OXFORD UNIVERSITY PRESS | Journal of Human Rights Practice

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Journal:	*Journal of Human Rights Practice*
Manuscript ID	JHRP-2019-041.R1
Manuscript Type:	Article
Keywords:	execution, follow-up, remedy, reparation, supervision, treaty bodies

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1. Introduction

When a supranational human rights body finds a violation in an individual case, it not only lays the foundation for the victim to be redressed; by providing authoritative interpretation of the guarantees enshrined in an international human rights treaty, it can also act as a 'standard setter for future cases' across all states (Brems 2019: 217). Through adjudicating individual complaints, supranational bodies thus put the meat on the bare bones of these treaties. Yet, only if decisions[1] are implemented will victims get justice, and recurrence of violations be prevented.

As most clearly articulated in the European context, it is widely recognised that implementation is the 'shared responsibility' of both states and supranational bodies (Brussels Declaration 2015). This is because supranational human rights bodies may incentivise, facilitate or trigger, but cannot enforce, implementation, which is instead driven by domestic political bargaining and collaboration (Hillebrecht 2014).

We propose that a prerequisite for all actors to discharge their part of this shared responsibility is the creation of an evidence-based public record of the status quo of

[1] We use the term 'decision' as a collective shorthand for judgments of regional human rights courts, decisions of UN human rights treaty bodies and the merits reports or recommendations of regional human rights commissions.

implementation and an authoritative means of determining whether the measures taken do, in fact, satisfy the requirements of the decision. If there is no such record or authoritative determination, supranational bodies cannot perform several important functions: to render visible any failure to implement a remedial measure; hold states accountable for their actions or omissions using the tools of persuasion and admonishment at their disposal; permit the involvement of non-state actors in the verification and implementation process; and, ultimately, guard against premature termination of follow-up.

These are no easy tasks. Supranational bodies face political obstacles, such as states obfuscating or failing to engage. They also face practical hurdles, like assessing the adequacy of measures designed to guarantee that a violation will not be repeated. The bodies may, indeed, have a disincentive to publicise their implementation records, lest they be criticised for failing to enforce their decisions. Yet, shortcomings in performing these functions may prevent victims obtaining justice.

This article discusses the varying approaches taken by regional human rights bodies and UN treaty bodies (UN TBs) to following up implementation—differences that are partly explained by the fact that this role is variously undertaken by judicial, quasi-judicial or political bodies (see also Sandoval, Leach and Murray, this issue).[2] We engage not only in technical discussion about how to identify and appraise

[2] This article is based on research undertaken as part of the Human Rights Law Implementation Project (HRLIP). Semi-structured interviews were conducted for the research with actors at the national and supranational levels (see Introduction to this special issue). This article refers to interviews using an anonymous code, location and date. If, however, the location risks identifying the interviewee, it has been omitted.

implementation; our discussion also has a normative dimension, since it is concerned with the *expectations* that victims of human rights violations may have of supranational bodies, and of state actors—the executive, legislature and judiciary—in respect of their engagement, in good faith, in discharging their shared responsibility in the follow-up process. Moreover, this debate has implications for non-state actors—victims, litigants, civil society organisations (CSOs)—as well as national human rights institutions (NHRIs)—who are ideally placed to report on realities 'on the ground' and thereby influence the assessment of implementation.

Section 2 explores how far supranational bodies can 'see' and interpret states' responses to their decisions. Are they mandated and suitably resourced to play this role, and do they have sufficiently diverse sources of information? Section 3 examines two cases—one pending and one closed—that exemplify the difficulty of identifying and assessing implementation. Section 4 examines the merits of supranational bodies 'categorising' the status of implementation, while section 5 discusses how transparent and responsive supranational bodies are in the sense of enabling 'real time' participation by all interested parties. Section 6 concludes with recommendations both to supranational and domestic actors.

2. 'Seeing' and interpreting what happens: the need for diverse sources of information

This section examines, first, how far supranational bodies are mandated and resourced to assess implementation. It argues, secondly, that they cannot rely solely on state submissions: in some cases, victims' voices are indispensable, while

evidence presented by CSOs, NHRIs, international institutions and academics can also help to assess the veracity and completeness of the state's account.

2.1 *The mandate and capacity of supranational bodies to assess implementation*

The supranational bodies vary in their mandates and capacity to determine the status of implementation. In Europe, the Department for the Execution of Judgments of the European Court of Human Rights (DEJ), a secretariat body of the Committee of Ministers (CM), is mandated to use its 'independent and impartial expertise' to assist the CM, inter alia, 'in its assessment of the measures taken and/or envisaged by states'.[3] In practice, most cases are indeed dealt with bilaterally between the DEJ and domestic authorities, without any involvement of the CM as a political body. Rule 69 of the Rules of Procedure of the Inter-American Court of Human Rights (IACtHR) sets out the means by which it 'shall determine the state of compliance with its decisions', while Rule 48 of the Rules of Procedure of the Inter-American Commission on Human Rights (IACommHR) empowers it to 'adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance'. For their part, the African Court on Human and Peoples' Rights (ACtHPR) and the African Commission on Human and Peoples' Rights (ACHPR) are mandated to report on the implementation of their decisions;[4] yet neither currently engages in a formal process to evaluate the status of implementation (and in practice the Commission only refers to implementation

[3] See the DEJ's mandate at https://www.coe.int/en/web/execution/presentation-of-the-department (accessed 2 January 2020).
[4] See Article 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; and Rules 112(7) and (9) of the 2010 Rules of Procedure of the African Commission.

sporadically). Meanwhile, UN TBs are encouraged to assess the information provided by states and develop criteria for analysing it (OHCHR 2017).

A common challenge facing supranational bodies is the scarcity of resources. In the UN system, as of May 2019, the Petitions Unit within the Office of the High Commissioner for Human Rights (OHCHR) had 26 staff (15 professional staff; three general service staff and eight temporary staff),[5] who service all the treaty bodies. One treaty body member stressed that 'capacity is an absolute massive problem' (UN01, 24 January 2019). In Africa, in May 2019 there were nine legal officers providing support to the ACHPR[6] and seven permanent legal officers at the ACtHR.[7] These officers work on *all* aspects of the bodies' mandates. For the ACHPR, with its broad remit, this means that the individual communication procedure is just a small part of officers' duties.

The Inter-American and European bodies have dedicated staff working on follow-up, which permits a rough comparison matching the secretariat size to the caseload, taken from annual reports for 2018. As of May 2019, the IACommHR had five staff members[8] dealing with the implementation of 229 recommendations in Merits reports and friendly settlements agreements (IACommHR 2019: 147-56 and 168-73), while the Court had four staff members (IASHR022, San Jose, 15 February 2018) dealing with 208 cases (IACtHR 2019: 65). The DEJ had 39 staff dealing with legal case management (many of whom are, however, temporary or seconded)[9] supervising the

[5] Staff member of the OHCHR, email, 17 May 2019.
[6] Staff member of the ACHPR, email, 15 May 2019.
[7] Staff member of the ACtHR, email, 16 May 2019.
[8] Staff member of the IACommHR, email, 15 May 2019.
[9] Head of Division within the DEJ, email, 20 May 2019.

implementation of some 6,150 cases (Committee of Ministers 2019: 57). Of these, around 1,250 are 'leading' cases that reveal structural or systemic problems whose resolution requires that the state concerned adopt general measures to avoid repetition of the violation. Behind these are some 4,900 'repetitive', cases which are usually grouped together with a leading case, yet which often present complexities of their own. The 'cases per staff member' ratio before the European and Inter-American bodies thus ranges from around 155 in Europe to 50 before the IACtHR and 45 before the IACommHR. Such comparisons can only approximate their respective workloads; for example, the 208 cases being followed up by the IACtHR contain 1,140 separate reparation orders (IACtHR 2019: 181). Certainly, all these figures underscore that no secretariat body can feasibly do its own detailed fact-finding, let alone regular country visits, for all the cases under follow-up.

