

## **Seminar on the Implementation of the decisions of the African Commission on Human and Peoples' Rights**

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*'Implementation of decisions - The experience of the IACHR, EHRC, ACRWC and the AfCHPR'*

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I am going to focus on outlining some findings from a three year research project we have been undertaking in collaboration with Prof Frans Viljoen and two other universities where we have attempted to track what has happened to remedies ordered and recommended in decisions adopted by the regional and UN TBs. We have looked at 9 States across Europe (Belgium, Czech Republic, Georgia), the Americas (Canada, Colombia, Guatemala) and Africa (Burkina Faso, Cameroon and Zambia). We undertook interviews with a range of stakeholders in each of these States including government representatives, victims, litigants, parliamentarians, the judiciary, NHRIs and civil society, as well as with members of the treaty bodies themselves; and arranged workshops in the countries and engaged in other activities at the national, regional and international levels. For each country we took a number of cases, in the case of Africa, from the African Commission, African Court and UN Human Rights Committee and looked at what was recommended in each and then tried to find out if these had actually been complied with. For example, had victims been paid compensation, had legislation be amended and so on.

A couple of issues around our methodology:

- We produced case templates which list each recommendation and the evidence we found for whether it had been implemented or not.
- We have tried to verify the information we obtained on the measures taken to implement each of the recommendations but it has not been possible on every occasion.
- We attempted to get hold of victims, relevant state officials to check the accuracy of our information but in some instances this was not possible.

We are still working through our findings, but a couple of headlines:

- There is more implementation than at first appears but for various reasons, as I will detail, it is not always visible.
- Bar one case in the region, the State has made some progress on implementing some aspects of the decision. This is not to say it is satisfactory, but that there has been some movement at least.

We have found many things but I want to focus my presentation on one issue today which is what happens at the national level once the government receives notice of the decision or judgment from these regional and UN treaty bodies.

### **I. Existence of national mechanisms and other procedures**

States have been encouraged by the UN to set up national reporting and monitoring committees which should include the mandate to monitor the implementation of treaty body recommendations, etc. Some States in our study had done this, including, for example, the Inter-Ministerial Committee in Cameroon and ad hoc committees in Burkina Faso to respond to judgments of the African Court. In addition to these very specific bodies, States also have other mechanisms to monitor or implement decisions whether these be or a particular ministry responsible for coordinating responses to decisions, or, for example, as in Zambia, a mechanism to monitor implementation of UPR recommendations.

Even where these committees do exist to coordinate the implementation of decisions, there are challenges with them. Their reports and discussions might not be open so few were aware of what they had found; their existence, let alone how to access them, was not always known even among other government departments and officials; and they may not be permanent but only initiated when a particular decision or issue arises.

While a single national mechanism to implement these decisions may be the most efficient and reliable means of ensuring implementation in some circumstances, mere establishment is insufficient. It needs to operate transparently, it needs to be composed of a broad range of stakeholders and engage directly with the victim, and have a broad mandate to monitor implementation of TB decisions, regional, sub-regional and UPR rather than just a single body for say African Commission, or African Court or ACERWC decisions given there are relatively few of these for the vast majority of States.

Furthermore, we also found that in order to implement these decisions and judgments from regional and international treaty bodies, other procedures would need to be followed in addition to any mechanism, if such existed.

Our project has therefore identified a number of key criteria for mechanisms and procedures which play a role in ensuring the effective implementation of these decisions.

## **II. Key criteria in effective implementation**

### **1. Status of the decision in domestic law**

Much has been said about the binding or otherwise nature of the African Commission's decisions. It is worth reiterating in our study we did not hear from any government that they were unwilling to implement a decision because it came from a non-judicial body as the main or sole reason behind their approach.

However, what is perhaps more relevant when one considers the legal status of these decisions in domestic law. Many States have 'foreign judgment acts' or equivalent legislation which determines how judgments from other domestic courts outside the jurisdiction would be enforced in the State. But this legislation did not apply to decisions emanating from regional or UN treaty bodies. The consequence of this is that without such recognition then the regional or international decision or judgment will not trigger a response from the authorities and processes at the national level in the same way that a domestic court order or ruling will.

As to whether these 'foreign judgments acts' could be extended to apply to decisions or judgements of the regional or UN bodies, is an interesting question and in theory could be a relatively straightforward way of clarifying their national status. However, we were cautioned that this would not necessarily be automatic and the same criteria that are applied, for example, to judgments from other domestic courts, such as the independence of the judicial body and the level of judicial reasoning in the case, would have to apply here. If this were the case, one can see some challenges with the membership and detail in some of the UN and regional bodies decisions, particularly the quasi-judicial organs.

