The dynamics of domestic human rights implementation: lessons from qualitative research in Europe

1. Introduction

Scholarship has burgeoned in the past decade on the 'decidedly porous' nexus of domestic politics and international law (Hillebrecht 2017: 34). This work has addressed a lacuna identified by Baluarte and de Vos (2010: 12) who welcomed the 'emerging wave of empirical scholarship' in international law and international relations examining state compliance with human rights conventions, but lamented the scant discussion of 'the degree to which, and under what conditions, states implement the judgments of the legal bodies designed to interpret and enforce those conventions'. Political scientists have since entered this field with an interest less in 'whether states happen to be in compliance with a legal regime' than the distinct question of 'whether and how the legal regime affects the behavior of the state' (Huneeus 2011: 505). They have used data published by supranational bodies to provide quantitative analyses of phenomena that were previously visible only through smaller-scale narratives. Basch et al (2010: 19) detected low compliance rates in the inter-American human rights system, and especially poor implementation of remedies requiring investigation and punishment of perpetrators. In Europe, Grewal and Voeten (2015: 25) found that new democracies, keen to signal their commitment to human rights, tend to implement similar judgments of the European Court of Human Rights (ECtHR) more quickly than established democracies, but within limits created by the absence of checks and balances in cases where executives resist implementation. Using data from both these regions, Hillebrecht (2014: 54) argues that such institutionalised constraints on executive decision-making—like an independent judiciary and a free media—indeed have a positive effect on compliance

because they sometimes limit the executive's freedom of manoeuvre and at other times provide it with willing 'compliance partners'. Eschewing the selection of any single explanation, Voeten (2014: 235) summarises the contribution of political scientists as revealing that 'managerial' explanations, which emphasise a state's bureaucratic and legal *capacity*, and accounts that prioritise *political* incentives for (or against) implementation of human rights judgments and decisions, are 'complementary rather than competitive'.

Precisely how these factors intersect, however, is revealed only by *qualitative* methods that are capable of uncovering the incentives, attitudes, behaviour and interactions of discrete actors and the ways in which they advance or frustrate implementation.[1] This article gives an account of qualitative research undertaken in Europe between 2016 and 2018 involving semi-structured individual or small group interviews with more than 100 interlocutors. These included government officials, parliamentarians, members of the judiciary, national human rights institutions (NHRIs), civil society organisations (CSOs), academics and litigators in three states: Belgium, the Czech Republic and Georgia.[2] They also included officials and former officials in Council of Europe bodies. Informed by the literature synthesised above, questions focused on how implementation is influenced by the institutional *architecture* at the domestic and supranational level; institutional *capacity* in respect of information, expertise, resources and relationships; and *attitudinal* factors, such as different actors' (perceived) interests and incentives. Our intention was to reveal not only *what* happened in the post-judgment phase, but *why*.

[1] Such methods were used by the Human Rights Law Implementation Project (HRLIP) in respect of judgments and decisions from the African, inter-American and European systems and from UN treaty bodies. In this article, only judgments from the European Court of Human Rights are considered in order to allow a more in depth discussion of the trajectory that implementation has taken in a few national contexts and thereby elucidate the strengths and limitations of our qualitative analysis.
[2] This article refers to interviews using an anonymous code, location and date.

To research these questions, a mapping exercise was conducted in order to select states and cases.[3] In respect of states, we purposively sampled countries which depicted some degree of engagement with the supranational level, yet whose domestic structures for implementation were known to vary from developed (Belgium and the Czech Republic) to embryonic (Georgia). They also varied in respect of their compliance record, measured by the average time taken to full implementation (with the Czech Republic being the fastest and, in line with Grewal and Voeten's (2015) findings concerning mature and new democracies, Belgium being slower than Georgia). This selection also allowed for interrogation of the impact of factors such as the Soviet legacy in Georgia, manifested both in the high number of cases pending before the Court and the nature of violations found (e.g. requiring compensation for victims of political persecution). The inclusion of Belgium, in turn, enabled us to examine implementation in a federal state, in contrast to the centralised systems in the Czech Republic and Georgia.

We deliberately excluded the 'worst compliers', such as Azerbaijan or Russia,[4] because we sought to explore strategies that not only obstruct but also promote implementation—the mixed picture that is more typical of states parties to the European Convention on Human Rights (ECHR). We acknowledge, however, the limitation in not having analysed a state that repeatedly fails to engage in good faith in the implementation process.

This country selection also presented us with cases—around six per state—that were sufficiently complex to permit exploration of the research questions, i.e. rulings requiring a range of reparation measures (to be adopted by a range of actors), usually of both an

[3] For a fuller explanation of the country and case selection, see the Introduction to this special issue, and http://www.bristol.ac.uk/law/hrlip/ (accessed 8 January 2020).
[4] See https://infogram.com/implementing-echr-judgments-proportion-of-cases-closed-by-coe-member-state-1h7j4dgdzlrv4nr (accessed 8 January 2020).

individual and general nature. Within that, we ensured a mixture of older cases (where it might be expected that implementation is advanced or completed or where protracted delay may be illuminating) and more recent, pending cases (allowing us to track (non-)implementation in 'real time'). The selection also ensured diversity in respect of factors including the types of rights involved; the novelty and specificity of the remedies indicated (if any); the political salience of the cases; and the characteristics of the victim(s) and initial perpetrator(s). In this article, we examine a smaller selection of these cases in order to permit detailed discussion of the path between judgments of the ECtHR and subsequent actions both by the authorities implicated in the judgment and other interested parties.

This 'process-tracing' method is described in Section 2, which also discusses the vexed matter of causality. It presents examples which range from a more-or-less direct—and even instantaneous—causal path between a judgment and actions leading to compliance to a more indirect or uncertain relationship. Within our case selection, the former are much rarer than the latter, suggesting that Strasbourg Court judgments whose implementation is complex or protracted may be but one, and not always the principal, causal agent of change. Section 3 explores the 'dynamics' of implementation in real time through the lens of two pending prison-related cases against Belgium, while Section 4 focuses on the strategies used by domestic actors to either advance or frustrate implementation in relation to pending discrimination cases against Georgia and the Czech Republic. Our discussion reveals the non-linear nature of the implementation process: it may go backwards as well as forwards; it may at times stall and at other times, accelerate. Implementation may be constrained or enabled both by pre-existing conditions—structural, political and attitudinal—and external developments that cause the political space for implementation to open or close. Faced with these constraints, 'compliance partners'—be they executive coordinators, politicians, judicial or civil society actors—may be more or less effective. Section 5 concludes with reflections

on what we have elsewhere referred to as the 'dynamic and iterative process' of implementation (see Donald, Long and Speck, this issue). While no single case can be seen as representative, we draw insights from the rich account of how the complexities of the post-judgment phase play out in selected instances in order to make recommendations to those working towards implementation.

2. Process tracing and the question of causality

Unlike human rights treaties, which generate general and non-time specific obligations, supranational judgments and decisions on individual complaints generate 'specific and temporally traceable commitments' (Çalı and Wyss 2009: 2). Thus, at case-level as opposed to treaty-level, it is assumed that actions leading to compliance are, at least partly, *caused* by the judgment or decision (Hawkins and Jacoby 2010: 40). Indeed, some authors insist on causality as integral to their definition of 'compliance' with a judgment or decision, excluding merely fortuitous adherence to the required standard (Kapiszewski and Taylor 2013: 804)—an insistence that the Committee of Ministers (CM), which monitors implementation in Europe, does not, however, share, being agnostic to the triggers of a reform as long as it takes place.