2.2 *Diversifying sources of information*

In the light of these resource constraints, supranational bodies rely considerably on the information provided to them, which in the first instance comes from governments. In Europe, this process has become highly prescriptive: governments are required to submit within six months of a final decision an Action Plan or Action Report detailing the actions envisaged or taken. Yet, executives may lack the capacity to present a reliable and comprehensive account. Inadequate reporting may stem from negligence, incompetence, or weak coordination between domestic actors.

Supranational bodies may also need to detect deliberate distortion of the picture: executives may portray a violation as an isolated event; downplay the need for a

holistic response to prevent recurrence; exaggerate the scope or effects of reform; or conceal negative side effects. Accordingly, we submit, there is an onus on supranational bodies to elicit information from diverse sources, including victims, CSOs and other international institutions.

2.2.1 *Ensuring that victims are heard*

How far can or should victims bring their perspective into the follow-up procedure? Do supranational bodies encourage them to add their voices to the dialogue? The answer to these questions depends upon the nature of the reparations at issue, and in particular whether they are aimed at redressing the individual victim(s) or preventing recurrence of the violation.

Victims' ability to engage in the monitoring of the implementation of their case relies, first, on whether they know how, and, secondly, whether supranational bodies actively encourage them to do so. Interviews at the African and inter-American bodies and the UN suggest that they strive to gain information on implementation from both parties to the proceedings. A secretariat member of the IACommHR stressed that 'our basic mechanism for measuring is contrast and comparison … We try not to presume [anything]' (IASHR030, Washington, 2 December 2017). The IACtHR and the African and UN bodies likewise allow information on implementation to be submitted by the complainants.

Yet, it can be challenging even to maintain contact with victims. One member of a treaty body noted that victims 'often completely disappear' (UN01). This may be due to treaty bodies' lack of direct engagement with victims, follow-up to individual

communications being an entirely paper-based process. Similarly, the African Commission has repeatedly noted 'challenges with the change of address and/or focal person by litigants' (e.g. ACHPR Report 2017: para. 31).

The IACommHR has found an effective means to address this problem: in 2018, its secretariat arranged telephone conversations with victims and their lawyers, leading to an increase in the response rate of more than 200 percent (IACommHR 2019: para 221). The IACtHR, too, has taken a proactive approach: for example, judges have had direct contact with victims during country visits (see Saavedra, this issue). These initiatives stand in marked contrast to the practice in Europe, where we encountered a general presumption that, in most cases, there was no need for (and indeed no perceived added value in) victim engagement because 'the secretariat can handle the execution process through discussion with the authorities', as a senior official from the CoE noted (SXB05, Strasbourg, 18 June 2018). It is perhaps unsurprising, then, that the DEJ does not routinely have contact with victims or their representatives, as evidenced by the fact that victims have made submissions to the CM in less than 2.5 percent of cases;[10] in fact, successful applicants to the ECtHR are not even updated about important developments in their case once it has been transferred to the CM. This has prompted a network of CSOs to call for an alert system, facilitating victims' access to information on their case (EIN 2018: para 6).

We submit that a minimum requirement for supranational bodies is to, first, inform the victim about what individual measures of redress the state must adopt (insofar

[10] Figures taken from HUDOC-EXEC, where a total of 665 applicants' submissions have been recorded compared to a total of 26,662 cases—both pending and closed—as of 9 January 2020..

as this is not specified in the decision itself), for example steps such as re-opening of investigations into the disappearance of a relative. Secondly, the victim should be kept up to date about what the state says it has done. Thirdly, supranational bodies should, where appropriate, elicit victims' views on the adequacy of reparation measures. There are certain reparation measures that victims are uniquely well placed to assess, among them symbolic measures such as memorials or public acts of acknowledgement of responsibility. These are arguably meaningless, if not counterproductive, if victims are not satisfied with them. Symbolic measures are a hallmark of the Inter-American human rights system (and comparatively rare in the European context), yet in practice victims are not always consulted; one CSO interviewee ventured that '[t]here are cases where the [IACtHR] has said that ... [symbolic] measures have been complied with … [but] we have not agreed that they really provided redress for the victims' (IASHR06, Costa Rica, 12 February 2018). A senior lawyer at the IACtHR acknowledged the subjectivity of this evaluation, asking, '[w]hat are the criteria to determine if a monument is beautiful or the victims like it?' (IASHR14, Costa Rica, 13 February 2018).

Another area where the experience of the intended beneficiaries forms an indispensable basis for assessing the state's response are decisions that require the provision of services to victims, such as women at risk of domestic violence. Interviewed about the implementation of the first decision on an individual communication from Georgia by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), *X and Y v Georgia,* CSOs welcomed the expansion of shelters for survivors of gender-based violence, but complained that too little consideration was given to whether the refuges suited their needs: '[The mere] existence of a shelter as a building is not ... satisfaction of the

requirements of the CEDAW Committee. There is a need to assess the quality of the shelters and their user-friendliness to these women, and this assessment is not there…' (GE03, Tbilisi, 24 April 2017). Interviews conducted by the Ombudsman with victims of domestic violence had revealed, they added, a demand for truly empowering measures, such as enforcement of a law that would require the *perpetrator* to leave the (common) property.

There are remedial measures, however, on which victims are less well placed to pronounce—measures that go beyond the situation of the individual and are aimed at ensuring that violations are not repeated against others. Complainants cannot, we submit, be expected to report on the need for, and impact of, broader reforms of a legislative, administrative, judicial or other nature. With reference to the 'Cotton Field' (*González v Mexico*) case, for example, in which the IACtHR asked victims to assess whether Mexico had put in place an appropriate system to prevent *femicides*, Rubio and Sandoval (2011: 1088-89) argue that they lacked the requisite knowledge and access to information. Rather, the Court should have put the onus on the state to show that the measures adopted would effectively prevent future violations. The European system acknowledges these constraints by restricting applicants' right to make submissions on implementation to providing information regarding individual measures (Rule 9.1 of the Rules of the CM). Thus, in Europe, unlike in the other regions and at the UN, it is not even permissible for applicants to comment on general measures of implementation.

2.2.2 *Counterbalancing the executive's account: civil society input*

Holistic assessments of implementation that victims may be unable to offer can be provided by CSOs or NHRIs. The rules of supranational bodies impose few limits on their ability to receive information from diverse sources. According to Rule 112(6) of the Rules of Procedure of the ACHPR, the Rapporteur assigned to a decision can 'make such contacts' as are necessary to follow-up, although typically requests for information do not extend beyond the parties concerned. Similarly, Rule 46 enables the ACHPR to 'hear from ... any other person capable of enlightening it'. Similar provisions exist in respect of the Inter-American Commission (Rule 48 of the Rules of the IACommHR) and, in Europe, the CM (Rule 9.2 of the Rules of the CM).The supranational bodies have every incentive to encourage CSOs and NHRIs to make submissions, providing evidence of prevailing shortcomings and making recommendations.