### **2. Consultation with the victim and other stakeholders**

One may expect that the government authorities would need to engage with the victim or at least the complainants in order to ensure implementation of the decision. However, our research found, across a number of countries and regions, that the authorities did not always do this and it was not

clear whose responsibility it was, if anyone's, to inform the victim or complainant and initiate contact with them. Indeed, in one of our countries they did not consider it necessary to engage with the victim on every occasion.

However, apart from the principle that implementation should involve the victim, it becomes especially relevant in relation to structural reparation measures, given their societal impact.

Other key stakeholders which, as other research has shown, have a potentially important role to play in monitoring implementation include parliament. Some decisions require legislative amendment. This inevitably involves engagement with parliament and often, we found this is simply initiated by the relevant ministry in the normal way that any legislation will be proposed and drafted and subject of course to the usual political dynamics in getting legislation through. Even where legislation is not specifically required by the decision or judgment, then parliament arguably still has a role to monitor the measures the State has taken to implement it. However, we found in our study that in some of our countries, Parliament was not systematically informed about decisions and parliamentarians we spoke with did not know.

A particularly interesting discussion also needs to be had over the role of the judiciary in facilitating implementation of these decisions. If the decision, for example, calls for the State to investigate a violation, or re-open a domestic court case, we found some challenges with their ability to respond to this. We heard from some government officials that implementing these recommendations would require them to interfere in the independence of the judiciary, a point which has, in some but not all cases, some merit. With another of our cases in Africa we were also informed that an investigation had been initiated by the speech of a senior government official. This is hardly ideal if one is to ensure that a consistent approach is taken in all of these cases. There are some examples of good practice, for example with a Unit of Special Cases set up in Guatemala which has facilitated investigation of cases in response to violations found by the Inter-American Court. In some European States there is 'application for protection of legality' which enables cases to be re-opened.

### **3. Financial issues**

A particularly interesting aspect is the financial elements of implementation.

At the outset, it is worth noting that many, if not most, decisions will have financial implications even if they do not involve compensation for the victims. In this regard, therefore, one might consider it necessary to involve the Ministry of Finance or Treasury in any implementation processes.

We identified various challenges with ensuring implementation of decisions involving compensation to victims.

Firstly, where the amount was set by the international treaty body, this could cause problems if it was not considered by the government to be in line with national level quantum. We heard questions raised by State authorities that suggested they did not have confidence in the findings as there was no reasoning in the decision, certainly when one looks at that of the African Commission, as to how it reached that amount and the criteria upon which it based its figure.

Secondly, if the African Commission or treaty body left it to the State to determine the amount to grant the victims, then the State will need to initiate a process of negotiation with the victim. It is often not clear, certainly to the victim, how this process is to begin and who should initiate it.

Thirdly, in either event, a ruling by an international or regional treaty body, as noted, does not trigger, in the same way as a domestic court decision, the process to ensure that the individual victims are actually paid. Indeed, we were told by victims that they were not at all clear on what the procedure was that they had to follow to obtain their monies. Added to this, as I have already said, the fact that the State may leave it to the complainant to initiate, we are left with a situation which, as one victim described to us:

‘So I was left alone fighting for the implementation of the decision’.

The situation may be facilitated by domestic lawyers who know the procedures needed to be followed in order to obtain compensation and in fact the involvement of such lawyers appears to be crucial in some States where they have policies not pay individuals direct but to pay the amounts into the bank accounts of the advocates or Bar council.

Finally, as to when the State may pay compensation to victims can depend on what is available in its annual budget, a point which some authorities told us was unpredictable given that it takes years for cases to process through regional and international mechanisms. Victims, we were told, may have to wait till the following year before they receive what is due to them.

#### **4. Ministerial engagement and ownership at the highest level**

A central factor necessary for the implementation of decisions was ministerial engagement and ownership of the decision and response to it at the highest level. However, the question arose as to which ministry should lead on the implementation. Here the main challenge is that while it is the Ministry of Foreign Affairs, through the diplomatic mission, which first receives notice of the decision or judgment, many did not consider this ministry to play the central role in its subsequent implementation.

Consequently, for some of our cases even the Ministry of Foreign Affairs did not seem to know whether a process had been initiated to implement a regional body decision.

In any event, what was clear was the need for high level engagement and ownership of the decision and its implementation. This is particularly relevant if a national mechanism to coordinate implementation exists.