The CM's approach accords with the insight, gleaned from our research, that determining causality is often a fraught process, especially where—as with the cases this article discusses—judgments require systemic reform, and / or where there has been a long time lapse between the ruling and reforms being adopted. This conclusion arises from our efforts to 'trace the path' between judgments and subsequent action by the relevant domestic authorities and other interested parties (ibid: 818). Such process tracing refers to 'the

examination of intermediate steps in a process to make inferences about hypotheses on how that process took place and whether and how it generated the outcome of interest' (ibid).

To this end, we constructed timelines for each case, synthesising three types of developments evidenced both by protagonists' accounts and documentary sources. First, we traced *developments related to the judgment itself*, such as when the application was communicated; when the judgment was issued and became final; and any third party interventions or referrals to the Grand Chamber of the ECtHR. Secondly, we tracked *developments related to implementation*, such as submissions by states, CSOs or NHRIs to the Committee of Ministers (CM), the political body that monitors (or 'supervises') implementation; CM decisions or resolutions; the adoption of legislative, administrative or other general measures; the convening of working groups or other mechanisms to implement the judgment; and, where relevant, closure of the case by the CM. Thirdly, we logged *external developments* that were not directly linked to the judgment but could have affected domestic responsiveness to it, such as an election leading to a change of administration or an event that influenced public perception of the issue, or beneficiary group, at the heart of the case.

The result was a rich account of the implementation process with sensitivity to the role and motivations of discrete actors. Periods of prolonged delay or, conversely, accelerated activity in response to a judgment were made visible by this chronological approach. Similarly, it permitted us to identify 'anticipatory' responses; that is, when the process of litigation, perhaps combined with wider advocacy, caused the state to make reforms even before a ruling is made, or in anticipation of a Grand Chamber judgment.

What conclusions can we draw with respect to causality? Of 15 ECtHR cases whose implementation we traced, only one was identified by our interlocutors unequivocally as an

instance in which the judgment was the sole driver for subsequent reform. This was *Klaus and Yuri Kiladze v Georgia* (2010), concerning the deficient legal framework to compensate victims of Soviet-era repression, which violated Article 1 of Protocol No. 1 to the ECHR (protection of property). Its direct influence was attested to by both a senior judicial figure (GE27, Tbilisi, 27 April 2017) and civil society interviewees (GE09, Tbilisi, 24 April 2017; GE10-GE12, Tbilisi, 25 April 2017). A former government official recalled that implementation had begun almost immediately (GE06, Tbilisi, 24 April 2017)—within a year of the judgment becoming final, amendments were passed to a 1997 law which, in a 'symbolic gesture', had promised compensation but failed to define the amount or modalities of payment (Kiladze Action Report 2014: 1). Everyone concerned, he ventured, had 'forgotten' about the 1997 law; the judgment thus came as a 'surprise', and could be viewed as directly responsible for the ensuing reforms. After derisory sums were awarded to the initial claimants, further legislative reforms followed in 2014 to guarantee higher levels of compensation, and the CM closed the case in March 2015.

Another judgment, *Taxquet v Belgium* (2010), in which the ECtHR held that someone found guilty by a jury at the Assize Court is entitled under Article 6 (the right to a fair trial) to an explanation of the reasons, was also decisive in ushering a change to judicial practice. Indeed, it prompted jury trials to be suspended on the very day the Chamber judgment was issued, at least in the Flemish part of Belgium (BE16 and BE17, Antwerp, 31 January 2017). The case was then referred to the Grand Chamber but even before its judgment was issued, legislative reform was passed—a clear example of an anticipatory response. Nevertheless, senior prosecutorial figures ventured that *Taxquet* is best understood as a 'trigger' for reform that had been under consideration since the mid-1990s (ibid). Asked whether the reforms that modernised procedures before the Assize Court and improved the quality of its

judgments would have happened without *Taxquet*, a Belgian Ministry of Justice official was ambivalent:

> Yes and no. There was the idea that we had to change something concerning the [Assize Court] but there was no precise plan. There we can say that the judgment has had the effect [of accelerating reform] (BE04, Brussels, 8 November 2016).

Whereas implementation of *Taxquet* began immediately, another example demonstrates that judgments can also become decisive even after a period of relative inactivity. Between 2009 and 2013, the ECtHR handed down five judgments, grouped by the CM under *Ghavtadze v Georgia,* concerning the inadequate treatment of prisoners with infectious diseases in violation of Article 2 (the right to life) and Article 3 (prohibition of inhuman or degrading treatment). Yet, starting from the earliest judgments, it was three years before action was taken and nearly five years before the government first reported to the CM. While the inadequacy of medical care in prisons had been condemned by the European Committee for the Prevention of Torture (CPT) as early as 2007 (*Ghavtadze v Georgia*: para. 56), it was only after elections in October 2012 that reforms were triggered by the incoming Georgian Dream coalition. Indeed, at this point, the judgments became highly influential: a former senior official identified them as the principal impetus for the ensuing reforms (GE31, Tbilisi, 27 April 2017). These included prevention, diagnostic and treatment programmes for hepatitis C and tuberculosis; a staggering 70-fold increase in the prison healthcare budget; the opening or expansion of medical facilities; and an increase in the number of trained medical personnel in prisons, whose salaries rose by 60 per cent (Ghavtadze revised Action Report 2014). The interviewee showed us a PowerPoint presentation recalling the story of Mr Ghavtadze, who had suffered from hepatitis C, tuberculosis and scabies and received

poor medical treatment in detention (GE31). The presentation proceeded to set out pro-reform arguments which had persuaded ministers of the need for implementation. The judgments, he explained, were able to exert leverage in respect of the *financial* cost of settling hundreds, if not thousands, of repetitive applications (costs would have added up quickly as the Court had awarded between 4,500 and 9,000 euros in non-pecuniary damages to each applicant). The arguments put to ministers had also accentuated the *reputational* damage that non-implementation would entail, both within the Council of Europe and vis-à-vis the European Union, with whom association negotiations were underway. The aforementioned official had made the case that

> We would be paying … [with] our image and [non-implementation] would hinder Georgia's democracy, it would hinder Georgia's European integration, it would even hinder Georgia's economic growth (GE31).

Not only this; the judgments became part of a wider strategy to first eradicate Hepatitis C in penitentiary institutions and then 'start negotiations with the global pharmaceutical manufacturers to make Georgia a public health project for Hepatitis C elimination' (ibid). For ministers keen to distance themselves from their predecessors, the eradication of disease became 'a tremendous and very, very attractive ambition' and was used to 'sell' an otherwise unpopular reform benefitting prisoners alone: 'we [fused] these two arguments to … [create] a "win, win" between the penitentiary system and the public health system' (ibid). Another former official likewise recalled that reform of prison healthcare was a 'number one priority' for the incoming administration (GE06). Thus, after the initially dilatory response, the *Ghavtadze* group of cases not only led to a remedy for the applicants and other prisoners, but also galvanised reform more far-reaching than that required by the judgments. The group of cases was closed by the CM in November 2014. A government

submission in 2019 on a separate group of cases concerning health care in prisons indicates that reform continued after the *Ghavtadze* group was closed, leading to further improvements, which had been positively appraised by the Public Defender (Ombudsman) and the CPT (Mirzashvili, Kikalishvili and Meskhidze Action Report: 3-6).