In Europe, where decisions are usually silent about reparations (Donald and Speck 2019), CSO or NHRI interventions at an early stage, in the form of submissions to the CM, can help identify appropriate remedial measures and even define the very scope of the follow-up process. This is exemplified in the CM's endorsement of repeated CSO calls for the creation of a specialised police unit in Georgia to investigate homophobic and transphobic violence, a recommendation made in relation to Identoba and Others v Georgia (see 3.1.5 below).

CSO submissions may also present evidence and insights based on direct engagement with victims and beneficiary groups which even well-intentioned governments may struggle to provide. This type of fact-finding, as a litigator in the African system ventured, is conditional on relationships of trust—trust that may be lacking where researchers are (seen as) being linked to the state as the initial

perpetrator of the violations (D2, 20 April 2017). Such was the case when a coalition of CSOs and the international NGO, Minority Rights Group, successfully lobbied for the first ever African Commission hearing on implementation, in the Endorois case, a landmark decision in which the Commission declared the Endorois community's eviction from its ancestral lands in Kenya illegal. Longstanding CSO engagement with the affected community thereby ensured that the Endorois' voices were heard at the supranational level.

CSOs or NHRIs will sometimes be the *only* domestic actors monitoring the less visible—and possibly unintended—effects of reforms, as an example from Europe shows: in December 2018, nearly six years after the ECtHR's ruling had become final, supervision of *Bureš v the Czech Republic*, concerning the use of restraints in 'sobering-up' centres of private psychiatric hospitals, was closed (CM Resolution Bureš 2018). The government's Action Report (Bureš Action Report 2018) convincingly describes measures including legislative amendments and new instructions on the use of restraints, following multi-stakeholder consultations, and taking into account a study by the National Preventive Mechanism. There is nothing in these materials, however, to suggest that the CM was aware of a problem to which we were alerted by a Czech CSO (CZ05-07, Brno, 20 June 2017), whose monitoring had revealed that patients were increasingly being sedated instead of fastened to beds, potentially causing fresh violations. It would appear that, because the CSO did not submit this information to the CM, the latter was unable to assess implementation holistically. This example, especially when contrasted with *Identoba v Georgia*, presented at 3.1—where CSOs *did* intervene and thereby exposed recurrent violations arising from homophobic and transphobic violence—shows how a CSO submission not made is an opportunity missed to 'set the record straight'. Such

missed opportunities are especially regrettable given that our review of CSO submissions in the cases selected for our research reveals that they were generally of high quality, presenting detailed, accurate and well-researched evidence and information.

While supranational bodies are open to diverse non-state sources, in no system does reality fully meet ambition. CSO submissions are not routinely published by African and inter-American bodies and therefore cannot be quantified—although CSO interventions at the follow-up stage do appear to be on the increase before the IACommHR and the IACtHR (see Saavedra, this issue). In Europe, CSOs make submissions to the CM in only five percent of leading cases (EIN 2019: 12). Within the UN system, CSOs can submit information on the implementation of decisions to TBs, under the state party reporting system. This practice is beneficial if case-level recommendations are leveraged to promote reforms demanded in the treaty bodies' concluding observations—and by CSOs in their 'shadow' reports. We discuss at 3.2 how follow-up of a decision against Burkina Faso by the Human Rights Committee (known as the CCPR, since it monitors implementation of the International Covenant on Civil and Political Rights, or ICCPR) was 'kept alive' in this way. Yet there is a concomitant risk that subsuming specific reparation measures into the reporting cycle could cause them to get lost in this broader process of monitoring compliance with treaty obligations—creating another reason for vigilance on the part of CSOs and the supranational body.

Where CSOs have failed to engage, what are the obstacles? Civil society interviewees identified several reasons for the lack of engagement: lack of knowledge about how follow-up works and what avenues exist for civil society input,

and about how to make a submission effective in the absence of hard data. One CSO workshop participant in Belgium (Brussels, 1 February 2017) ventured that for CSOs, follow-up to ECtHR decisions was:

> time consuming and … unclear; you don't know when the case will be reviewed [by the CM] … or at which stage they will accept ... the views of the victim or [if] they are sensitive [to] the victims.

Several CSO and NHRI representatives in Europe (e.g. BE01, Brussels, 8 November 2016; CZ11, Prague, 21 June 2017) said they had never been invited to make submissions. This is problematic where supranational bodies are aware that a particular organisation is well placed to assess implementation, for instance because it litigated the case or submitted an *amicus curiae* at the adjudication stage. An important step towards encouraging CSO involvement in the follow-up process has, however, recently been made in Europe, where the DEJ created a new website[11] providing guidance on CSO interventions. So pressing was the perceived need to bring the voices of CSOs and NHRIs to the table that it led to the creation, by a group of human rights academics and practitioners, of the European Implementation Network (EIN),[12] which provides a platform for advocacy in Strasbourg and supports non-state actors to influence the course of implementation, inter alia by making high-quality interventions at the most opportune moment.

2.2.3 *Whom to trust?*

[11] See DEJ website at https://www.coe.int/en/web/execution/nhri-ngo (accessed 2 January 2020).
[12] See http://www.einnetwork.org/ (accessed 17 January 2020).

In the previous two sections, we have argued for supranational human rights bodies to be proactive in eliciting the views of victims and non-state actors, as a way of detecting incomplete, inaccurate or bad faith reporting by governments. Where counterbalancing evidence is lacking, there is a risk that undue deference might be given to the state's assessment. Where, on the other hand, supranational bodies *have* received information from the victim or another credible source, we submit that the 'default' should be for the systems to attribute significant value to this material in the absence of a state reply. Inspiration may be drawn, in this respect, from the European system, which sets a clear expectation, in the Rules of the CM, that the state should respond to submissions by applicants, CSOs or NHRIs within five working days, failing which their information will be shared with CM members and ultimately published online, even if the state has not commented on it. The system is thus set up to 'punish' non-cooperation by states, with the presumption that civil society reports that remain unrefuted reflect badly on the state—in stark contrast to the practice of the CCPR, where states are almost incentivised to be uncooperative because the follow-up procedure is discontinued unless the government presents its views (OHCHR 2017: 5) (see section 4).

3. Knowing when enough has been done

Gleaning information from diverse sources about the actions—or omissions—of states is, we have argued, a prerequisite for effective follow-up. Yet, it is not the only challenge that supranational bodies face. This section focuses on two cases which, while they may not be representative of the respective bodies' case law, epitomise some common difficulties of assessing implementation. The first, *Identoba v Georgia*, an ECtHR judgment concerning homophobic and transphobic violence and

discrimination, reveals the challenges inherent in assessing guarantees of non-repetition, especially where violations are rooted in prejudicial attitudes or other systemic causes and where the judgment does not indicate specific remedies. This is a task that all supranational bodies find demanding; as a CSO representative in the inter-American system put it (IASHR035, Washington, 1 December 2017):

> I believe that no system ... has clear indicators of what would [count as] implementation of more abstract elements such as ... non-discrimination ... How could you measure that you discriminate less today than yesterday? The fact that you have a law does not mean that you discriminate less.

