



Making Social Rights Real

Implementation Strategies for Courts, Decision Makers and Civil Society

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WORKING PAPER 2

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Implementation Strategies for Courts, Decision Makers and Civil Society

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Table of Contents

| | |
|--|----|
| Introduction | 7 |
| What Determines Whether ESCR Decisions Are Implemented at the Domestic, Regional, and International Levels? | 13 |
| Factors That Influence Implementation in Domestic ESCR Cases | 13 |
| Existing Regional and International Mechanisms..... | 16 |
| Case Studies of Successful Implementation Mechanisms | 26 |
| The European Court of Human Rights: Addressing Clone Cases and Improving Domestic Implementation Mechanisms..... | 26 |
| The Inter-American System: Encouraging State-Petitioner Negotiation | 29 |
| Enforcing the Right to Food in India | 31 |
| Alleviating a Humanitarian Disaster: The Rights of IDPs in Colombia..... | 34 |
| Prison Reform in the United States | 38 |
| Forced Eviction in South Africa: The Olivia Road Case..... | 39 |
| Strategies to Improve the Implementation of ESCR Decisions | 41 |
| Strategies for Domestic Courts | 41 |
| Strategies for Regional and International Courts..... | 51 |
| NGOs | 58 |

National Governmental Human Rights Institutions..... 60

Conclusion..... 61

References..... 62

Introduction

For generations, human rights defenders, judges, policy makers, and scholars have endeavored to obtain recognition of economic, social, and cultural rights (ESCR) and to ensure their justiciability in domestic and international courts, a struggle that has been largely successful. The inclusion of these rights in the United Nations’ Universal Declaration of Human Rights in 1966 was only the beginning of the efforts to see them realized. Domestic courts around the globe, including in Colombia, India, South Africa, and Kenya, now rule on ESCR on a regular basis, and several countries have explicitly included ESCR and their justiciability in their constitutions. International tribunals such as the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights now consider petitions regarding ESCR. In May 2013, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights came into effect, which allowed the Committee on Economic, Social and Cultural Rights, the treaty body charged with monitoring implementation of the Covenant, to hear individual complaints regarding violations of ESCR.

Nonetheless, the struggle to realize ESCR is not yet over. The challenge now faced by courts, governments, human rights defenders, and international organizations is ensuring that favorable ESCR court decisions are actually implemented. Having the right to water, housing, or healthcare recognized on paper means nothing if in practice people do not have access to potable water, adequate housing, or quality, affordable healthcare. Unfortunately, many court decisions regarding ESCR are never implemented. A review of implementation rates at the domestic level is beyond the scope of this text, but anecdotal evidence suggests that non-implementation of ESCR court decisions is a significant problem that not

only limits the effective enjoyment of human rights, but also threatens the legitimacy and strength of the judicial systems handing down decisions that are ignored.

Data on these decisions at the international level is equally troubling. While it is difficult to find specific information about the implementation of ESCR cases before international bodies, looking at reparations ordered in these cases provides a window into this area of the law. Looking at the different types of reparations ordered by courts, we can see which ones are most relevant to ESCR decisions (e.g., training programs, community funds, and law and policy reform).

The International Covenant on Economic, Social and Cultural Rights (ICESCR), part of the UN's human rights protection system, has an individual complaint procedure, effective since 2013. However, the treaty body has yet to issue a decision based on an individual complaint and may consider petitions only from ten States.¹ The Human Rights Committee (HRC), the treaty body responsible for implementing the International Covenant on Civil and Political Rights, has developed an extensive jurisprudence, and therefore it is worth examining the level of implementation of its cases. Generally, when deciding whether a State has complied with an HRC order, the UN Special Rapporteur will designate a State's responses to the HRC's recommendations as "satisfactory" or "non-satisfactory."² As of 2009, the Office of the High Commissioner on Human Rights' (OHCHR) Petitions Section was monitoring the implementation of 546 petitions, of which 67 (12 percent) were deemed "satisfactory."

Implementation rates of ESCR decisions are generally higher within regional human rights systems than within the universal human rights system, but this varies by regional system. Within the European System, the system considered to have the best compliance record, governments

tend to implement court orders for monetary compensation (around 82 percent compliance), but implementation levels for more complex orders (such as conducting retrials or changing laws and procedures, which are more often required in ESCR cases) are much lower, between 31 to 41 percent (Hillebrecht, 2012: 286). The Inter-American Human Rights System has lower implementation rates, especially when it comes to ESCR orders and remedies, like establishing community development funds or providing healthcare to petitioners.³ The African System has by far the lowest implementation levels in all categories of reparation measures.⁴

1 Only ten States—Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia, Spain, and Uruguay—have ratified the Optional Protocol to the ICESCR.

2 A satisfactory State response does not necessarily mean that all the HRC's recommendations have been adequately implemented. Rather, it reflects what the HRC considers to be a willingness of the State to implement the recommendation. Thus, a classification of "satisfactory" may indicate that the State has, in fact, completely implemented the HRC's recommendations, or it may mean that no recommendation has been completely fulfilled (Open Society, 2010: 119).