Other judgments, however, have fallen on stony ground. One such example is the 2015 ECtHR ruling in *Identoba* concerning the authorities' failure to protect a rally in support of lesbian, gay, bisexual and transgender (LGBT) rights from attacks by religious counter-demonstrators, in violation not only of Article 11 of the ECHR (the right to freedom of peaceful assembly) but also Article 3. Here, what little effective action has been taken, is, as one former official acknowledged, due more to Georgia's association agreement with the EU than the judgment itself (GE06). A CSO representative added: 'I would be very surprised if we find that even a single thing in the government [submissions to the CM in 2016] was done because of *Identoba*' (GE01, London, 17 January 2017). The EU has indeed prioritised this issue, lamenting the fact that the Georgian authorities have 'failed to act promptly and efficiently' on discrimination against sexual and other minorities (Association Implementation Report on Georgia 2016: 4). Yet even the EU's scrutiny has borne little fruit: at the time of writing, Georgia's record of implementing *Identoba* remains deplorable (see section 4 and Donald, Long and Speck, this issue).

In summary, our process-tracing shows that judgments may visibly exert influence in different ways and over different timescales—contrast *Ghavtadze*, where a change of government was first required, with the decisive 'moment' of influence we saw in *Taxquet*. At other times, as shown by *Identoba*, the influence of Strasbourg Court judgments has been minimal at best, with other external drivers being more influential. Even detailed tracking of developments in the post-judgment stage may not tell the whole story: causality remains hard

to determine with precision since judgments may form part of a protracted flow of events and decision-making, advancing or stalling over a period of years. As an official of the Belgian Ministry of Justice put it, '[a] judgment of the Court is important but it's not because of one judgment that the government decides to act' (BE04).

3. Understanding the dynamics of implementation

We saw in section 2 that investigation into how, if at all, ECtHR judgments change the actions and behaviour of those implicated should not start at the moment the judgment is issued or becomes final. Rather, implementation needs to be understood in the context of pre-existing conditions—structural, political and attitudinal—which may shape perceptions of which remedies are both practically feasible and politically attainable. In this section, we explore the dynamics of implementation in real time by examining the response to judgments against Belgium concerning two prison-related issues. The first is *Vasilescu v Belgium* (2014), the leading judgment in a group of cases concerning inhuman or degrading detention conditions. The second, a group of cases under *L.B. v Belgium* (2012), relates to the indeterminate detention without adequate treatment of persons with psychiatric conditions who cannot be held criminally liable for the offence they have committed but are seen as a danger to society, a policy known as 'internment'. *L.B.* was followed in 2016 by a pilot judgment,[5] *W.D. v Belgium*, which set a two-year deadline for resolution of the problem. At the time of writing, both groups of cases are still being supervised by the CM under its enhanced procedure, reflecting the structural nature of the violations.

[5] In a pilot judgment, the ECtHR identifies the structural problem underlying repetitive cases and prescribes measures to resolve it, usually with a deadline.

3.1 Inhuman and degrading conditions of detention: the Vasilescu group of cases against Belgium

Vasilescu highlighted problems endemic to Belgium's dilapidated penal institutions of which the authorities had long been aware; in two different prisons, the applicant had been forced to sleep on the floor in an overcrowded cell, which he shared with one or more smokers, without access to a toilet or running water (*Vasilescu v Belgium*: paras. 6 and 13-14). The judgment, issued in November 2014, refers inter alia to critical reports issued by the CPT as far back as 1998 (ibid: para. 50), and the issue was raised during the Universal Periodic Review (UPR) of Belgium in 2011 (Human Rights Council 2011: paras. 100.35-100.44). Some measures had been taken before the judgment, such as the building of three new prisons under two 'Masterplans' adopted in 2008 and 2012. Yet, an official within the Ministry of Justice ventured that the Court's condemnation was decisive:

> [The Belgian authorities] had spoken for three or four decades about overcrowded prisons and said, 'Yes, we will do it', but the problem was not solved … [When] *Vasilescu* [came] in 2014, it [became] very urgent … The [Minister of Justice, Koen Geens] said ... 'It has to be solved' (BE20, Brussels, 1 February 2017).

Another Ministry of Justice official, too, suggested that pressure from the ECtHR 'converged … at the political level' with the CPT and UPR reports to galvanise the authorities (BE03, Brussels, 8 November 2016).

Yet in its latest Action Plan—submitted in July 2019—the government acknowledges that it will be years before the full impact of reforms is felt: notably, new prison infrastructure

envisaged under the third Masterplan of 2016 will not be completed until 2024 or 2025 or has no end date determined (Vasilescu Action Plan 2019: 7). In a separate measure, a Royal Decree of February 2019 sets out minimum standards for cell sizes and matters such as sanitation and out-of-cell activities. However, there is a 20 year transition period for the redevelopment of all cells, meaning that some prisons may not comply until 2039 (ibid: 16). In respect of statistics for overcrowding, the latest Action Plan notes that the annual average rate fell by nearly 12 percent, from 23.7 percent in 2012 to 11.8 percent in 2017 (ibid: 11). Yet the situation is more complicated in two respects. First, the annual average fluctuates: the CM Notes from 2017, citing the Directorate General of Prisons, put the average annual overcrowding at 9.6 percent in 2016, signalling that 2017 in fact showed a slight increase. Secondly, overcrowding rates vary greatly between institutions: nearly 60 percent of all penitentiary institutions were overcrowded to some degree in 2017, and one was as much as 73 percent over capacity (Vasilescu Action Plan 2019: 12).

What accounts for this slow progress, despite the professed ministerial commitment? The explanation lies partly in the longstanding 'bifurcated' nature of Belgian penal policy, created by the tension between a reductionist approach—indicating measures such as community sentences and electronic surveillance as alternatives to detention—and policies that have had the effect of *increasing* the prison population (Scheirs et al 2015). Successive governments have exhibited this tension, with policy sometimes being conditioned by external 'shocks'; for example, the notorious case of the paedophile Marc Dutroux in 1996 triggered initiatives that led to more sexual offenders being detained (Snacken 2007: 148), while the early release from prison in 2012 of his former wife and accomplice, Michelle Martin, acted as a catalyst for greater restrictions to be placed on conditional early release from detention (Scheirs et al 2015: 157)—creating an unpropitious climate for reductionist measures in the period leading up to *Vasilescu*.

Efforts to decrease overcrowding both before and since *Vasilescu* have also been thwarted by other factors not wholly within the government's control. Individual choices made by judges and prisoners appear to have stymied reductionist efforts. For example, measures adopted to facilitate conditional early release of 'short-term' prisoners (those convicted to a sentence of less than three years) seem to have 'led to perverse effects' (BE18, Brussels, 31 January 2017), incentivising judges to issue *longer* sentences in order to ensure that these prisoners do serve at least three years (Beyens et al 2010: 401); thus, 'provisional release as a "solution" for prison overcrowding has itself become a mechanism of penal inflation' (Snacken 2007: 162). More generally, we were alerted to the absence of a concerted effort to raise judicial awareness about alternatives to detention and other reductionist measures.[6] At the other end of the spectrum, there has been a tendency for 'long-term' prisoners, i.e. those serving more than three years, to 'max out' their entire prison sentence rather than seek early parole, since they apparently prefer the certainty of a fixed prison term over the uncertainty caused by conditions imposed on released offenders (Bauwens et al 2012: 27-30). This shows that even avowedly reductionist measures may prove to be ineffective: prisoners are not merely 'passive' recipients of judgments (ibid: 28), and may choose options that have the effect of exacerbating rather than reducing prison overcrowding—hence frustrating, even unwittingly, the implementation of *Vasilescu*.