Identoba also exemplifies how CSOs can mitigate this problem by submitting evidence that supplements or corrects the state's account and proposing qualitative and quantitative benchmarks to assess implementation.

The second example, *Sankara v Burkina Faso*, a CCPR decision on a complaint by the family of the murdered President of Burkina Faso, highlights the risk that follow-up may end prematurely and against the expressed wish of victims. It exemplifies, too, the opportunities and challenges presented when follow-up of a UN TB decision is diverted to the state party reporting system.

3.1 *Tackling homophobia and transphobia: Identoba and Others v Georgia*

On 17 May 2012, around 30 lesbian, gay, bisexual and transgender (LGBT) activists gathered peacefully in Tbilisi to mark the International Day against Homophobia and

Transphobia, or IDAHOT. The organisers had warned the police about violence by groups linked to the Orthodox Church—warnings that materialised when counter-demonstrators attacked the IDAHOT activists. Police refused to intervene and proceeded to arrest and detain several IDAHOT protesters. In its judgment three years later, the ECtHR found violations of Article 3 of the European Convention on Human Rights (ECHR) (prohibition of inhuman and degrading treatment), in conjunction with Article 14 (prohibition of discrimination), on account of the authorities' failure to fulfil their positive obligation both to protect the IDAHOT marchers and launch effective investigations to identify the perpetrators and unmask their discriminatory motives. The Court also found a violation of Article 11, the right to freedom of peaceful assembly. Aside from awarding sums of up to 4,000 euros in non-pecuniary damages, which were paid on time, the judgment was silent about reparations.

At the time of writing, the CM is still supervising *Identoba* under its enhanced procedure—reflecting the complexity of the required implementation steps—in conjunction with other cases concerning violence against Jehovah's Witnesses (CM Notes on Identoba 2019). For reasons of space, we examine only *Identoba*. While the government's latest submission in September 2019 calls for the CM to close supervision of this case (Identoba Action Report 2019: para 86), a joint CSO communication, submitted the same month, raises numerous concerns suggesting that this would be premature (Identoba CSO submission 2019)—a conclusion with which the CM concurred (CM Decision on Identoba 2019).

3.1.1 *The perspective of victims and beneficiary groups*

The government and CSO submissions give divergent accounts of how, if at all, IDAHOT has been marked in Georgia since 2012—a crucial indicator of the state's success in ensuring non-repetition of the violation. CSOs lament the 'egregious' failure of the authorities to face down threats of violence by far right groups and guarantee the safety of LGBT activists, causing the 2019 Tbilisi Pride March to be cancelled (Identoba CSO submission 2019: Appendix 2), a situation also deplored by Georgia's NHRI, known as the Public Defender (Identoba Public Defender submission 2019: 4-5). By contrast, the latest government submission is silent on this aspect of implementation. Nor has the government acknowledged in submissions to the CM that in 2013, IDAHOT protesters suffered even more aggravated violence than in 2012, as 20,000 counter-demonstrators armed with iron batons attacked them with apparent police collusion, and that no events took place in 2014, due to the trauma of those events, or in 2016, because of violent homophobia surrounding the impending general election—events laid bare in evidence provided by CSOs (Identoba CSO submission 2016: paras 6-21), and in complaints lodged with the ECtHR relating to the 2013 events.[13]

The dissonance between the official and CSO accounts persists in respect of the investigation into the events of 2012 and 2013. For example, the latest CSO submission (2019: paras 29-31) recalls that, despite video evidence, just four individuals were charged with criminal offences for the 'mob violence' of 2013, all of whom were later acquitted—developments that are absent from the government's Action Reports. Moreover, our interviews suggest that some of the government's reported investigative activity was, as one applicant put it, a 'facade', with victims

[13] Identoba and others v Georgia (Application no. 74959/13) and Women's Initiatives Supporting Group v Georgia (Application no. 73204/13).

being summoned for police interviews repeatedly to create the illusion of progress without serious intent (GE01, London, 17 January 2017).

The foregoing demonstrates the crucial role of CSOs not only in filling information gaps but also in inserting the victims' perspective; for example, with respect to the traumatising effects of the violence of 2013.

3.1.2 *Statistical data*

Interviewees emphasised the importance of statistical data to provide 'hard-edged' measures of implementation. For *Identoba*, the focus is on statistics for criminal proceedings initiated on grounds linked to sexual orientation and gender identity. Again, the government and CSO submissions diverge. Moreover, they reveal that statistics may be presented misleadingly. For example, the 2018 Action Report (para 42) states that criminal convictions for homophobic or transphobic crimes doubled from 2016 to 2017—but neglects to highlight that this was an increase from four to eight cases out of a total of 49 'examined' (Identoba CSO submission 2018: para 19).

Paucity of disaggregated data is another concern. For instance, the government reported in 2019 (para 53) that 81 hate crime judgments were delivered in 2018, but failed to indicate how many of these concerned homophobic or transphobic crimes (Identoba CSO submission 2019: para 22).

Statistics on prosecution of hate crimes against sexual minorities are, as one CSO interviewee ventured, a 'key litmus test' for implementation of *Identoba* (GE02, London, 17 January 2017). The onus on government agencies to provide reliable, disaggregated data is a primary focus for advocacy by CSOs and the Public Defender (GE09, Tbilisi, 24 April 2017). Indeed, one CSO interviewee ventured that generating and interpreting such data has become integral to their activism: 'you have to … [target] a particular statistical thing and then you can keep the battle going' (GE02).

3.1.3 *Monitoring changes in domestic case law*

It is not only aggregate figures for homophobic and transphobic crimes that are potentially misleading, but also the interpretation of domestic court decisions. Again, CSO evidence acts as a corrective to the official account. For example, five domestic court decisions were presented in the 2018 Action Report (para 45) as illustrating the 'effectiveness' of hate crime investigations. One of these, a Supreme Court judgment, was cited approvingly by the CM (CM Notes on Identoba 2018). The CSO submission, however, explains that in this case—in which a transgender woman was murdered and set alight by an assailant with a history of transphobia—the Prosecutor's Office had, in fact, failed to identify a transphobic motive, which meant that the Supreme Court was unable to use the 'aggravated circumstances' provision of Article 53 of the Georgian Criminal Code, which would have permitted the imposition of a higher sentence. Indeed, CSOs deplore the 'almost non-existent' (Identoba CSO submission 2019: para 5) use of Article 53, which was not applied in any case concerning homophobia or transphobia until 2016.

The case cited above exemplifies the difficulty for supranational bodies of monitoring changes in case law, especially where, as in Georgia, there are 'inadequate systems' for publishing court decisions (Identoba CSO submission 2018: para 22), making the supranational body reliant on executive summaries. In such instances, CSO evidence—in the form of contextual information about cases or different rulings showing that the original problem persists—may at least prompt the supranational body to interrogate the executive's account of judicial behaviour. Such scrutiny can ensure that isolated domestic rulings are not misrepresented as a trend and that changes to bring domestic case law into conformity with Convention requirements are truly embedded, especially in the absence of a unifying opinion by an apex court.