3 A 2012 analysis by Baluarte demonstrated that pecuniary damages were complied with in 60 percent of cases; symbolic admissions of responsibility were implemented in 64 percent of cases; legislative and administrative changes were complied with in 19 percent of cases; States complied with orders requiring training programs for public officials in 38 percent of cases; orders regarding medical and psychological care were never complied with; orders to ensure the safety and security of victims were never complied with; orders to create scholarships and educational benefits were complied with in 8 percent of cases; orders to return the bodily remains of victims were complied with in less than 10 percent of cases; and orders for development funds and community support projects were complied with in just 11 percent of cases (Baluarte, 2012: 288-305). A 2010 study by González-Salzberg looked at compliance rates with the Court's decisions regarding various reparations orders. González-Salzberg's results were similar to those of other studies: pecuniary compensation and payment of costs and expenses were fully or partially complied with in 92 percent and 86 percent of cases, respectively; publicity of judgment was complied with in 60 percent of cases; public acknowledgement of international liability occurred in 70 percent of cases; orders to amend legislation were complied with in 46 percent of cases; and orders to conduct investigations and punish violators had the lowest compliance rates, at 26 percent. His study noted that all States under study had taken some steps to comply with the Court's orders (González-Salzberg, 2010, 129-29).

4 Viljoen and Louw undertook a thorough review of compliance with Commission decisions in 2007, based on a review of communications between the Commission and States, as well as the Commission's Annual Activity Reports between 1994 and 2003 (Viljoen and Louw, 2007: 4). Of a total of 46 cases for which the Commission had issued a decision on the merits, States had fully complied with 6 cases (14 percent). They found that States had partially complied with recommendations in 14 of the cases (32 percent). The researchers recorded full non-compliance with 13 cases (30 percent) (Viljoen and Louw, 2007). Additionally, in 7 cases (15 percent), all involving Rwanda and Nigeria, the researchers determined that while the States had complied with the Commission's recommendations, this compliance was "situational," or based on a change of government, and thus the changes that led to implementation could not be considered the result of the States' intent to comply with the Commission's recommenda-

While the African Commission does not systematically collect data on the implementation of its reparation measures, non-implementation is a constant concern in its annual reports (African Commission on Human and Peoples' Rights, 2013).

The academic literature on ESCR has yet to fill this void of information and analysis. There is a paucity of systematic studies on the fate of judicial decisions on ESCR. Beyond the courtroom, what happens to the orders contained in these judgments? To what extent do public officials adopt the conduct required by courts to protect a given ESCR? What impact do the rulings have on the State, civil society, social movements, and public opinion? What strategies and mechanisms have been used by courts, advocates, governments, and international organizations to increase compliance with and the impact of such decisions?

A budding area of scholarship seeks to tackle these questions. Some contributions to this literature have offered domestic or comparative quantitative assessments of the effects of ESCR rulings (Gauri and Brinks, 2008). Others have focused on rulings on a specific right—notably the right to health—in order to offer detailed comparisons of effects across jurisdictions (Yamin and Gloppen, 2011). Yet others have offered detailed case studies to extract analytical conclusions on the implementation and efficacy of ESCR rulings (Langford, Rossi & Rodríguez-Garavito, forthcoming; Langford et al., 2013; Rodríguez-Garavito, 2011, 2013; Rodríguez-Garavito and Rodríguez Franco, 2010; Uprimny and García, 2004).

Given this void and the disappointing implementation levels in various countries and across human rights systems, this document seeks to provide an overview of implementation mechanisms and strategies to increase the implementation of ESCR decisions at the international, regional, and domestic levels. We hope that this guide provides useful information about implementation strategies for international human rights bodies, domestic courts, national human rights institutions, and NGOs.

This document is divided into three sections. The first section discusses the various factors that influence the implementation of ESCR decisions at the domestic, regional, and international levels. It also provides an overview of existing implementation mechanisms in international law.

The second section describes case studies of successfully implemented domestic and regional decisions. It includes cases from the European Court of Human Rights, the Inter-American Court of Human Rights, India, Colombia, the United States, and South Africa. The third section outlines recommended implementation strategies based on the successful cases discussed in previous sections. These strategies may be useful for various actors (regional and international courts, domestic courts, civil society, and domestic human rights institutions).

tion (Viljoen and Louw, 2007: 4). Finally, Viljoen and Louw noted that in 4 cases (9 percent) the level of compliance with the Commission's recommendations could not be determined due to a lack of information (Viljoen and Louw, 2007: 5).

What Determines Whether ESCR Decisions Are Implemented at the Domestic, Regional, and International Levels?

Factors That Influence Implementation in Domestic ESCR Cases

Whether State actors implement ESCR court decisions depends on multiple factors, including the available implementation mechanisms of the judicial system where the case is filed. Implementation mechanisms at the domestic level in turn depend on how a given State's legal system is structured and the content of its laws. This includes its constitutional law and procedural law, as well as the constitutional and legislative provisions that regulate the judiciary. Since there is great variation in how legal and judicial systems are set up, to ensure a decision's effective implementation, advocates must research the available procedures in the jurisdiction they are working in and analyze their possible strengths and weaknesses.

When courts, human rights institutions, and civil society advocates determine what strategies are most appropriate in a given ESCR case, it is useful to consider how the following factors (by no means an exhaustive list) may affect their strategies. While these factors generally affect the litigation and enforcement of domestic ESCR decisions, some also affect the implementation of regional and international ESCR decisions.