3.2 The issue of internment: the L.B. group of cases against Belgium

Like the problem of inhuman and degrading prison conditions, the issue of internment in prison without appropriate treatment of mentally ill offenders—highlighted by the *L.B.* group

[6] Information supplied by DEJ official, 17 July 2019.

of cases, which comprises the *W.D.* pilot judgment—had festered for many years. Yet, as we shall see, the implementation of the latter has taken a strikingly different trajectory to *Vasilescu*.

Cumulative pressure on internment had come from successive ECtHR judgments dating back to 1998 (*Aerts v Belgium*), critical CPT reports (*L.B. v Belgium*: para 74) and the UPR process (Human Rights Council 2011: para 103.22). The ECtHR issued the *L.B.* judgment in 2012 (finding a violation of Article 5, the right to liberty) and a cluster of judgments followed in 2013 and 2014 (finding violations of Article 5 and sometimes also Article 3). As with *Vasilescu*, the Minister of Justice himself, Koen Geens, was said to have displayed a personal commitment: as one academic noted, 'he took [the issue of internment] … to heart and ... said "this is a scandal and we need to do [something]"' (BE09, Leuven, 9 November 2016). Individual agency was also at play in a breakthrough that occurred in May 2014, when a new law on internment was passed, replacing one that dated back to 1930. Interviewees noted that this reform was the personal initiative of Senator Bert Anciaux, who, nearing the end of his career, felt free to take on a potentially unpopular cause (BE08, Ghent, 9 November 2016). The law, which came into force in October 2016, for the first time recognised the provision of care as an objective of internment alongside the protection of society; however, it did not rule out entirely the detention of persons with mental health problems in psychiatric wings of prisons. Further legislative reform was to follow in 2016 and 2017, stipulating inter alia that internees can only be placed in such psychiatric wings on a short-term basis. In summary, an academic characterised this period as transformative, noting that 'the law changed more than it had [in the previous] 100 years' (BE08).

As internment cases accumulated, the ECtHR informed the parties in the *W.D.* case that it was considering applying the pilot judgment procedure, which it duly did when the judgment

was issued in September 2016. Although before the Court the government opposed the application of the pilot judgment procedure (on the basis that internment did not affect an entire category of people and was in the process of being resolved; *W.D. v Belgium*: para. 157), several interviewees noted that the pilot judgment—and the anticipation of it—strengthened the hand of those actors, including the coordinating unit within the Ministry of Justice, who were pushing for comprehensive reform. This was confirmed by a lawyer within the Department for the Execution of Judgments of the ECtHR (DEJ), who ventured that the unit welcomed the designation of the internment issue as a systemic problem: 'they totally agree; they are somehow happy to have some help from the Court ... to get other national interlocutors on board' (SXB01, Strasbourg, 25 November 2016). Similarly, an academic described *W.D.* as a 'glorious defeat' which was 'the only way to get a structural solution' (BE10, Leuven, 9 November 2016).

In parallel, based on a 2008 Masterplan, places were created for internees in two specialised non-penitentiary forensic institutions, which had opened in Ghent in 2014 and Antwerp in 2017. These facilities not only increased capacity but were a way of bypassing resistance by private psychiatric hospitals to admitting certain internees, such as arsonists (BE18)—resistance which had precluded any solution based on the provision of care to internees by private facilities. Three new forensic psychiatric centres are planned to become operational by 2022, in pursuit of the overall objective, set out in the latest Masterplan of 2016, to eliminate internment in prisons—an aim which exceeds the Court's requirement merely to 'reduce' it (*W.D. v Belgium*: para. 170)—and to 'provide [internees] with care adapted to their needs' (L.B. Action Plan 2018: 40).

While recognising persistent shortcomings in the provision of treatment and care to the more than 500 internees still held in prisons, the latest CM Notes acknowledge the 'wide-ranging

reform', which has led to a reduction, by more than half, of the number of internees detained in prisons between 2013 and June 2018 (CM Notes on L.B. 2018).

3.3 Vasilescu and L.B.: what explains the difference in progress?

What accounts for the different trajectories of the *Vasilescu* and *L.B.* groups? After all, they share several similarities: both are prison-related, both have been the subject of cumulative pressure over decades, and both are being implemented more or less simultaneously. In both cases, too, the reforms envisaged had the personal backing of the Minister of Justice. Both also share some of the same challenges, such as the need to adopt complex and costly measures, including legislation and infrastructural change (especially challenging in respect of the renovation of dilapidated facilities post-*Vasilescu*). Implementation of both has been primarily coordinated by the same unit within the Ministry of Justice.

Moreover, in neither case did implementation start immediately. Indeed, post-*Vasilesc*u, there appears to have been no period of sustained momentum to effectively tackle prison conditions. Nor do the *Vasilescu* Action Plans describe any dedicated structures to coordinate implementation, which is being led by the Ministry of Justice alone. Implementation of *L.B.*, too, got off to a slow start because it implicated both federal and federated structures and both justice and health officials; it took the government seven months just to assemble the right actors around the table (BE03). Yet, unlike in *Vasilescu*, there has since been a high degree of coordination to address this complexity, which may partly account for the differential levels progress in tackling the two issues. Political dialogue has been pursued through an inter-ministerial body, led by the Minister of Justice himself, which brings together the various federal and federated ministers and federated entities responsible for public health. There is also a dedicated working group to oversee the

implementation of the Masterplans on internment (L.B. Action Plan 2018: 22) and 'mobile teams' involving health and justice officials coordinating reforms 'on the ground'.[7]

This proactive approach to implementation of the *L.B.* group, in contrast to *Vasilescu*, appears, in turn, to have been a response to pressure created by the dynamics of the litigation process. On the issue of internment, unlike that of prison conditions, domestic judicial pressure had been mounting: a senior judicial figure recalled that domestic judges had for years been '[sounding] the alarm' about the absence of appropriate facilities to which mentally ill prisoners could be sent (BE15, Strasbourg, 1 December 2016). At Strasbourg, too, the internment issue gained more momentum than *Vasilescu*. Until August 2017, when there was a second judgment concerning prison conditions in Belgium (*Sylla and Nollomont*), *Vasilescu* was the only case on the matter, and moreover one that we were informed had been litigated only with a view to redressing Mr Vasilescu's plight and not with any strategic intent (BE14, Brussels, 10 November 2016). By contrast, the lawyer for Mr W.D. noted that he had taken dozens of cases to Strasbourg in order to drive up the costs of non-compliance (BE24, telephone interview, 4 April 2017)—a promising strategy, given that the Court had awarded his client 16,000 euros, and that there were some 50 applications pending against Belgium when the Court 'froze' examination of these repetitive applications, in line with the pilot judgment procedure (*W.D. v Belgium*: para. 165). He stressed his determination to use litigation to the benefit of all internees:

> [It] is ... one big project that we [have been] working on for ten years now: to systematically send everything that does not [succeed] in Belgian courts to [Strasbourg] … We try to use every advance in a case for all the other people as well (BE24).