3.1.4 *Assessing measures aimed at changing attitudes and behaviour*

Identoba epitomises the difficulty of assessing guarantees of non-repetition which require changes to discriminatory attitudes and behaviour through measures such as training of law enforcement officers, judges and prosecutors. Here, both qualitative and quantitative indicators are needed. For instance, the government presents an impressive figure of 2,300 prosecutors who were trained in 2017 on discrimination and investigation of hate crimes (Identoba Action Report 2018: para 49). This development was welcomed by CSOs; yet, organisations involved in delivering training raised doubt as to its efficacy: for example, at the police academy of the Ministry of Internal Affairs (MIA), 'insensitive and somewhat discriminatory attitudes' were evident during the training (Identoba CSO submission 2018: para 32; see also ECRI 2016: paras 64-68).

These limitations suggest that supranational bodies should insist that governments provide not only statistics for numbers trained, but also qualitative data about curricula and measures of impact. This also has implications for the timescale over which implementation is assessed, since the impact of training aimed at shifting attitudes and behaviour is only likely to be visible in the longer term, through, for example, changes in the way that complaints concerning homophobic and transphobic abuse are handled. Moreover, supranational bodies—and CSOs at the domestic level—should promote the participation of civil society and affected communities in the planning, delivery and evaluation of anti-discrimination training. This is an issue on which CSOs may share experience internationally: we encountered instances in the African and inter-American regions, too, where governments argued that training had effectively tackled discrimination, only to see such claims challenged by civil society. A CSO (IASHR010, San Jose, 8 February 2018) acknowledged the difficulty for the IACtHR in identifying when follow-up can end:

> [When can] the Court … say: 'I am satisfied with the level of compliance?' When [the state] has trained a hundred, when it has trained a thousand, when there are no new cases? … What is the criterion that the Court will have when [reparation] measures ... are so general?

Indeed, assessment of implementation is even more fraught when it comes to gauging the impact of measures to combat intolerance not only among state agencies but also at a societal level. In respect of *Identoba,* attention has focused on measures to tackle discrimination against sexual minorities such as those adopted as part of Georgia's National Human Rights Strategy and accompanying action plans. CSOs lament the fact that, while Parliament approved the latest action plan for 2018-20, the chapter on 'gender identity and equality' has still not been approved

half-way through the implementation period—a point omitted from the government's Action Report to the CM (Identoba CSO submission 2019: para 14). Perhaps unsurprisingly, then, the Public Defender concludes that 'the problem of homophobia, transphobia and xenophobia remains systematic and there are hardly any measures on the part of the state to overcome [it]' (Public Defender submission 2019: 4).

3.1.5 *When to end follow-up?*

Successive CM examinations of Identoba lend weight and credence to submissions by CSOs and the Public Defender, whose influence on the follow-up process is palpable. The question remains as to what criteria the CM should use to determine when to close the case.

The process of supervision has identified measurable benchmarks, such as statistics on prosecution of hate crimes. Other remedial measures, such as training, require both quantitative and qualitative assessment. Our analysis suggests the need for vigilance when interpreting such data, since governments may, through neglect or bad faith, misrepresent the true extent of progress. Another key criterion is for the IDAHOT march to proceed in Tbilisi in a way that meets the requirements of both Articles 3 and 11 ECHR; that is, neither subject to inhuman and degrading violence or so circumscribed as to be effectively invisible. Given the lamentable record since 2012, we submit that progress should be demonstrated not only once but across successive years.

Identoba further highlights how, when a judgment is silent on the matter of reparations, CSO interventions can define the scope of follow-up. For example, ECRI (2016: para 68) recommended the creation of a specialised police unit to deal with racist, homophobic and transphobic hate crime—a move that several CSO interviewees (e.g. GE13 & GE14, Tbilisi, 25 April 2017) insisted should be a prerequisite for the CM to close *Identoba*. In September 2019, for the first time, the CM encouraged the government to create such a unit—a measure the authorities have so far rejected. *Identoba* thus illustrates the dynamic nature of the follow-up process whereby, when a decision does not specify reparations, the wide discretion initially afforded to the state to design appropriate measures gives way to a more exacting approach that demands evidence of impact and effectiveness before supervision can end. Supranational bodies may be, at least initially, indifferent to which domestic actors are involved in implementation where, for example, an outcome may be achieved either by an executive order or legislation, or where a change in judicial interpretation of a law may suffice. Yet, *Identoba* illustrates how the supranational body may (have to) become more prescriptive over time, especially where the authorities are inactive and models for reform are proposed by expert bodies.

3.2 *Ending follow-up prematurely? Sankara v Burkina Faso*

On 15 October 1987, a coup d'état took place in Burkina Faso during which the (then) President Thomas Sankara was killed. No investigation was undertaken into his death and the whereabouts of his remains were not disclosed. In January 1998, a death certificate was issued stating that he had died of natural causes. In 2002, after trying to instigate court proceedings and an inquiry, his widow, Mariam Sankara,

and his sons submitted a complaint to the CCPR. In 2006, the Committee found the state in violation of Article 7 of the ICCPR (prohibition of torture or other ill-treatment) noting that the refusal to conduct an investigation into Sankara's death, the lack of official recognition of his place of burial, and the failure to correct the death certificate constituted inhuman treatment of Ms Sankara and her sons. The CCPR also found a violation of Article 14(1) (right to equality before the law) on account of the failure to instigate judicial proceedings (*Sankara v Burkina Faso*: paras. 12.1, 12.4-6 and 13).

The CCPR stated that Burkina Faso was 'under an obligation to provide the family with an effective and enforceable remedy' in the form of official recognition of the burial site and compensation for their 'anguish and trauma', and that it was 'required to prevent such violations from occurring in the future' (*Sankara v Burkina Faso*: para 14).

3.2.1 *Deciding when to close follow-up*

The government responded within the Committee's 90 day deadline, saying it was ready to acknowledge Mr Sankara's grave to his family and had amended the death certificate. It had also declared him a national hero and was erecting a monument in his honour. It added that Mr Sankara's military pension had been liquidated for the benefit of his family and that compensation had been offered to the family but had been refused (CCPR 2006-7: 664). However, the complainants disputed the adequacy of the proposed remedies and stated that '[t]rue "official recognition" of the place where his remains are buried could only come after a judicial inquiry had established the circumstances of his death and burial by direct witness evidence,

burial record, DNA analysis, autopsy or forensic reports' (CCPR 2006-7 665). They noted that the Prosecutor continued to hinder a judicial inquiry, in violation of Article 14. The complainants had also been unaware of the decision to modify the death certificate, which had been taken unilaterally and in *ex parte,* secret proceedings, which they claimed constituted a further violation of Article 14(1). They added that the military pension and compensation did not constitute an effective remedy, in part because accepting compensation would require them to waive their right to have the circumstances of Mr Sankara's death established by judicial inquiry and to seek remedies before the courts (CCPR 2006-7: 664-5).

The CCPR did not make any assessment following this initial exchange and the decision remained under its follow-up procedure. No new information was provided by the government but in 2007 the complainants twice contacted the CCPR to reiterate their objections to the government's response. They argued that, despite the Committee's failure to specifically mention it in the decision, the only appropriate remedy was the initiation of an inquiry, which the Prosecutor had repeatedly rejected. They referred to the CCPR's own jurisprudence to demonstrate that this had been the type of remedy it had requested in similar cases and recalled the Committee's decision on the admissibility of their complaint, which had affirmed that the failure to hold an inquiry was a violation of Article 7 (CCPR 2007-8: 517-8).