Legitimacy and strength of the judiciary: The legitimacy and strength of the judiciary is a factor that affects the implementation of both domestic and regional/international cases (Dejusticia et al., 2010: 14). A court's legitimacy and strength depends, among other factors, on the court's independence from other branches of government, its knowledge, and the objectivity of its decisions. An important aspect of judicial strength is not only whether State actors and civil society objectively respect the

judiciary but also whether courts have sufficient power to enforce their decisions. They must be able to retain jurisdiction over a case, monitor its implementation, impose sanctions or fines on State actors that fail to comply, and hold those actors in contempt, if necessary.

Judicial strength and legitimacy partially explain the difference in implementation levels between courts in South Africa and those in Costa Rica. The former have less legitimacy and lower implementation levels than the latter, which have higher legitimacy (Dejusticia et al., 2010: 14). Similarly, at the regional level, States have implemented more decisions issued by the European Court of Human Rights than by the Inter-American Commission on Human Rights, probably due to the differences in legitimacy between the two bodies.

Institutional capacity: The institutional capacity of both the court issuing a decision and the government agencies responsible for implementing it are important factors to consider in ESCR cases. Whether a court has the time, resources, and knowledge to adequately monitor the implementation of its orders is an important factor to consider when determining what type of remedies to request (Dejusticia et al., 2010: 10). Whether a decision will be implemented also depends on whether the responsible State agencies have the resources, capacity, and inter-institutional coordination necessary for its implementation. At the regional level, an obstacle to the implementation of regional court decisions is the lack of adequate coordination mechanisms between those responsible for litigating international cases (who often belong to ministries who deal exclusively with foreign matters), and the domestic institutions whose policies or actions led to violations and are capable of remedying those violations (Open Society, 2010). This becomes even more difficult when the State has a federal system of government divided into national and provincial governments (Open Society, 2010). As we will discuss in more detail below, national human rights institutions and NGOs may help overcome deficits in courts' monitoring capacities by serving as experts on issues that the courts have neither the time nor resources to adequately address.

Costs of implementation: The implementation of every case, no matter the right in question, involves a cost, financial or political, for State agencies in charge of its implementation. Many State actors, courts, and even human rights activists and litigants believe that the financial and political costs of implementing ESCR decisions are much higher than those of decisions on civil or political rights (Dejusticia et al., 2010: 8). While this is

often a misperception based on a skewed "accounting" of the true costs of implementation, it is true that collective or structural cases often require extensive financial resources in addition to the existence of government agencies with the institutional capacity to ensure their implementation. Additionally, implementation costs may include the political price of supporting decisions involving highly stigmatized groups (Dejusticia et al., 2010: 8). These true costs, as well as the misperception of having high implementation costs, are factors that ultimately affect the implementation of ESCR decisions. International advocates agree that the perception of high implementation costs negatively affects the implementation of regional human rights tribunal decisions (Dejusticia et al., 2010: 8).

In many instances, courts have the power to encourage implementation by imposing sanctions or fines on government agencies for non-compliance (Dejusticia et al., 2010: 8-9). When courts have greater legitimacy, or when advocates ensure that public opinion is in favor of implementation, the political costs associated with non-implementation rise. Thus, courts and advocates must consider the cost of implementation when deciding what type of remedies to mandate or request, and they should also consider how to ensure that, on balance, political costs favor implementation.

Size of litigant group: Several scholars have developed hypotheses relating the size of the litigant group to the level of implementation. They have observed that individual cases often have high levels of implementation, while medium-sized cases with a relatively small, identifiable group of litigants requesting a change in public policy have somewhat lower levels of compliance (Dejusticia et al., 2010: 9). Collective or structural cases, which involve the greatest number of people and significant resources and actors, have the lowest level of implementation (Dejusticia et al., 2010: 9). International rights advocates, in particular those who work in the Inter-American Human Rights System, tend to agree with these findings (Dejusticia et al., 2010: 9). While this generalization may be useful when considering which implementation strategies might work in a particular case, it is not always applicable. Indeed, several of the successful case studies discussed below involve large structural or collective cases.

Social movements surrounding litigation: Social change theory posits that people, through organized groups, can be at the center of social transformation. In this theory, social movement organizations, especially organizations composed of or representing the people whose rights are being

affected in the case, should participate in all strategies of litigation and implementation. Their participation can help maintain public pressure on State actors responsible for implementing decisions, and help ensure that there is sufficient political will for the implementation phase.

However, while it is important for affected people to organize and for the case to enjoy broad social support, not every ESCR case must be tied to or supported by marches and protests in order to succeed. Indeed, ESCR advocates have noted that some authoritarian contexts do allow this type of mobilization. For example, in Egypt, human rights activists have adopted other strategies to attract attention for ESCR litigation, including media campaigns (Dejusticia et al., 2010: 6-7).

Determining an appropriate level of social participation is a highly contextualized process, in which one should consider whether the right in question is local in nature or capable of attracting national support (access to water in a community vs. the right to education), the type of government (democratic vs. authoritarian), and those whose rights are in question (sympathetic rights holders vs. highly stigmatized groups), among others (Dejusticia et al., 2010: 6-7). All these factors should be considered when determining whether, to what extent, and how to encourage the participation of social movement organizations in ESCR litigation and implementation.