[7] Information supplied by DEJ official, 17 July 2019.

Further impetus was added in April 2019 by the communication to the government of five more cases (under *Venken v Belgium*), having been 'unfrozen' after the expiration of the two-year deadline given by the Court in the *W.D.* pilot judgment.

Our interlocutors have, in both cases, highlighted the importance of individual agency within the implementation process—Senator Anciaux in respect of *L.B.* and Minister Geens in respect of both cases. It is on the matter of internment, however, where the Minister's commitment appears to have borne fruit. This may be, in part, because he had the political backing of his Christian Democratic and Flemish Party to pursue reform (BE20). A larger explanatory factor may be, however, that in relation to prison conditions, pro-implementation actors, including the Minister himself, have been constrained by the especially intractable structural tensions in penal policy described at 3.1. Moreover, implementation of *Vasilescu* hinges, in part, on protagonists whose behaviour is beyond executive control: as we saw, judges have undermined reductionist measures by exercising their discretion to impose higher sentences, and prisoners have rejected options for early release.

The importance of extraneous 'moments' in the implementation process is also evident. Whereas in *Vasilescu*, the Dutroux affair *narrowed* the political space to adopt the necessary reductionist measures, the story of the internment cases is punctuated by an event which *widened* the scope for reform. This was the widely reported euthanasia request by an offender, Frank Van Den Bleeken, the first detainee to seek to avail of Belgium's Euthanasia Act of 2002. Mr Van den Bleeken had been detained in an ordinary prison, without appropriate psychiatric care, for more than 30 years and with no prospect of release. One academic noted that the ensuing disquiet was the 'extra push' needed for the introduction of the specialised centres for mentally-ill offenders (BE18), a view corroborated by a Ministry of

Justice official, who recalled that Minister of Justice Koen Geens had visited Mr Van den Bleeken in prison (BE20) and had publicly described the episode as a 'disgrace' for Belgium (Ministry of Justice press release 2017). The Minister's reaction demonstrates the political space he enjoys to pursue reform on behalf of even this reviled minority—Mr Van den Bleeken was a murderer and rapist—the very system of incarcerating people who could not be held criminally liable having been recognised as wrong in principle.

4. Why and how domestic actors obstruct or advance implementation

We referred in the Introduction to the notion of 'compliance partners' within and beyond the state apparatus with whom supranational bodies may engage over implementation. What is also clear is that there are constituencies whose actions may have the intention or effect of hampering implementation. This section explores, through an examination of two cases, *who* have been pivotal pro- or anti-implementation actors (whether or not they identify as such); *how* they advanced or obstructed implementation; and *why* they acted in this way, insofar as it is possible to infer motivations from interviews or documentary sources. Both cases—*Identoba v Georgia* (referred to at section 2) and *D.H. and Others v the Czech Republic*—concern deep-seated discrimination against, respectively, sexual and ethnic minorities. In neither case did the Court specify what remedies were required. Both are still being supervised by the CM under its enhanced procedure, but the CM's latest appraisals reveal a very different state of implementation: whereas, in *Identoba*, progress has been minimal, the CM has 'welcomed the profound commitment and the holistic approach displayed by the Czech authorities' (CM Decision on D.H. 2018: para. 1). This may, in part, reflect the 'age' of each case: *D.H.* dates back more than twelve years (and progress has in fact been made only recently), whereas *Identoba* became final in 2015.

4.1 When the balance is tipped away from implementation: Identoba and Others v Georgia

Among the cases we examined, the most egregious example of both state and non-state actors actively hindering implementation is presented in *Identoba and Others v Georgia*. Here, the victims—far from being protected by the authorities from homophobic and transphobic hate crime—have continued to suffer harassment at the hands of both private and state actors. As we have documented elsewhere, evidence of the lack of political commitment to implement *Identoba* abounds, from the failure to bring both private and state perpetrators of homophobic and transphobic hate crime to justice, to weak enforcement of anti-discrimination legislation (Donald, Long and Speck, this issue). The annual rally to mark the International Day against Homophobia and Transphobia (IDAHOT), the attack on which in 2012 led to the judgment, has either been subject to even more serious assault by ultra-conservative activists with apparent police collusion (2013), cancelled for fear of such violence (2014, 2016, 2018 and 2019) or been held under such restrictive conditions as to arguably fall short of the requirements of Article 11 (2015 and 2017) (ibid)—developments omitted entirely from the latest government submission (Identoba Action Report 2019).

What is striking in *Identoba* is the range of protagonists whose actions have had the intention or effect of impeding implementation. In respect of the government, this included a threat allegedly made to LGBT activists which was recounted to us at first hand: a CSO representative recalled a deputy minister saying in 2016, during discussions about that year's IDAHOT rally, '[w]e know how you work; you do these kind of provocations and then you go to the [ECtHR]', which the CSO interpreted as the government's 'indication that we should not … [demonstrate] anymore' (GE25, Tbilisi, 26 April 2017). Nor has the Human Rights and

Civil Integration Committee ('Human Rights Committee') in the Georgian parliament proved to be a reliable partner in advocating for the implementation of *Identoba*: for example, a public commitment to observe IDAHOT annually, announced by the Committee's chair, Sopo Kiladze, in September 2017 in the presence of representatives of the EU and UN Development Programme, was abandoned in May 2018 without explanation—and without the Committee having marked IDAHOT even once (OC Media 2018).

Ms Kiladze is among the politicians who have made interventions which—even if they do not expressly refer to *Identoba*—create a climate which dramatically narrows the political space for implementation. One such move—drawn to the CM's attention by CSOs (Identoba CSO submission 2016: para. 19) but absent from official reporting to the CM—was a constitutional amendment defining marriage as a 'union of a woman and a man', entrenching the definition that had long existed in the Civil Code. This was introduced in 2014 by Prime Minister Irakli Gharibashvili, revived as an election issue in 2016 by the Georgian Dream government, and passed in 2017 with the backing of the Human Rights Committee (Identoba CSO submission 2016: para. 19; OC Media 2018). A government official, who regretted the move, described it as 'very political' and aimed at placating those who opposed same-sex marriage as 'something that the West imposes on us and [deviates] from our values and traditions' (GE32, Tbilisi, 28 April 2017). This regressive approach to implementation among politicians reflects, in turn, the formidable array of social forces ranged against moves to combat homophobia and transphobia. Since 2013, religiously conservative activists have gathered in their tens of thousands to mark 17 May—when IDAHOT is celebrated—as 'Family Purity' day, all but extinguishing the political space for LGBT activism (Open Democracy 2019).

How do those close to the process appraise the implementation of *Identoba* to date? A former official, who was involved in the first year of the implementation process, acknowledged this

was ‘a sensitive case due to the role of the Orthodox Church and ... the religious beliefs of the majority of the society’ (GE06). Yet the former official insisted that the views of groups that were not party to the case, including the Church, were not allowed to impede implementation; ‘our primary and only objective was to enforce the judgment’. The former official was at pains to insist that ‘Georgia [was] a very good executor of the judgments of the European Court of Human Rights; we don’t owe even a single euro to [any victim]’, yet, when questioned, gave no explanation for the lack of progress made in respect of guaranteeing non-repetition of the violation.