#### **5. Coordination**

Whether a specific mechanism exists to monitor implementation of the decision or judgment and it has the mandate to coordinate any government response, or not, it is crucial that some part of government has the responsibility to coordinate implementation activity. This we found was an important factor from all three regional systems.

What we have seen, is that even if a committee exists to track implementation, a number of other processes have to be initiated in order to ensure implementation, particularly where the package of remedies is wide.

Inevitably, the greater the number of stakeholders and those with a vested interest from the authorities’ perspective as well as victims, the greater the need for coordination.

## **6. Visibility and transparency**

The visibility of the decision, mechanisms and implementation measures themselves appear to often be little known, even among those who you presume would be aware of them.

### *a. Visibility of the decision*

Our first finding was that the decision or judgment itself may not be known, even within government, let alone among other stakeholders and the public in general. One of the reasons for this could be because the main interlocutor for the receipt of the decision is the Ministry of Foreign Affairs, when in fact there is a general agreement that the ministries central to the actual implementation of the decision are others, in particular Justice and Finance.

### *b. Understanding and awareness of the process or mechanisms*

The second issue is that in several of the countries in our study, there was little awareness of the mechanism, if it existed, and relevant procedures that needed to be followed to implement the decision. This lack of awareness was apparent not only among the victims and complainants but also among government departments themselves.

Civil society organisations, even those with knowledge of the regional bodies, were not necessarily aware of what the national level process should be for complainants to enforce decisions.

### *c. Visibility of the measures taken to implement the decision or judgment*

Overall we found more implementation than we expected across a range of countries and regions and TBs. One of the reasons why this may have happened is because sometimes, as one interviewee told us, ‘the State does good things but does not tell us’.

Finally, any measures taken by the authorities, or a failure to do so, can again not be transparent. This information, we were told in some instances, was not known among government, let alone outside. As one civil society organisation informed us:

‘No, with the recent cases I asked the MOJ at a meeting what was being done and they said they didn’t have that information, but if they don’t then who does?’

Indeed, there was some indication, in one country at least, that the lack of awareness of what action the government had taken to respond to the decision may be deliberate, rather than accidental, masking the fact that it had in fact complied with aspects of the decision.

This is not necessarily to preclude some situations where there may need to be ‘quiet diplomacy’. However, the starting point should be transparency. Without this, we heard, there was a tendency to rumours, both positive and negative, and it was not clear what the actual level of implementation was if it was not stated officially by the government authorities.

## **7. Database and tracking of implementation**

Related to the issue of transparency is that one of the challenges in implementation is that there may be no database or information-management system to tracking the receipt or implementation of decisions. In some of the countries we examined there appeared to be no government held database tracking the decisions coming from the international and regional treaty bodies and what measures had been taken to implement them.

Examples exist of good practice in other jurisdictions, such as SIMORE developed in Paraguay as a tool to monitor decisions and their implementation. It has been supported by the UN and a model template is available to others who want to use it.

### **III. Recommendations**

In addition to the points made regarding factors that should be taken into account when establishing or strengthening a single national committee to coordinate implementation, my other recommendations are as follows:

- there is a clear line of responsibility for coordinating, engaging and communicating information about implementation.
- This process or mechanism needs to be clear to victims, lawyers and other stakeholders and the process for obtaining compensation, information on the progress of implementation needs also, as a default, be transparent.
- That it is the responsibility of the State to implement and consequently the responsibility of the State to initiate the process of implementation and for this not to be left to the victim or complainant to progress.
- There is a need for transparency and accountability regarding: the visibility of the decision (and here one can draw upon the examples of the African Court regarding that the State publish the decision in national media, and in the official gazette) and to which I would also add social media. In addition, the State could also be asked to publish the measures it has taken to implement the decision.
- States could be encouraged, in addition to using the State reporting process, to make comments as a matter of course during, for example, their presentations on the agenda item 'human rights situation in Africa' at the sessions in order to update the Commission on the implementation of decisions. This is an efficient way of gathering information, in public, and where many States are present.
- The African Commission could consider working with States and others to develop enabling legislation for the recognition of its decisions at the national level.

Implementation, as many have told us in our research, is a process. Some States have said to us that they would like to have continued engagement with the African Commission around implementation of the decisions. One of the challenges with setting a standard 180 days to implement is that it can be a rather blunt tool. In some instances it is not enough time. If the deadline passes and the State has not reported, ironically the pressure may be off for it to do so. The African Commission, to facilitate greater dialogue with the State, could consider having a range of different deadlines depending on the recommendation (e.g. that the State provide the name of the government ministry or body responsible for coordinating implementation within, for example, a month; and that other recommendations may take 3 or 6 months or perhaps longer, etc.).