Existing Regional and International Mechanisms

While this document focuses on strategies for the implementation of ESCR decisions, in all cases, successful implementation strategies should be based on a thorough understanding of the relevant judicial system's capacity, strengths, and weaknesses. Advocates should understand the "rules of the game" as defined by the relevant legal system. In the case of domestic decisions, as mentioned above, these rules are defined by each State's constitutional and legislative norms governing the powers and procedures of the judiciary. At the regional and international levels, these rules are mainly derived from the treaties that create judicial and quasi-judicial human rights bodies, together with the procedural rules that regulate their internal functioning. As we shall see, human rights bodies have developed many implementation and monitoring mechanisms on their own through creative interpretations of their implied powers. This has been an important development in all the systems considered below: the United Nations, or universal, human rights system; the European Court of Human

Rights; the Inter-American Human Rights System; and the African Commission on Human and Peoples' Rights.

Universal System

(United Nations Human Rights Committee)

The international, or universal, human rights system consists of the various human rights treaties developed under the auspices of the United Nations. It also includes the treaty bodies, which are composed of independent experts responsible for monitoring and facilitating the domestic implementation of the obligations contained in the human rights treaties. The principal mechanisms through which these treaty bodies monitor human rights violations are through the periodic review reports submitted by States and through individual complaint mechanisms, also known as communication procedures.¹

Under the individual complaint mechanism, an individual who considers his or her rights to have been violated may file a complaint (known as a communication) with the relevant treaty body. The treaty body then assumes a quasi-judicial function, determining whether the individual's rights have been violated, and recommending steps for the State to take in order to remedy the violation. The Human Rights Committee (HRC) is the oldest treaty body with an individual complaint or communications procedure. Since 1977, it has been monitoring States' compliance with the International Covenant on Civil and Political Rights, and thus will be the focus of the discussion here.²

In 1990, the HRC began monitoring levels of compliance with its "views" (the name given to its findings and recommendations) through

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- 1 The individual communications procedure is optional, and not all treaty bodies have such a mechanism. For those that do, States must accede to the jurisdiction of the treaty body to examine such communications independently of its ratification of the treaty itself. Currently, six treaty bodies have individual communications mechanisms: the HRC; the Committee on Economic, Social and Cultural Rights (CESCR); the Committee against Torture (CAT); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination against Women (CEDAW); and the Committee on the Rights of Persons with Disabilities (CRPD).
 - 2 The ICESCR has an individual communications procedure, which entered into force in 2013. However, the body charged with monitoring the treaty has not yet issued any decisions regarding individual communications, making it impossible to determine how the body plans to ensure the implementation of its decisions.

the creation of a Special Rapporteur for Follow-Up on Views, a position that was formally recognized in 1997.³ This follow-up mechanism involves the participation of the HRC, the Petitions Section, and the Special Rapporteur. The procedure begins with the HRC's views, which requests information from the State on what measures have been taken to implement its view and which also includes recommendations. The State usually has six months to submit a reply. After the State responds or provides sufficient information, the Special Rapporteur for Follow-Up on Views presents a report to the HRC, which in turn recommends further action by the State (Open Society, 2010: 124).

If a State fails to respond to the HRC's request for information, or provides an unsatisfactory response, the Petitions Section will send the State a reminder (Open Society, 2010). If the State does not adequately respond to that reminder, the Petitions Section may refer the case to the Special Rapporteur (Open Society, 2010). Perhaps the most common compliance strategy used by the Special Rapporteur is to meet with the State's representatives in Geneva or New York for follow-up consultations during one of the HRC's three annual meetings (Open Society, 2010). During these consultations, the Special Rapporteur will ask the State what implementation measures have been put in place to give effect to the HRC's views, and ask what obstacles the State is facing in its implementation efforts (Open Society, 2010).

The European Court of Human Rights

The European regional human rights protection system consists of the European Court of Human Rights and the Committee of Ministers (COM). The Court was established in 1959 by the Council of Europe (COE) through article 19 of the European Convention on Human Rights, which protects civil and political rights throughout the region. The Court has jurisdiction over the 47 States that make up the COE. In addition to advisory and inter-State petitions, the Court may hear individual petitions alleging the violation of the applicant's rights contained in the European Convention.

The Court has 47 judges, divided into five sections. Each section forms a chamber, made of seven judges. The Grand Chamber, composed of 17 judges, acts both as an appeals body and a court of first instance for

cases that involve novel or serious issues, or which could entail a departure from established jurisprudence. In addition to the judges, 250 registry lawyers assist the Court (Caflisch, 2006: 10).

The Committee of Ministers is made up of the foreign ministers or the permanent diplomatic representatives of COE member States. The COM is the decision-making body of the COE and is responsible for supervising the execution of the Court's judgments on human rights. The COM carries out this function through a "participatory model of accountability," which combines information politics, technical expertise regarding implementation, and naming and shaming (Hillebrecht, 2012: 281).

The European Court generally does not order prescriptive measures. It does not advocate for policy change, overturn domestic case law, or even determine appropriate measures to provide recourse to the applicant. Because of its strong position in favor of the principle of subsidiarity, the Court does not believe that it has jurisdiction to make such recommendations to the State. This explains why the Court often merely identifies violations without proposing a specific solution (Hillebrecht, 2012: 281).

Once the Court accepts a case and finds a violation of the Convention, States must "reason backwards from the violation" to determine what the appropriate remedy is and what actions are necessary to avoid similar future violations (Hawkins and Jacoby, 2011: 52). Throughout the years, the Court's rulings have emphasized three main State obligations: (1) measures of just satisfaction, (2) individual measures, and (3) general measures to prevent similar violations (Hillebrecht, 2012: 281).