A current official recognised that implementation came with a ‘political cost’, adding that the government treads a ‘very thin line’ when it takes any steps to implement the judgment, while at the same time seeking to avoid a ‘backlash’ among defenders of traditional values and a ‘negative effect [on] the general understanding of the ECHR’ (GE32). The official had carefully calibrated the message to colleagues that the Court was ‘not intruding into our domestic policy [but] … just helping us to get on the right track’. Like the former deputy minister who promoted implementation of *Ghavtadze* (see section 2), the official had sought to persuade colleagues by accentuating the reputational costs of non-implementation:

> Our aspiration to [join] the EU and NATO … helps us with delivering the correct message—that, yes, [this aspiration] comes with certain conditions that [are] better for the country in terms of its development and future … Otherwise we would just be bombarded with the counterargument that ... 'This is our tradition [over] many years and why would we [want to] change that?’ (ibid)

However, such steps as have been taken, have been partial or weakly enforced; for example, measures to tackle hate crime in Georgia’s first National Human Rights Strategy were mostly

unimplemented, and lacked clear criteria for monitoring their effectiveness (Identoba CSO submission 2018: para. 11). This explains why the official acknowledged that progress was only being made 'little by little' (ibid). This admission contrasts starkly with the position taken by the government in its Action Report of 2018 (paras. 57-58) and again in 2019 (para. 86), when it submitted to the CM that the case should be closed as all necessary measures had been taken, a conclusion so far rejected by the CM.

How do we explain the sluggish response to *Identoba*, which followed a period during which, as we saw in section 2, reforms *were* successfully carried out by the same Georgian Dream-led administrations in the cases of *Kiladze* and *Ghavtadze*? Certainly, no interviewee suggested that weak implementation of *Identoba* was due to any generalised lack of respect for Strasbourg among the authorities. Rather, it appears to be explained by the power of the forces ranged against implementation, and the existence of the same homophobic and transphobic attitudes within the state apparatus that were at the root of the original violations (Identoba CSO submission 2018: para. 5). Indeed, so weak is their commitment that the authorities have not even attempted to use the judgment strategically, in order to 'sell' unpopular implementation steps domestically by using Strasbourg as a convenient 'scapegoat', as governments sometimes do (Hillebrecht 2014: 31). These constraining factors have trumped the expressed wish of the officials we interviewed for Georgia to be seen as a 'good executor', and even the political and financial incentives provided by the EU association process (see section 2). Moreover, they have thus far outweighed the efforts of avowedly pro-implementation actors, such as conscientious officials, the Public Defender and CSOs. Submissions by the latter have, however, exerted considerable influence at the supranational level: the CM's decision not to end supervision of *Identoba* when it last examined the case in 2019 was partly based on CSO evidence that refuted the official account (CM Notes on Identoba 2019).

4.2 When the balance is tipped towards implementation: D.H. and Others v Czech Republic

An organised backlash, contributing to considerable delay in implementation, is also evident in the 2007 judgment in *D.H. and Others v Czech Republic*—though in this case, pro-implementation actors appear in recent years to be prevailing. The case concerned the disproportionate placement of Roma children in special primary schools (or 'practical' schools) for those with mild learning difficulties, which the Grand Chamber held by 13-4 to amount to discrimination in violation of Article 14 of the ECHR in conjunction with Article 2 of Protocol No. 1 (the right to education). The judgment, which overturned a 2006 Chamber ruling, is striking for its novelty—it was the first time the Court had explicitly applied the principle of indirect discrimination, in this case to challenge structural ethnic segregation in education—and for the four strongly-worded dissenting opinions.

After almost a decade, *D.H.* led to comprehensive reform in the shape of, inter alia, amendments to the Education Act, which entered into force in September 2016 and were to be implemented over a two-year transitional period. The measures stipulate that all children should principally be educated in mainstream primary education with a unified curriculum (CM Notes on D.H. 2019). The educational programme for children with 'mild mental disability' was to be abolished, opening the way for the inclusion of all pupils with special needs in mainstream education, backed by an increase in funding for support measures, which rose from 2.3 million euros in 2016, to around 58.5 million in 2017, to 216 million in 2018 and a projected 302.6 million in 2019 (D.H. Government communication 2019: 5). Nevertheless, statistics presented by the Public Defender shortly after the end of the transitional period show that the proportion of Roma children educated under programmes

for those with mild mental disability has, in fact, fallen only slightly, from 30.6 percent in school year 2015-16 to 29.1 percent in 2018-19. Roma children represent less than four percent of all primary school pupils, meaning that they are still 12 times more likely to be educated under such programmes than their non-Roma peers (D.H. Public Defender submission 2019: 2).

The aspiration to eliminate segregated special education for pupils with mild mental disability was already being debated at the time of the *D.H.* judgment, according to a former deputy education minister (CZ23, Prague, 26 September 2017). Yet it did not initially 'weather the backlash' that began around two years after the judgment (OSJI 2016: 38). This was sparked by school principals who supported the pre-*D.H.* status quo and in 2010 wrote an open letter to the (then) Education Minister, Miroslava Kopicová—a supporter of reform—and urged her to 'stop looking at problems ... through the lens imported from Strasbourg' (ibid: 67). At around the same time, the Association of Special Pedagogues (ASP) was formed to spearhead resistance, rapidly gaining hundreds of members and, over time, joining forces with teachers' unions and professional associations, health professionals, local and national politicians and non-Roma parents (ibid). In 2011 and 2012, three petitions were organised with a total of 120,000 signatures to protest against the planned abolition of 'practical' primary schools, prompting the government to defer the date of abolition from 2015 to 2017 (ibid: 68).

A representative of the ASP recalled that his colleagues had felt 'bitter' about the judgment, the consequences of which he likened to 'taking away ... the parachute' from children who would fail in mainstream education (CZ15, Prague, 22 June 2017). He viewed *D.H.* as 'unjust' and, in support of his interpretation, cited from memory a dissenting opinion which had called the majority decision 'absurd' since 'the Czech Republic is the only Contracting State which has in fact tackled the special-educational troubles of Roma children' (*D.H. v Czech Republic,* dissenting opinion of Judge Zupančič). Remarkably, in 2016, the dissenting opinions in

D.H.—by then nearly nine years old—were resurrected as front page news in the *Právo* newspaper, showing how salient the judgment remained in the context of what had by then become a broader debate about inclusive education for all children, not just Roma (Romea.cz 2016a). Other sections of the press lined up more sustainedly with the anti-implementation actors, notably the mass circulation *Blesk*, which ran a campaign to 'Stop Harmful Inclusion' in the run-up to the 2016 reforms coming into force (Šimáček 2016). A CSO representative ventured that the campaign 'did huge harm' and threatened to turn inclusivity into a 'dirty word' (CZ10, Prague, 21 June 2017), causing parliamentarians who had voted for the first stage of inclusive reform in 2015 (the funding of support measures) to '[start] questioning inclusive education within less than a year' (Drahokoupil 2017). The CSO representative added: 'The narrative was [about] the NGO, Strasbourg and European Union "conspiracy" against [the] "good" Czech Republic because "we know how to educate our children"' (CZ10).