Following this exchange, the CCPR recalled that it had not included a specific reference to the need for an inquiry in its decision and that its 'decisions are not open to review and that this applies equally to its recommendations for reparation' (CCPR 2007-8: 518). The Committee considered the measures the state claimed to have taken were 'satisfactory' and therefore decided that it would discontinue the follow-up

procedure (CCPR 2007-8:518). The impact of this was to close the dialogue with the parties concerned in April 2008.

The CCPR's approach appears problematic, not just for this case but potentially others, too, in three ways. First, it suggests that categorisation of implementation can be a blunt tool and may lead to premature closure of a case. At the time, the CCPR categorised state responses to its decisions as 'satisfactory', 'unsatisfactory', or 'no follow-up response received'. The CCPR would review the remedy as a whole rather than evaluating the state's response to each reparation measure. It would consider replies to be 'satisfactory' if 'they display the willingness of the State party to implement the Committee's recommendations or to offer the complainant an appropriate remedy' (CCPR 2008-9: para 232). This was arguably too low a bar and it is notable that in 2013 and again in 2016, the CCPR refined its approach to categorisation, mitigating but not eradicating this problem, as explained in section 4.

Secondly, the decision to terminate follow-up raises questions about the need to counterbalance the executive's account: as one human rights professional told us 'I'd simply like to say that the ... efforts made and actions undertaken were not in line with the spirit and principle of the Human Rights Committee' (A3, Burkina Faso, 13 December 2017). Where there are conflicting views from the state and victims on matters of reparation, we submit that there is an even greater imperative to draw on diverse sources in order to avoid undue deference being given to the state's assessment—especially in a politicised case like *Sankara* (the President at the time the case was closed was Blaise Compaoré, who had been involved in the 1987 coup). Indeed, a member of a UN treaty body acknowledged that 'we are often not in a very good position to judge these things. We are very far removed from the

ground' (UN01). In cases of unlawful killings and disappearances, where families typically prioritise truth-seeking measures, it appears even more problematic that follow-up is closed against the victims' express wishes.

Thirdly, the Committee's approach appears to have been unduly rigid in insisting that its reparation measures could not be open to review, especially since the original decision lacked clarity as to the necessity of an inquiry. It is not unreasonable for the complainants to have interpreted the CCPR's call for 'official recognition of the place where Mr Sankara is buried' (*Sankara v Burkina Faso*: para 14) as requiring an inquiry. Indeed, the CCPR stated in its consideration of the merits that 'any complaint relating to acts prohibited under article 7 of the Covenant must be investigated rapidly and impartially by the competent authorities', and subsequently reiterated its finding of a violation of Article 7 as a result of the refusal to conduct an investigation (*Sankara v Burkina Faso*: para 12.2).

3.2.2 *Diverting follow-up to the state party reporting system*

The Committee's decision to cease follow-up meant that there was no process for the complainants to submit further information or for pressure to be maintained on the state. However, opportunities for follow-up were kept alive through the state party reporting procedure. In 2015, the CCPR requested Burkina Faso to include information on *Sankara* as part of the consideration of its initial state party report, which was submitted in April 2016. Under this process, the state included information on steps taken to exhume the presumed remains of Mr Sankara and companions in 2014 (although the forensic results were inconclusive) and to commence criminal proceedings against several soldiers. It also noted that an international arrest warrant

had been issued for Blaise Compaoré in December 2015 for his alleged involvement in the death of Mr Sankara (Burkina Faso State Report 2016: para 5). Similar information was submitted by CSOs in their joint report to the CCPR, which also noted that the case 'had not experienced a significant judicial evolution given its highly political nature' (Burkina Faso CSO Report 2015: 12).

The state party reporting system therefore provided opportunities for follow-up despite the closure of the case. Yet, this avenue for continued scrutiny has limitations. First, there can be a long delay before a state party report is considered; many states submit reports late or not at all (CCPR Report 2017-18: para 62). Secondly, there is no guarantee that implementation of the decision will be raised under the procedure, which considers state compliance with all its obligations under the relevant treaty. Thirdly, although the CCPR allows all concerned individuals, bodies and CSOs to submit relevant information to it during the preparatory stages of the state party reporting,[14] only CSOs and NHRIs can submit formal reports which are published online. Therefore, individuals must rely on those organisations to raise their views on implementation formally and publicly.

Ultimately, the complainants' argument that follow-up of *Sankara* was closed prematurely appears to be borne out by subsequent events: efforts to verify where Mr Sankara was buried were only undertaken almost three decades after his murder in 2014, after a regime change, and the promise in 2007 to erect a monument was not fulfilled until 2019 (BBC News Afrique March 2019). More broadly, the case

[14] See OHCHR website at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx (accessed 2 January 2020)

exemplifies the reasons why cases requiring investigations are among the worst implemented across all regions (Baluarte 2012: 298; Hawkins and Jacoby 2010: 58) because they are often 'old, costly and difficult to investigate, and politically volatile' (Huneeus 2011: 517). This creates an onus on supranational bodies to exercise particular caution when deciding to terminate follow-up of such cases.

4. Categorising implementation

Supranational bodies adopt different approaches to categorising the status of implementation of their decisions, and sometimes also the degree to which states have cooperated. Does categorisation provide an accessible means of 'measuring' implementation or is it a blunt instrument which may mask, rather than reveal, complexities?

Among regional human rights bodies, the most elaborate approach to categorisation has been developed by the IACommHR. In its 2018 Annual Report, the Commission categorises the overall status of compliance with 121 friendly settlement agreements (IACommHR 2019: 147-56) and recommendations issued in 109 Merits Reports (IACommHR 2019: 168-73) according to whether it is 'full' (or 'total'), 'partial' or 'pending'—categories that the Commission has used since the early 2000s. These categories mean, respectively, that the state has fully complied with all of the friendly settlement clauses or recommendations; that it has complied with some, but not all, of them or has taken some, but not all, required steps for each of them; or that it has taken no steps, or has taken steps that have yielded no concrete results, or has expressly indicated that it will not comply with the friendly settlement clauses or

recommendations, or has not reported to the Commission and there is no information from other sources to suggest otherwise (IACommHR 2019: 146).