In recent years, the Court's traditional hesitation to order specific measures in its judgments has been slowly disappearing due to judicial necessity. In addition to the avalanche of petitions that the Court receives annually, the COM maintains jurisdiction over cases until the State has adopted adequate measures of reparation and non-repetition. This has led to an unsustainable workload for the Court and the COM, a problem that is aggravated by cases involving similar violations in the same State (clone cases), which imply that the State has not adequately implemented reparation measures, specifically measures of non-repetition, which leads to identical violations.

Those who study the European Court have noted its relatively strong enforcement powers compared to other regional human rights systems. The European Court effectively uses peer pressure and "naming and shaming" carried out by the COM, as well as COE oversight of the Court's

³ In recent years, CAT, CERD, and CEDAW have instituted follow-up procedures similar to those of the HRC (CEDAW, CERD, CAT, Rules of Procedure).

judgments through Parliamentary Assembly rapporteur reports that examine State implementation of judgments and other political means (Hillebrecht, 2012: 283).

Once the Court issues a judgment, responsibility for its implementation transfers over to the COM. As described above, the COM is an intergovernmental body made up of representatives of each of the member States to the COE, generally the ministers of foreign affairs or their delegates. The COM is supported in its work by a permanent Secretariat, which in turn has a directorate of human rights and legal affairs, in which the lawyers and specialists of the department of execution of judgment work with States and advise the COM regarding implementation (Cali and Bruch, 2011: 6, 12).

After receiving the final decision, the COM immediately includes the case on its agenda. The COM then invites the State to report on the measures that it has adopted to address the violations. To comply with this invitation, the State works with the Secretariat of the Execution of Human Rights Judgments to develop an action plan. The State must present this action plan to the COM within six months of the final judgment (Cali and Bruch, 2011: 13). The Committee may, “where appropriate, adopt decisions or interim resolutions to express concern, encourage and or make suggestions with respect to execution” (COE, COM, first annual report 2007, cited in Hawkins and Jacoby, 2011: 52).

After the State presents its action plan, it must periodically present action reports to the COM, in order to inform the COM of the progress it has made in implementing the Court’s judgment. The COM may also consider submissions from NGOs regarding the execution of judgments (Rules of COM for the Supervision of the Execution of Judgment and of the Terms of Friendly Settlements, Rule 9). During its quarterly human rights meetings, the COM may issue interim resolutions regarding individual cases, which provide measures that States should take and a timeline for further action (Cali and Bruch, 2011: 15). When the COM is convinced that the State has adopted adequate measures of reparation and non-repetition, it will issue a final resolution to close the case (Hawkins and Jacoby, 2011: 52-53). In general, States are expected to take two to five years to complete the process.

After spending several years considering how to improve its efficiency and increase compliance with Court decisions, in 2004 the COM reformed the system through the passage of Protocol 14. Among the many

changes, the new protocol allows the COM to pursue infringement proceedings against States that fail to implement Court judgments (Caflich, 2006: 10). Under such a proceeding, a two-thirds majority of the COM may request the Court to determine whether the State has complied with implementation (Caflich, 2006: 10). If it has not, the Court may issue an interim resolution stating that the State has failed to fulfill its obligations and refer the case back to the COM to take additional measures (Caflich, 2006: 10). Unfortunately, the COM still lacks power to force compliance and depends on the will of the State to implement the necessary measures (Hillebrecht, 2012: 283). The ultimate sanction for non-compliance would be the State’s expulsion from the Council of Europe, but this sanction has never been used (Cali and Bruch, 2011: 15).

The Inter-American System

The Inter-American Human Rights System, which is the regional human rights system of the Americas, is composed of the Inter-American Court of Human Rights and the Inter-American the Inter-American Commission on Human Rights. Both are part of the Organization of American States (OAS), a political and economic organization covering the entire American continent. In addition to a general and thematic monitoring of the human rights situation in the 35 member States of the OAS, the Commission is authorized to hear individual claims regarding violations of the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights (ACHR), and other regional human rights treaties from all member States of the OAS, while the Court is authorized to hear such claims from the 21 States⁴ that have accepted the Court’s contentious jurisdiction.

The Inter-American Commission on Human Rights

The Commission has the authority to review individual complaints against all 35 member States of the OAS. The individual case procedure established by the ACHR and the Commission’s Rules of Procedure has two stages: an admissibility stage and a merits stage. At any point while

⁴ States that have recognized the Court’s contentious jurisdiction include Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. See <http://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm>.

the complaint is before the Commission, it may assist the parties in reaching a friendly settlement, should they request such an agreement. Should discussions to reach a friendly settlement fail, the Commission will continue to process the case. If the Commission finds violations during the merits stage, it will prepare a preliminary report explaining the violations and enumerating recommendations that the State should implement to rectify or compensate for the violations. The State is given three months to comply with the Commission's recommendations. Should the State fail to comply, the Commission has two options: (1) issue a final, public decision or (2) submit the case to the Court, provided that the State involved has accepted the Court's jurisdiction (Baluarte, 2012: 270). Given that the Commission's recommendations are non-binding, the ability of the Commission to refer cases to the Court is perhaps its strongest tool to encourage the implementation of its decisions.

