisions. In the case of Sri Lanka, for example, human rights lawyers and human rights organisations have challenged the denial of an effective remedy resulting from the Supreme Court's judgment in the Singarasa case (see above) and its adverse implications for enforcement in recent communications pending before the UN Human Rights Committee.

Institutional Responses: Strengthening Mechanisms to Enhance Compliance

The foregoing practical considerations are necessitated by a simple reality: the general weakness of the enforcement system of regional and international human rights treaty bodies. The treaty regime relating to complaints mechanisms is based on the premise that states will automatically comply with decisions, which explains the lack of a developed legal framework governing enforcement. This includes the absence of explicit powers given to the human rights treaty bodies themselves to ensure compliance. In light of the threat to their authority and

the effectiveness of the human rights treaty system inherent in partial or complete non-compliance, human rights treaty bodies have developed various institutional responses to delays and non-compliance with their decisions.

In what is arguably the weakest mechanism, the African Commission has requested states to include information on compliance in their periodic reports and has established a working group on follow-up mechanisms to ensure compliance.¹⁷ The Protocol to the African Commission seeks to strengthen enforcement for cases decided by the African Court.¹⁸

UN human rights treaty bodies have appointed special rapporteurs to follow-up decisions.¹⁹ This can result in the naming and shaming of states parties in case of non-compliance but the impact of follow-up procedures has been limited.²⁰

The Inter-American Court has assumed powers to monitor compliance with its judgments.²¹ While the lack of a formal enforcement procedure has arguably weakened the effectiveness of its role in the follow-up, the Court has recently started to use innovative methods, such as conducting hearings on compliance and the setting up of tripartite structures to decide on the use of trust funds for groups of victims (representatives appointed by the victims and the state respectively, and another representative appointed jointly by both), with a view to facilitating implementation.²²

The enforcement system under the European Court is characterised by the powers given to the Committee of Ministers to supervise the execution of judgments pursuant to Article 46(2) of the European Convention on Human Rights. The Committee of Ministers has developed a detailed monitoring system and has encouraged states to strengthen their capacity to comply with judgments.²³ The European Court itself has taken a stronger and

more effective role in ensuring compliance in cases of systemic problems such as delays in domestic proceedings and the lack of domestic remedies, referred to as 'dysfunction', by using "pilot-judgments".²⁴ These judgments are effectively precedents, which compel states parties to put in place effective domestic remedies or risk a large number of adverse judgments by the European Court.²⁵ The role of the European Court has recently been strengthened with the coming into force of the 14th Protocol:

*If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.*²⁶

The various follow-up procedures are important but will have limited impact so long as key causes for delays and non-compliance are not tackled effectively. Steps to be taken include the development of jurisprudence that: specifies the form of restitution and the amount of compensation; spells out in considerable detail the obligation to investigate and prosecute; and stipulates other forms of satisfaction, including legislative and institutional reforms or other measures as appropriate. The treaty body should seek to engage the state party in order to facilitate compliance. There is also a need for continuous engagement to ensure that states put in place an adequate framework for compliance.

Equally important is the readiness of the relevant political bodies, such as the UN Human Rights Council, the Council of Europe, the Organisation of American States or the African Union, to take policy measures that strengthen the enforcement system as a whole and to impose tangible sanctions in case of unacceptable delays or non-

compliance. Further action is needed to overcome the gap between rulings made and levels of compliance if the complaints mechanisms are to become truly effective. Victims of human rights violations who will have often waited for several years to obtain reparation, and others whose rights have been violated or are at risk, deserve no less than a concerted effort by all regional and international human rights mechanisms to combat and drastically reduce delays and non-compliance.

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1 More information, including the text of relevant publications, is available at <www.redress.org>. See in particular REDRESS, *Enforcement of Awards for Victims of Torture and Other International Crimes*, May 2006.

2 See International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, Berlin Conference 2004, 2004, paras. 15 *et seq.*

3 REDRESS, *Enforcement*, *supra* note 1, pp. 17 *et seq.* as well as Viljoen, F. and Louw, L., 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights', 1993-2004, *American Journal of International Law* 1, January 2007, Vol. 101, pp. 1-34. See for an insight into a state's compliance record *Responding to Human Rights Judgments*, [UK] Government Response to the Joint Committee on Human Rights' Fifteenth Report of Session 2009-2010, in particular Annex B: Statistical information on the UK's record on the implementation of adverse European Court of Human Rights judgments, at p. 60, available at <<http://www.justice.gov.uk/responding-human-rights-judgements-2009-2010.pdf>>.

4 However, see on the impact that the African system has exerted in some states, Okafor, O. C., 'The African System, Human and Peoples' Rights, Quasi-Constructivism and the Possibility of Peacebuilding within Africa', *International Journal of Human Rights* 8, Winter 2004, No.4, pp. 413-450.

5 The European Court, for example, sets a three month period from the day the judgment becomes final within which the respondent state has to pay the damages awarded. The UN Human Rights Committee requests the state party to inform it within 180 days 'about the measures taken to give effect to the Committee's Views'.

6 See for example *Burdov v Russia* (Case No. 2), European Court of Human Rights, Judgment of 15 January 2009, para. 66.

7 See on the reasons, including lack of coordination, and impact of delays, including on the state's position and credibility within a human rights treaty system, *Responding to Human Rights Judgments*, *supra* note 3, at pp. 7-9.

8 With the exception of the European Court whose judgments are considered to be largely declaratory in nature. It has largely confined itself to specifying pecuniary and non-pecuniary damages but has in recent judgments also ordered other measures such as a retrial or release, see for example *Ükünç and Günes v Turkey*

(Application no. 42775/98), Judgment of 18 December 2003, at para. 32 and *Assanidze v Georgia* (Application no. 71503/01), Grand Chamber Judgment of 8 April 2004, at paras. 202-3 respectively. However, it is for the state and for the Committee of Ministers to identify other measures, in particular of a general nature, which are needed to give effect to the judgment.