The Commission's 2018 Annual Report is innovative in the way it further disaggregates information on compliance, indicating its rapidly evolving approach to this function. First, for friendly settlement agreements, a percentage is given, indicating the number of clauses that have been complied with as a proportion of the total number of clauses, enabling the parties to 'visualize' the level of implementation (IACommHR 2019: 147). Secondly, tables indicate progress made during 2018 for discrete friendly settlement clauses (IACommHR 2019: 159-65) and individual recommendations (IACommHR 2019: 175-78). For these smaller units of analysis, two further categories are introduced: 'substantial partial' (as distinct from 'partial') compliance, meaning that the state has provided evidence that it has adopted the relevant measures but these have not yet been completed (IACommHR 2019: 146); and 'non-compliance' (as distinct from 'pending' compliance) where, due to the state's conduct, it is not possible for it to comply or it has expressly advised that it will not comply with the measure. In addition, the outcomes of each measure are listed as being either 'individual' or 'structural'. Thirdly, detailed narrative reports for each case summarise information provided by the parties and provide the Commission's analysis of the status of compliance with each clause or recommendation and its individual or structural results. For its part, the IACtHR also categorises compliance as full, partial or pending and lists on its website cases at

the monitoring stage with narrative reports on completed and pending reparation orders.[15]

In the UN system, the Human Rights Committee was among the first of the TBs to categorise implementation of recommendations contained in its decisions on individual communications (OHCHR 2017). Under the current criteria, where a state has made some response, the Committee categorises it according to whether the reply or action is: 'largely satisfactory', meaning that there is 'evidence of significant action' towards implementation; 'partially satisfactory', meaning that additional information or action remains necessary; or 'not satisfactory', meaning that action taken or information provided by the State party is irrelevant or does not implement the recommendation. In addition, the Committee notes when there has been 'no cooperation', meaning that no follow-up report has been received even after reminder(s); or where 'the information or measures taken are contrary to or reflect rejection of the recommendation'. Other treaty bodies that use similar approaches (some more and some less elaborate) are the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on Enforced Disappearances and the Committee on the Rights of Persons with Disabilities (OHCHR 2017).

In contrast to the IACommHR and some UN treaty bodies, neither the African nor the European human rights bodies categorise the status of implementation of decisions. The ACHPR does not systematically make formal assessments of implementation or

[15] See 'Cases in supervision stage', http://www.corteidh.or.cr/cf/jurisprudencia2/casos_en_etapa_de_supervision.cfm?lang=en, which includes brief narrative reports, and 'Monitoring compliance with judgment' [sic], http://www.corteidh.or.cr/cf/jurisprudencia2/busqueda_supervision_cumplimiento.cfm?lang=en, which includes more detailed reports (accessed 2 January 2020).

make public information submitted by the parties; at most, the Commission may, in its activity reports, summarise such information, if any has been received. For its part, the ACtHPR publishes in its activity reports a table on the status of implementation, listing the reparation measures ordered and summarising what, if anything, the state has done, without providing a qualitative analysis. For the CM, cases are either pending or closed. The CM does, however, indicate the relative urgency and complexity of a case by classifying it under one of two different supervision tracks—standard or enhanced.). Moreover, as the monitoring process progresses, it may signal its displeasure with a state's response by using, in cases under enhanced supervision, incrementally stronger language. Moreover, in contrast to the approach of the African bodies, information received from governments and other actors is systematically synthesised, analysed and published, as discussed in section 5.

How useful, then, is categorisation to supranational and domestic actors? The CCPR acknowledges that '[a]ll attempts to categorize follow-up replies by States parties are inherently imprecise and subjective' (CCPR 2008-9: 232). Yet, as one treaty body member ventured, 'unless you measure [implementation] in one way or another, it's difficult to say what is really your message' to the state (UN01). Certainly, supranational bodies need to be able to identify in a disaggregated manner the extent of implementation of the discrete obligations contained in or flowing from a decision, given that compliance is not a dichotomous concept (Hawkins and Jacoby 2010). Such an approach allows the bodies to be nimble-footed in praising and incentivising a state's progress in relation to some measures while exposing inaction on others. Categorisation can also permit an aggregate assessment of a state's record; for example, the proportion of decisions, or discrete reparation measures, that have

been fully or partially implemented or to which there has been no response by the state. Moreover, it could in principle allow comparison 'across cases, states or tribunals' as a means of learning from successes and identifying systemic shortcomings (Hillebrecht 2009: 370).

The risk, however, is that the 'broad and ambiguous' (Hillebrecht 2009: 366) category of partial compliance does not explain either the various forms or degrees that partial compliance takes or its causes. Insufficient differentiation may have the perverse effect of increasing states' existing tendency to take minimalistic steps in response to a judgment (von Staden 2018), by creating an incentive for them to earn the status of partial compliance by picking 'the lowest-hanging fruit', such as payment of reparations or symbolic reparations, rather than implementing more 'durable' and politically challenging measures, like the prosecution of perpetrators (Hillebrecht 2009: 366). This risk is mitigated if categorisation is accompanied by a detailed narrative account of implementation—and, crucially, informed by the perspective of victim(s), CSOs and NHRIs. A lawyer in the case of Dos Erres, concerning a massacre of civilians by the Guatemalan army in 1982, recalled that when the case was under consideration by the IACommHR, a friendly settlement was signed, and Guatemala began to comply with the measures except those relating to justice for the victims (GUA021, Ciudad de Guatemala, 14 April 2018). He added that the IACommHR used to say 'let's congratulate … Guatemala because sixty or seventy percent of the measures have been implemented'; yet, for the victims, the most important measure was justice, and therefore the friendly settlement was eventually terminated and the case referred to the IACtHR. One solution proposed by interviewees was to differentiate among reparations by giving greater weight to those that matter most to victims, such as measures to hold perpetrators to account(e.g.

IASHR035), which studies show are among the least well implemented across regions (Basch et al 2010: 18; Hillebrecht 2014: 51). Hillebrecht (2009: 376) likewise proposes weighting certain remedial measures according to the 'value' placed on them by victims and other actors. This presupposes, however, that the supranational bodies are in contact with all relevant stakeholders, which, as we have seen in sections 2.2.1 and 2.2.2, is not always the case.

A member of the IACommHR Secretariat acknowledged that partial compliance encompasses a wide spectrum of possibilities; hence, the category is merely intended to show 'where the door is open' to implementation or, conversely, closed in respect of pending or non-compliance (IASHR030). Alongside these categories, the detailed narrative reports provide 'a vehicle to evaluate change year by year'. Certainly, the Commission is to be commended for its recent adoption of a disaggregated approach which, as proposed by Hillebrecht (2009: 371; 2014: 41-44), makes visible where states have implemented—or failed to implement—financial reparations, individual measures and/or guarantees of non-repetition.

The utility of categorisation should also be assessed by examining the *consequence* of a particular category being applied. Here, the practice of the CCPR gives cause for concern in terms of the criteria for when the follow-up procedure is discontinued (OHCHR 2017: 5). This occurs when a state's response is 'largely satisfactory' or when it has provided three substantive replies, posing the risk that follow-up may cease even if the victim(s) are not satisfied or their view has not been ascertained, as happened in the Sankara case discussed at 3.2. Moreover, as noted at 2.2.3, the Committee—alone among the treaty bodies—discontinues follow-up if the state fails to cooperate (ibid). This creates a perverse incentive for states not to respond—and

the fact that, in such instances, the 'no cooperation' grade is made public offers scant reassurance to the victims.

In summary, categorising can provide a user-friendly 'snapshot' of the implementation of a decision or its constituent parts—showing whether the door is open or closed—as well as permitting aggregation for the purposes of comparison. While categorisation is technically demanding, as Hillebrecht (2009: 377) notes, when carried out in a suitably disaggregated way, it will help supranational bodies tasked with follow-up to 'redistribute their human and financial capacity to the areas most in need of attention'. Yet, categorisation must not be reduced to a tokenistic operation, conferring a spurious precision on matters which are, in fact, uncertain or contested. Supranational bodies must also guard against creating perverse incentives for states either to 'earn' the status of partial compliance through deliberate minimalism, or to disengage altogether, lest laggardly behaviour or outright non-cooperation appear to be 'rewarded'. Finally, categorisation, where it is undertaken, should be substantiated through a qualitative assessment of the state's response, informed by the views of victims and other interlocutors as well as state submissions—input that should, wherever possible, be made public. Such are the demands of transparency and responsiveness which are discussed in the next section.