Beyond its ability to refer cases to the Court, the Commission's power to monitor compliance with its recommendations is not expressly stated in the Convention. The Commission carries out this function based a theory of implied power, as a necessary condition for the Commission to adequately fulfill its duties. The Commission acted under this implied monitoring power when it adopted the 2001 reform of its Rules of Procedure. The most relevant reform to its implementation monitoring is in article 46 of those Rules, which states that "once the Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations." Nonetheless, there is no obligation for States to comply with these follow-up measures, and the Commission has rarely made use of this provision.

The Commission first included data about the implementation of its recommendations in its 2001 Annual Report (IACHR 2001 Annual Report, Chapter III). The Commission collects data regarding State compliance by requesting it in a letter sent to the parties (Open Society, 2010: 79). Publicly identifying and attempting to shame States that have failed to comply with the Commission's recommendations is one of the most basic tools that the Commission uses to induce compliance with its recommendations, but it is not terribly effective.

The Inter-American Court of Human Rights

The ACHR and the OAS Charter are vague regarding how the Court's judgments should be enforced. The only monitoring mechanism that the ACHR and the Court's Statute include is the Court's submission of annual reports to the General Assembly of the OAS. Despite the lack of clearly established mechanisms and procedures for the implementation of the Court's decisions, the Court has used its authority under various articles of the ACHR, its Statute, and its Rules of Procedure to develop its own dynamic approach to compliance monitoring (Shaver, 2010: 664). Monitoring compliance with its judgments has become one of the most demanding activities of the Court, as the number of active cases increases significantly each year, and the Court periodically monitors the details of each measure ordered (Antônio Cançado Trindade, in Ventura, 2006: para. 23). As of 2012, the Court was supervising the implementation of its orders in 138 cases (Inter-American Court, 2013: 17).

When the Inter-American Court issued its first reparations orders in 1989, it outlined a framework for monitoring compliance, stating that the Court would supervise the orders and close the file only when the State had complied with its orders. The Court issued its first compliance orders in 2001 in two cases against Peru, *Barrio Altos v. Peru* (para. 50) and *Durand and Uguarte v. Peru* (para. 45). The procedures soon became standard practice for all the Court's decisions. By 2002, the Court was including compliance orders for each aspect of its reparations orders. These orders help clarify the Court's expectations, as well as provide a basis for the Court's annual reports to the General Assembly (Baluarte, 2012: 277).

In 2005, the Court modified its compliance monitoring procedures. Currently, the Court asks the State to report the steps it has taken to implement a decision only after the deadline given in the decision has passed (Krsticevic, 2007). Once the Court receives this information, it forwards the report to the Commission and the victims or their representatives so that they may comment (Krsticevic, 2007). After considering the information from all three parties (the State, the Commission, and the victims or their representatives), the Court determines the State's level of implementation (Krsticevic, 2007: 33). If the Court determines that the State has fully implemented its decision, it will close the case (Krsticevic, 2007: 33). If not, the Court will list the case as non-compliant, and will include that status in its annual report to the OAS (Krsticevic, 2007: 33).

Once a case is listed as non-compliant in the Court's annual report, the Court no longer requests information from the State on an annual basis but rather assumes that unless the State provides information to the contrary, there has been no change in the status of non-compliance regarding the case (Krsticevic, 2007: 32). Nonetheless, the Court still retains the power to request information from the State or hold hearings regarding compliance, as the Court deems necessary (Krsticevic, 2007: 32). If the Court determines that a State has made no progress or considers that the State is refusing to comply with its decision, the Court may report the case to the OAS and request that said body take action regarding the State's non-compliance, although this mechanism is rarely used (Krsticevic, 2007: 32).

Weak oversight by the Organization of American States

As mentioned above, the Inter-American Human Rights System is part of the OAS, the main political, juridical, and social governmental forum in the hemisphere. The General Assembly is the supreme organ of the OAS, and it is comprised of all member State delegations. Both the Commission and the Court report annually to the General Assembly.

The OAS General Assembly plays two important roles in the implementation of Court decisions and Commission recommendations. The first is to include in the Assembly's activities cases of State non-compliance, and the second is its power to issue recommendations and sanction non-compliant States (ACHR, art. 65). The Court drafts its own annual report for the General Assembly's approval, which is then sent to the president of the Permanent Council of the OAS, as well as the Secretary General, in order to be forwarded to the General Assembly, in accordance with article 91(f) of the OAS Charter (Shaver, 2010: 664).

The African Commission on Human and Peoples' Rights

The Organization of African Unity, a regional organization to promote unity, solidarity, and stability in Africa, was formed in 1963 when the Charter of the Organization of African Unity was signed by 32 States. The Organization transitioned to the African Union in 2001 and currently has 51 member States. The focus of this new regional organization is on social and economic development, as well as political unity. While the overarching purpose of these organizations has never been human rights protection and promotion, within the Organization of African Unity, member

States adopted the African Charter on Human and Peoples' Rights in 1981.

The main human rights bodies that form the African system are the African Commission and Court on Human and Peoples' Rights.⁵ Articles 30 to 45 of the African Charter establish the creation of a Commission composed of 11 members, and charge this body with the responsibility to promote, protect, and interpret the rights enumerated in the Charter. The Commission is the first continent-wide human rights body with the authority to hear individual complaints regarding violations of the African Charter. In addition to declaring violations, the Commission may also issue non-binding recommendations regarding how the State may repair a violation and compensate the victim, as well as avoid future violations.