Implementation in the years immediately after *D.H.* was also hampered by political constraints: the frequent turnover of education ministers—seven between 2007 and 2015, who were variously pro- and anti-implementation—meant that 'time was wasted' by politicians alternately pursuing unfeasibly ambitious reform without assembling the state administration behind it or, conversely, being 'in complete denial' about the problem (CZ23). Nor did parliamentarians prove to be a receptive constituency, since they were 'under [too much] pressure from ... [campaigning] groups' (ibid).

The response to this unpropitious climate throws an interesting light on the strategies open to pro-implementation actors. According to the former deputy education minister, who was involved in handling the desegregation issue from early 2012, rather than going on the offensive, conscientious actors deliberately *curbed* their ambition and pursued options that might, from afar, have appeared to be minimalistic or prevaricatory; for instance, by limiting

implementation to executive action rather than legislative reform. The National Action Plan for Inclusive Education (NAPIE), led by the Ministry of Education and covering the period 2010-13, was one such initiative. As the former deputy minister explained:

> If it had become a matter of parliamentary debate at the moment of forming the government plan, [it would have] become impossible … So we tried … to do executive action and ... minimise the need for new legislation. The situation wasn't ready for that … so from the beginning we were ready for … a less ambitious scheme but [one] that will actually be achieved (ibid).

In the event, the NAPIE rapidly became paralysed after a change of administration in 2010 led to the abolition of the work of the ministerial department dealing with inclusive education (Smekal and Šipulová 2014: 306). While the CM censured the Czech government for its failure to provide timely information on implementation (ibid: 312), the former deputy minister ventured that, behind the scenes, the DEJ was supportive of the—necessarily incremental—process that was undertaken domestically to 'create a mindset shift and some sort of consensus among all the relevant bodies' (CZ23). The DEJ had facilitated dialogue at the domestic level, without imposing unrealistic expectations as to the pace or scope of reform:

> They made visits to Prague … and we went to Strasbourg. We kept each other informed. They also helped us ... talk to the other institutions. But they basically understood that it needs to be our job (ibid).

This account of a period in which relatively little progress was achieved, which was corroborated by an official within the DEJ (SXB08, Strasbourg, 8 November), reveals that apparent inactivity may mask the fact that, away from public view, conscientious actors

engage in damage limitation in an unfavourable political climate, or develop longer term strategies for implementation. One such strategy relates to the way in which pro-implementation actors 'framed' the issues at stake in *D.H.* over time. Ministry of Justice officials reflected on the importance of language in persuading sceptical constituencies of the need for reform; for instance, the use of terms such as 'substandard education' in the early years of the process had backfired (CZ17, Prague, 22 June 2017). Recognising that some teachers were affronted by the implications of the judgment—and were becoming an influential lobby—officials had sought to take the political sting out of the issue and build consensus around the wider principle of inclusive education, as the former deputy minister recalled:

> An important part of resistance against the *D.H.* ruling was that it was perceived by the special education community [as telling] them they [had been] doing their jobs wrong all their lives … So, we didn't want to deepen the divide... We tried to 'de-emotionalise' it by saying … 'we need to agree that … we cannot treat people … from different social and cultural backgrounds as if they were mentally ill' (CZ23).

Another strategy employed by pro-implementation actors to get legislation through parliament was to downplay the 'Strasbourg dimension' which had been deployed by those resistant to implementation; as a senior official in the Ministry of Justice observed, 'it's not always necessary … to highlight that it's because of Strasbourg, particularly in ... very complex cases in which you inevitably do more than what is strictly enquired [by the judgment' (CZ17). Indeed, the 2016 reforms, in embracing inclusive education for all pupils with special needs, have taken on a broader scope, in part because they were considered holistically in the light not only of *D.H.* but also the requirements of international instruments

such as the Convention on the Rights of Persons with Disabilities (CRPD) (ibid). Here, the proactive approach of the office of the Government Agent is evident: the standing committee of experts (or *'Kolegium'*) assembled to oversee the implementation of judgments—including not only ministries, parliamentarians and judicial figures, but also CSOs and academics—proved to be a means of tackling resistance within and beyond the state apparatus (Schorm, this issue).

The breadth of the reform, in turn, appears to have succeeded at least partially in placating the resistance to *D.H.* As the former deputy education minister ventured:

> Many people in the Czech Republic … felt that we [were] ... treated as an exemplary case by the [ECtHR]. So I think it's a good development that it's now not so much about the Court's decision but about the principle of inclusive education—and there are [in 2017] far more vocal proponents of inclusive education than there were ten years ago (CZ23).

These proponents include conscientious officials and parliamentarians (in particular, members of the Parliamentary Assembly of the Council of Europe). Bodies such as the Czech Schools Inspectorate and the Public Defender have been important advocates for reform, the latter being a key interlocutor of the DEJ (SXB08). CSO activism has also been influential, the 'pinnacle of international advocacy efforts' being a civil society briefing by Amnesty International, the European Roma Rights Centre and the Open Society Justice Initiative to the European Commission that contributed to the Commission's decision to launch infringement proceedings against the Czech Republic in September 2014 for failing to meet its obligations under the EU's Race Equality Directive (OSJI 2016: 61). The pool of pro-reform voices has also widened to include non-Roma parents whose children are beneficiaries of

inclusive education, as illustrated by an open letter from the parent of a child with Down's Syndrome, who deplored the 'Stop Harmful Inclusion' campaign by *Blesk* for being a 'one-sided, targeted campaign against the rights of a small, socially vulnerable group of citizens' (Romea.cz 2016b).

Nevertheless, entrenched anti-Roma sentiment persists, and may be hampering implementation in ways that are difficult for the government to tackle. This includes the persistent problem of ethnic segregation in *mainstream* schools. In 2019, the Public Defender highlighted that, in school year 2018-19, there were 70 primary schools where Roma pupils made up more than half of all pupils, creating the risk of 'similarly negative outcomes' for pupils as those caused by the original violation in *D.H*. (D.H. Public Defender submission 2019: 2). While this constituted only two percent of primary schools, a further 18 percent had a disproportionate number of Roma pupils (between five and 49 percent), indicating a wider pattern of segregation. A representative of the Public Defender's Office (CZ04, Brno, 20 June 2017) explained that this was due both to the phenomenon of 'white flight'—that is, non-Roma parents shunning schools with a relatively high number of Roma pupils—and a tendency for some Roma parents to keep their children out of mainstream schools for fear of ostracisation (ibid; Smekal and Šipulová 2014: 305). This was poignantly illustrated by the mother of a *D.H.* applicant, who placed the latter's younger brother in a special school because '[b]ack in the mainstream school, the children and the teacher laughed at him, no one spoke with him' (OSJI 2016: 58). A CSO representative observed that until recently, parental choice of school was seen as beyond the purview of the government (CZ10). An academic member of the *Kolegium* on implementation observed, however, that the authorities are now grappling with the dilemma between respecting parental choice or 'educating these children [as the state sees best]' (CZ13, Prague, 21 June 2017).

4.3 Lessons from Identoba *and D.H.*

Our process-tracing in the cases examined above reveals a range of strategies or behaviours that have the intention or effect of hindering implementation. These may result in steps that appear superficially to advance implementation, but are not enforced in practice, like measures to tackle hate crime in Georgia's National Human Rights Strategy. They also extend to outright harassment of, or failure to protect, victims or wider beneficiaries; overt blocking of reform or hollow actions masquerading as commitment to reform; and obfuscation in reporting on implementation to the CM. All these failings are evident in *Identoba*, non-implementation of which cannot be ascribed primarily to lack of legal or bureaucratic capacity but rather the absence of political commitment. Non-state actors, too, have presented a formidable obstacle to implementation in both cases, through well-tried means such as demonstrations, petitions, lobbying and media campaigns—in *D.H.*, mobilising overtly against implementation of the judgment per se, and in *Identoba,* constricting the political space for implementation.