5. Being transparent and responsive

Implementation is hampered when information is outdated or not made public, precluding meaningful participation from all interested actors. Some supranational institutions have become more transparent and responsive in respect of information-sharing; however, few work in 'real time', in the sense that information submitted to

the supranational body is published rapidly enough, and in a suitably accessible form, so as to enable CSOs to challenge the state's version of events and adjust their advocacy for implementation in the light of the supranational body's assessment.

The CM comes closest to meeting these expectations. One of the DEJ's primary objectives is to 'ensure transparency and visibility of the results of the supervision process'.[16] It does so through various means. Chief among these is the HUDOC-EXEC searchable database, launched in 2017, which provides a repository of relevant CM decisions, government action plans and reports, and submissions from injured parties, CSOs and NHRIs. In addition, the CM has since 2007 published annual reports, which contain extensive statistical information that is helpful in discerning trends in implementation. Country factsheets, meanwhile, provide additional statistical and other information on new, pending and closed cases.

Aside from the CM, no supranational body operates such a database or routinely publishes in full all submissions received. As noted in section 4, the IACommHR has recently improved the presentation of disaggregated information about implementation in its annual report. Yet, reports published annually or intermittently do not facilitate timely participation by all interested parties. Litigants and CSOs urged African institutions, in particular, to be more proactive in alerting complainants, and CSOs that have taken the initiative to submit information when a state submission has been received (D1, 20 April 2017). One step towards finding a technical solution to this problem has been taken by the DEJ in Europe, which now

[16] See DEJ website at https://www.coe.int/en/web/execution/presentation-of-the-department (accessed 2 January 2020).

operates an RSS feed,[17] allowing interested parties to subscribe to updates regarding the publication of new documents (albeit country, and not case specific). Among the UN TBs, the Committee on Economic, Social and Cultural Rights (CESCR) alone elicits responses to states' submissions on the implementation of general recommendations (CESCR 2017: 2). Those submissions are in turn transmitted to the state for its response and taken into account in the CESCR's assessment. In the interests of 'visibility and transparency', the Committee may upload submissions from the state, victims (suitably anonymised) or other entities, or summaries thereof, on its website.

A further requirement is for supranational bodies to make visible how influential, if at all, submissions by victims or CSOs have been. One CSO litigant argued with respect to the ACHPR, 'There's no point in [the Commission] getting ... information and then just using it for confidential talks with the state … [T]hey need to share the information with both sides and then ... make their own analysis—and make that analysis public' (D3, 20 April 2017). Indeed, as Murray (2019: 2) ventures, the Commission appears to operate under a 'shroud of secrecy' since the policy of confidentiality applied to its communication procedure is applied, by default, to the post-decision phase.

Victims and CSOs will hardly be incentivised to invest resources engaging with the follow-up process if their submissions appear to be disregarded. Nor can civil society actors exercise leverage in their domestic advocacy if their evidence is not given credence by supranational bodies. The determinative weight given by the CM to CSO submissions in *Identoba* (section 3.1) is exemplary and illustrates the potential for

[17] See DEJ website at https://www.coe.int/en/web/execution/rss-feeds (accessed 2 January 2020).

non-state actors to influence follow-up if supranational bodies adopt transparent and responsive working methods.

6. Conclusion

Implementation is a dynamic and iterative process: the desired end point might not become evident for months or even years, and may only emerge through the—possibly repeated—participation of multiple actors in the design of reparations that are both congruent with the decision and politically realisable. It falls to supranational bodies to solicit, analyse and publicise information from these diverse sources and thereby reach an authoritative assessment of implementation at any point in time. This, in turn, relies upon states engaging in good faith, victims having a voice, and CSOs and NHRIs seizing the opportunity to influence the follow-up process.

We have identified strengths and weaknesses in every supranational body: none has found all the answers yet—in part, because none is adequately resourced to perform all the functions identified above. Within these constraints, we indicate the direction they might take, while recognising that their differing institutional frameworks preclude any 'blueprint' for reform.

The respective bodies' mandates do not preclude the kind of transparent and responsive approach we recommend. Within these remits, it is open to the bodies—subject to resources—to be proactive in eliciting the views of victims, especially where *only* the victims can reasonably assess the quality of implementation. Likewise, there is potential for each supranational body to become more dynamic in its interactions with CSOs and NHRIs; for example, by inviting them to make

submissions both at the start of the follow-up process and in response to state submissions; creating alert mechanisms to keep them updated; and making public its agenda so that CSOs and NHRIs know *when* a submission is likely to exert impact. Supranational bodies can incentivise such engagement by issuing guidance as to what makes a strong submission and by giving visible evidential weight to such interventions. The bodies should also set clear expectations for states as to the timing and scope of their own submissions (such as the 'action plan' system in Europe) and the imperative for the state to respond to non-state submissions. Where appropriate, the bodies should also urge the state to ensure the participation of the victims, beneficiary groups, CSOs and NHRIs in the fashioning of remedies at the domestic level; for instance, in the design and delivery of anti-discrimination training. The bodies should also establish the necessary infrastructure to integrate all sources of information at their disposal, including that generated by other parts of their own mandates or by other international institutions.

We submitted at section 4 that categorisation of the status of implementation is a useful tool to aid transparency, provided that it includes a suitably disaggregated assessment of discrete reparation orders. This assessment should ideally include the supranational bodies' synthesis and evaluation of all material submitted and, at a minimum, publication in full of the various submissions—a relatively 'quick win' for the bodies that do not already do this. Certainly, categorisation should not create perverse incentives for states not to cooperate, as the CCPR presently does.

These functions may not presently be feasible for all supranational bodies, in the absence of secretariats with dedicated staff that are equipped to perform them. The starting point, then, is for these bodies to give strategic priority to their follow-up

function—and not to relegate it to being 'almost [like] a hobby', as one staff member of the OHCHR lamented (UN03, Geneva, 5 October 2017). States, too, have broader responsibilities to ensure that human rights bodies are supported to perform all aspects of their mandate, as well as cooperating in good faith by making timely and accurate submissions on implementation.

We have identified multiple opportunities for litigators, CSOs and NHRIs to influence follow-up. Where cases have a strategic dimension, litigators' route to influence starts by phrasing their pleadings so as to indicate at an early stage the root of the alleged violations and the reparation measures deemed necessary (see Murray and Sandoval, this issue; Donald and Speck 2019: 115). For their part, CSOs and NHRIs can fill information gaps in states' accounts, guide supranational bodies as to where to focus their scrutiny, and propose reparation measures which may determine the very scope of the follow-up process. Within the UN system, CSOs or NHRIs may keep follow-up of certain decisions alive by making use of state reporting procedures. Further the importance of CSO and NHRI engagement in follow-up—exemplified in the supervision of *Identoba*—creates an onus on funding agencies to support this aspect of CSOs' work alongside their litigation.

Our discussion reveals the potential for a virtuous cycle to be established, with supranational bodies incentivising and being responsive to submissions from multiple sources, which in turn strengthens follow-up of their decisions and, ultimately, ensures justice for victims and non-repetition of violations. This is how the 'shared responsibility' for implementation becomes a reality.

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