The Charter does not contain a follow-up mechanism to ensure implementation of the Commission's recommendations. The only provisions relevant to implementation in the Charter are found in article 58, which establishes that if the Commission learns of situations of massive violations of human rights, it must send the case to the African Union Assembly of Heads of State and Government (Viljoen and Louw, 2007: 21).

Despite the lack of a formalized procedure, the Commission has undertaken certain efforts to promote the implementation of its recommendations. The Commission will send letters to State parties calling for implementation, make use of promotional visits to follow up on States' lack of implementation, make use of the State's periodic reports to the Commission to request information regarding measures the State has taken to give effect to the Commission's recommendations, and take advantage of the Commission's examination of State reports to question State representatives regarding implementation measures taken with respect to specific cases (Viljoen and Louw, 2007: 17). While these initiatives are

⁵ The African Court on Human and Peoples' Rights was established in 1998 via the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, but did not enter into force until 2004. The Court has 11 judges, and in addition to the authority to hear cases upon the request of State parties to the Protocol, it receives cases regarding individual rights violations upon referral of the Commission. Article 29 of the Protocol establishes that the Council of Ministers of the African Union is responsible for overseeing the execution of Court judgments, and the Court may identify cases of non-compliance to the Assembly of Heads of State and Government in its yearly report of activities. To date, the Court has yet to rule on the merits of a case.

laudable, they have been carried out on an ad hoc basis, and their use remains the exception (Viljoen and Louw, 2007: 17).

In 2010, the Commission reformed its Rules of Procedure to provide a legal basis for the Commission's follow-up efforts on individual cases. Rule 115 provides that within six months of a decision, the State must inform the Commission of measures taken to implement the decision. The Commission may request additional information or send reminders should the State fail to respond. Additionally, a commissioner is assigned to each case in order to follow up on implementation and report on the case's status during the Commission's public sessions. Finally, the Commission may report cases of non-compliance to the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union.

Case Studies of Successful Implementation Mechanisms

This section will explore several success stories regarding the implementation of ESCR decisions at the regional and domestic levels. We will look both at institutional factors that influenced a State's decision to implement ESCR decisions and measures that courts took to encourage compliance. The cases under consideration will show how the strategies recommended later in the document play out in different contexts.

The cases discussed below reflect the strategies that we have found most successful. At the national level, these strategies are (1) courts' retention of monitoring jurisdiction, (2) the use of human rights indicators to measure implementation, (3) the use of expert committees, (4) structural reform, in particular receiverships, and (5) meaningful engagement. At the regional and international levels, these strategies include (1) defining and coordinating responsibilities between regional/international and domestic actors, (2) the use of pilot judgments, (3) encouraging friendly settlements, and (4) compliance meetings between courts, State actors, and petitioners.

The European Court of Human Rights: Addressing Clone Cases and Improving Domestic Implementation Mechanisms

While many States do implement decisions of the European Court, the growing number of "clone cases" (cases of repeated rights violations due

to the State's failure to adequately implement measures of non-repetition or address underlying policy issues) from certain States has clogged the Court's docket and lowered levels of implementation. Recently, the COE and the European Court of Human Rights have tried to address low implementation levels of Court decisions and clone cases. The System has decided to make two important changes: (1) focus on coordination and communication between agents representing the State at the regional level and the domestic actors with the power to enact changes necessary to implement Court decisions, and (2) grant the Court a more active role in ordering remedies and monitoring implementation in cases of widespread violations through pilot decisions.

Focus on domestic implementation mechanisms

Beginning in the early 2000s, the COE began to concern itself with the lack of domestic implementation mechanisms, which the COE considered an obstacle to the effective implementation of Court decisions. After deliberation, in 2008, the COE's Committee of Ministers issued a recommendation requesting each State to designate a "national coordinator of judgments" and design mechanisms to ensure communication and the transmission of relevant information between this coordinator and the COM, in the hope that this would help develop established ways of increasing future implementation and avoid future violations (Open Society, 2013: 27, 31).

State members of the COE have quickly responded to the COE's concerns regarding domestic implementation of Court judgments. Starting in the early 2000s, various States have taken steps in that direction. For example, in 2005, Italy created a centralized payment system for Court judgments under the authority of the Ministry of Economic Affairs, to simplify and expedite the payment of financial reparations (Open Society, 2013: 42). In 2006, Italy passed the Azzolini Law, which transferred the implementation of judgments from the Ministry of Foreign Affairs to the Office of the Prime Minister and specifies the prime minister's powers and duties relating to the European Court's judgments (Open Society, 2013: 27, 39). The main goals of the law have been to link the functions of different branches of the Italian government, improve communication, and increase information-sharing between the prime minister and Parliament (Open Society, 2013: 39). It is hoped that the 2008 recommendation will spur additional countries to consider adopting such mechanisms. There is

some basis for this hope, as in 2011, Russia adopted a presidential decree that established a framework for monitoring the Court's decisions, meant to ensure the implementation of judgments calling for legislative reforms and permitting the Ministry of Foreign Affairs to discuss implementation strategies suggested by both civil society and State actors, make recommendations to the president, set annual deadlines, and publish its monitoring activities (Open Society, 2013: 39).