9 The right to an effective remedy for human rights violations is enshrined in Article 2(3) of the International Covenant on Civil and Political Rights, Articles 12, 13 and 14 of the Convention Against Torture, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 13 of the European Convention on Human Rights, Article 25 of the American Charter on Human Rights and Articles 1 and 7 of the African Charter on Human and Peoples' Rights. It has also been recognised in the landmark resolution of the UN General Assembly, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, UN Doc. A/RES/60/147, 16 December 2005.

10 However, see Viljoen and Louw, *supra* note 3, pp. 12 *et seq.*, who found no correlation between formulation of the remedy and (non) compliance in the African system while noting that it is central to the assessment of compliance.

11 See in particular the case studies in Caravallo J. L. and Brewer, S. E., 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' *American Journal of International Law* 4, 2008, 102, pp. 768-827, at pp. 788-795 and Okafor, *supra* note 4.

12 See REDRESS, *Enforcement*, *supra* note 1, p. 39 and International Law Association, *supra* note 2, paras. 39 *et seq.*

13 *Brusco v Italy*, Admissibility Decision (Application no. 69789/01, 6 September 2001); *Broniowski v Poland* [friendly settlement] (Application no. 31443/96, 28 September 2005), as well as *Dogan and others v Turkey* (Application nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29 June 2004). See also Russian Federal Law 'On Compensation to Citizens for Violation of the Right to a Fair Trial within a Reasonable Time or the Right to Execution of a Judgement within a Reasonable Time', which entered into force on 4 May 2010 in compliance with the European Court of Human Rights' judgment in *Burdov v Russia*, *supra* note 6. See Burkov, A., 'Improvement in Compliance of the Russian Judicial System with the International Obligations Undertaken by the Russian Federation', 28 June 2010, available at <<http://www.eu-russia-centre.org/our-publications/column/improvement-compliance-russian-judicial-system-international-obligations-undertaken-russian-federation.html>>.

14 *Nallaratnam Singarasa v Sri Lanka*, Communication No.1033/2001, UN Doc. CCPR/C/81/D/1033/2001, 23 August 2004; *Singarasa v the Hon Attorney-General*, Supreme Court of Sri Lanka, Court File # S.C. SpL (LA) No. 182/99, Judgment of 15 September 2006. The Supreme Court argued that decisions by the Human Rights Committee were not binding in Sri Lanka and that there were no legal grounds to reopen the case domestically.

15 This was evident during the proceedings of a Conference on Enforcement of Awards for Victims of Torture and Other International Crimes, organised by REDRESS and Freshfields, Bruckhaus and Deringer in June 2005. See REDRESS, *Enforcement*, *supra* note 1, pp. 83 *et seq.*

16 Article 28(i)(b) of the 14th Protocol, which came into force on 1 June 2010.

17 See in this context Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights (ACHPR/Res.97 (XXXX)06, 29 November 2006).

18 See Articles 27-31 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on findings, judgment, notification, exe-

cutation and reporting (including on non-compliance) respectively.

19 See for example *Report of the Committee against Torture* (2008/2009), General Assembly, Official Records, Sixty-fourth session, Supplement No.44, UN Doc. A/64/44, para. 89.

20 See e.g. *ibid.*, at paras. 90-95 and *Follow-up Progress Report of the Human Rights Committee on Individual Communications*, UN Doc.CCPR/C/98/3, 21 May 2010.

21 See Article 65 of the American Convention on Human Rights and *Baena Ricardo et al v Panama*, Competence, Inter-American Court of Human Rights, Judgment of 28 November 2003, Series C, No. 104, paras. 58-139.

22 See, for example, *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Court of Human Rights, 2 November 2007, Series C No.172, para. 202.

23 Recommendation CM/Rec(2008)2 of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, adopted by the Committee of Ministers on 6 February 2008 at the 107th meeting of the Ministers' Deputies.

24 See *The Pilot Judgment Procedure, Information Note* issued by the Registrar, European Court of Human Rights, 2009, available at <http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B90843A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf>.

25 *Broniowski v Poland*, *supra* note 13 and *Burdov v Russia*, *supra* note 6.

26 Article 46(4). Article 46(5) stipulates that 'If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.'

Endnotes from page 66

1 *Hadijatou Mani Koraou v The Republic of Niger*, Judgment No. ECW/CCJ/ JUD/06/08 of 27 October 2008. INTERIGHTS was co-counsel in the case with support from Anti-Slavery International and Niger NGO Timidria. See <<http://www.interights.org/niger-slavery>>.

2 Mani was awarded the US State Department's 'International Woman of Courage' awards 2009 and as a result of the case was named in Time Magazine as one of the top 100 most influential people in 2009. US Secretary of State Hilary Clinton said: 'Hadijatou is such an inspiring person. Enslaved by being sold at a very young age, she never gave up on herself or her deep reservoir of human dignity. When she finally escaped from slavery, she didn't forget those who were still enslaved. For her inspiring courage in successfully challenging an entrenched system of caste-based slavery, and securing a legal precedent that will help countless others seek freedom and justice, we honour and salute her.'

3 See *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgment, IT-96-23 and IT-96-23/1-A (2001) and *Prosecutor v Milorad Krnojelac*, Judgment, IT-97-25 (2002); *Siliadin v France* 43 EHRR 16; 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, *Malawi African Association and Others v Mauritania* (2000) 8 IHRR 268 (2000).

4 Figures from Anti-Slavery International at <<http://www.antislavery.org>>.