For their part, pro-implementation actors have devised a range of strategies to counteract resistance. They may frame issues so as to de-politicise or 'de-emotionalise' them or to highlight the financial, political or reputational costs of non-implementation. They may accentuate the 'Strasbourg' dimension of a case—in the case of conscientious state actors, using DEJ visits to increase pressure on recalcitrant domestic actors and in the case of non-state actors, making submissions to the CM. Conversely, they may downplay the supranational dimension where it is unpersuasive to sceptical constituencies, or they may emphasise the benefit of a reform measure beyond the victims or immediate beneficiary group. At other times, they may even delay or limit the ambition of reform if the political climate is unconducive.

In the case of *D.H.*, those resisting implementation have at certain periods dominated public discourse and obstructed particular reforms; yet, over time, a broad alliance has emerged which has been instrumental in fostering reform that exceeds what the judgment strictly requires. *Identoba* tells a different story: we identified only isolated voices for reform within the state apparatus and CSO activism which remains embattled at home but has exerted influence at the supranational level, successfully refuting the partial and inaccurate official account of developments since the ruling (see Donald, Long and Speck, this issue).

5. Conclusion

What lessons, then, can be drawn for conducting qualitative research into implementation of human rights judgments? We would like to highlight two main insights. First, as made visible by process-tracing, implementation, especially of complex cases, should be situated in a long timeframe: the timelines we used to trace developments in our selected cases often started before the judgments were issued and got pushed even further back as we spoke to interlocutors who explained how deep-seated the problem was. This approach revealed, for example, the deep roots of the violations in *Vasilescu* and the way in which these continue to thwart implementation.

Secondly, when tracing the path of implementation, it is imperative to triangulate evidence from different interlocutors and documentary sources. This is particularly important in cases whose implementation has been protracted, where over the course of many years the institutional memory might have dissipated: to seek to understand *D.H.*, for example, we interviewed protagonists and observers who had knowledge and experience of different phases of the (to date) more than twelve year implementation process. A diversity of

interlocutors and sources also enabled us to mitigate a potential limitation of our research; namely, the fact that certain protagonists seemed to have an interest in portraying the story of a case in a selective way or were unwilling to participate at all. There was, for instance, a stark contrast between, on the one hand, officials from the Belgian and Czech Ministries of Justice, who were forthcoming and engaged in self-reflective and detailed discussion about the selected cases, and, on the other hand, their counterparts in Georgia, who did little more than repeat information that was publicly available through Action Plans, even when prompted to go further. The Georgian Prosecutor's Office and Ministry of Internal Affairs, meanwhile, declined repeated requests for an interview about the reasons for prevailing shortcomings in the investigation and prosecution of perpetrators of hate crimes. The absence of these voices undoubtedly leaves gaps in our narrative. Yet we were able to fill in these gaps at least partially by eliciting multiple accounts from other state and non-state sources of the same event or time period. Contrast, for instance, the former official who insisted, in respect of *Identoba*, that 'our primary and only objective was to enforce the judgment' (GE06) with the contemporaneous account of an LGBT activist who recalled being directly warned against further demonstrations by a deputy minister (GE25). Here, a careful reading of diverse sources—submissions to the CM by the government and CSOs, the CM's own examination of the case, and other documentary sources and interviews cited above—calls into question the reliability of the former and vindicates the latter.

The rich narrative account achieved by this approach permitted us to bring to the fore the 'motivational conflicts' that determine the timing and substance of responses to human rights judgments (Çalı and Wyss 2009: 8-9) and the different types of pro- and anti-implementation dynamics at play (ibid: 17). Further, our process-tracing casts light on the extent to which human rights judgments cause individuals or institutions to change their attitudes, behaviour and decisions: as we saw in section 2, there can occasionally be a visible causal path from

judgment to actions leading to compliance (*Kiladze v Georgia*), but this is rare. More often, causality is nuanced or indirect and responsiveness conditioned by pre-existing attitudes and conditions. Where they *do* exert influence, judgments can galvanise or accelerate action, add precision to ongoing debates about reform, or empower or validate particular pro-reform actors. Yet progress is rarely consistent and the conditions for reform may fluctuate; the process may be punctuated by developments unrelated to the ruling itself, which may cause the political 'space' for reform to open and close at different moments and hence create both opportunities and obstacles for pro-implementation actors. Within this dynamic environment, individual agency may at times overcome structural and attitudinal constraints and at other times be shackled by them. We have seen the importance of individuals who act as 'transmission belts' between the domestic and supranational levels—recall, for example, the former official who had spurred the reform of prison healthcare in Georgia following *Ghavtadze* by spelling out the political, financial and reputational costs of non-implementation and crafting messages designed to overcome domestic resistance. But recall, also, the isolated Georgian official who has sought to overcome prevailing discriminatory attitudes by strategically using the Court's judgment in *Identoba*, thus far without success given the powerful range of forces ranged against implementation and the outright flouting of the judgment by the authorities. Discrimination persists, too, in the case of *D.H.* concerning Roma rights but, unlike in the Georgian context, conscientious individuals, in tandem with well-functioning structures and mechanisms, have used creative strategies to keep the implementation process alive even when conditions were unpropitious.

Even the most conscientious actors, however, may see their efforts to promote implementation backfire or have unintended consequences given the multiplicity of actors, both public and private, often involved. Well-intentioned reform may fail to achieve the desired result since they cannot control the actions of all concerned: note how, in a context

of ongoing, entrenched prejudice, parental choices regarding their children's education have undermined efforts to desegregate the Czech school system in the *D.H.* context. Moreover, in cases concerning systemic violations, there may be multiple Convention-compatible routes to solving the problem and solutions may only emerge after other options have been tried and discarded, such as the resort to building new psychiatric centres rather than relying on existing private facilities to implement the *L.B.* group.

The dynamic and iterative nature of the process creates both challenges and opportunities for actors—domestic and supranational—who wish to advance implementation. Domestically, success may depend on the forming of alliances between state and civil society actors. For the former, the imperative is to embed conscientious actors in well-functioning structures and mechanisms like the Czech *Kolegium* which brings together key state and non-state actors with an interest in the implementation of judgments (Schorm, this issue). These can provide continuity, make implementation an inclusive process, and guard against its over-politicisation. For their part, CSOs and NHRIs have every incentive to develop flexible advocacy strategies that are based on a holistic analysis of the dynamics at play. This understanding will also enable domestic actors to know how and when to engage Strasbourg in seeking to advance implementation—using the CM to help galvanise unwilling decision-makers or making submissions to the CM whose content and timing is able to influence the supervision, and through that, the implementation process.

The CM, in turn, should identify allies—both state and non-state—and cultivate and empower them, for example by broadening the range of interlocutors on visits to capitals beyond the current practice of mainly meeting government representatives. It is, after all, at the domestic level where implementation is ultimately won or lost—in the iterated exchange, collaboration and bargaining over time between all potential compliance partners.

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