These laws attempt to address the specific obstacles to implementation that arise in a particular country, and therefore take different approaches. One strategy is to increase the authority of the actors responsible for implementing Court decisions. Another is to increase coordination among relevant government actors and agencies. Yet another option that has been used is to create ad hoc inter-ministerial committees to address a specific case or group of cases.

Pilot judgments: Broniowski v. Poland

As the European Court has become more concerned with clone cases, or cases on the same issue coming from the same State, which clog up the Court's docket, it has begun to experiment with ways to relieve some of its burden. Since 2004, the Court has issued "pilot judgments," which are similar to decisions of the Inter-American Court in that they lay out specific measures that States must take, with timetables for compliance (Buyse, 2009: 22). Under pilot judgments, the Court retains jurisdiction and monitors the State's implementation of its decision. To date, such judgments have been used only in cases of large-scale systemic human rights violations.

The first pilot judgment case decided was *Broniowski v. Poland*, often referred to as the "Bug River" case. This case involved a problematic Polish policy regarding compensation for persons displaced after World War II, which left some 80,000 people without adequate compensation. At the time of the Court's judgment, there were 167 claims pending on the same issue. In a decisive break from its deferential posture toward States, the Court ordered Poland to make legislative changes that would prevent similar issues. As a result of the judgment, in 2005 the government of Poland and the applicants in the *Broniowski* case reached a friendly settlement. The Polish judiciary declared the existing law regarding compensation unconstitutional, and the legislature later proposed and adopted a new law regulating the issue in late 2005 (ECtHR, *Broniowski v. Poland*, 19 Decem-

ber 2002 (admissibility) (Appl.no. 31443196) Merits 22 June 2004, cited in Buyse, 2009: 3-4).

Given that pilot judgments are specifically designed to address cases of systematic or generalized rights violations, it is not surprising that the procedure has been used to address cases that implicate ESCR issues. In 2006, the Grand Chamber ruled on *Hutten-Czapska v. Poland*, a case involving the policy of rent control designed to protect tenants against extreme rent increases. However, the restrictions, which affected around 100,000 landlords, were so tight that the landlords were generating losses on their property since they were unable to increase rent at all. In a remarkable decision, the Court ordered Poland to end these systemic violations and establish and guarantee a fair balance between "the interests of landlords and the general interest of the community," essentially ordering Poland to reform an economic and social policy. In 2008, the Grand Chamber ceased its supervision of the case, after the applicant and Poland reached a friendly settlement and Poland had shown an "active commitment" to reform the rent control system. Specific supervision was delegated to the COM (ECtHR, *Hutten-Czapska v. Poland* (Grand Chamber), 19 June 2006 (Appl.no. 35014/97), para. 236 in Buyse, 2009: 7).

The Inter-American System: Encouraging State-Petitioner Negotiation

The Inter-American Court's monitoring procedures often function as a platform for negotiation between the State and the petitioner, with the Court acting as a mediator. These procedures have led to the successful implementation of several decisions in the Inter-American System. For example, in *Mapiripán Massacre v. Colombia*, the Court ordered the State to "implement, within a reasonable term, permanent education programs on human rights and international humanitarian law within the Colombian Armed Forces, at all levels of its hierarchy" (Inter-American Court of Human Rights, *Mapiripán Massacre v. Colombia*, 2005: operative para. 13). As a result, in 2008, the Colombian government established an agreement with the Inter-American Institute of Human Rights, which agreed to supervise the implementation of the training program (Buluarte, 2012: 287). Together, Colombia and the Institute developed a single, permanent human rights training program for the country's armed forces, as well as a human rights directorate within the army, both of which formed part of the country's Comprehensive Policy on Human Rights and International Humanitarian Law (Buluarte, 2012: 287).

Additionally, the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* marked the first time that a regional tribunal recognized indigenous peoples' communal right to their ancestral land. In general, orders to grant collective title to indigenous lands have proven difficult to implement in the Inter-American System. However, as a result of the Court's judgment, the Nicaraguan government and representatives of the Awas Tingni community formed two commissions charged with implementing certain aspects of the judgment. One joint commission oversaw the investment of \$50,000 to benefit the community as a whole, while the other commission was responsible for delimiting, demarcating, and titling the Awas Tingni community's territory (Alvarado, Leonardo J., *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case Awas Tingni v. Nicaragua*, 24 *Arizona Journal of International and Comparative Law* 609 (2007) in *Open Society*, 2010: 71).

The first commission used the funds to build an Awas Tingni student boarding house (*Open Society*, 2010: 75-76). But the second commission was unable to complete its assigned task because the government attempted in bad faith to persuade the community to accept a less favorable agreement (*Open Society*, 2010: 75-76). A second attempt to demarcate the Awas Tingni land was made in 2003 when the Nicaraguan legislature enacted a land demarcation law, and Nicaragua finally granted the Awas Tingni community title in 2008 (*Open Society*, 2010: 75-76).

The Court also issues compliance orders in its monitoring of cases to set deadlines or order other steps to ensure compliance. In a case against Guatemala, the Court facilitated communication between the petitioners and the State. The Guatemalan Presidential Commission for Coordinating Executive Policy on Human Rights, the agency representing Guatemala before the Court, informed the Court that it was unable to implement aspects of the Court decision because the State institutions involved refused the Presidential Commission's requests. In response, the Court used a compliance order requesting that the government of Guatemala name State agents as interlocutors for implementation of the orders (*Case of Molina Theissen v. Guatemala, Monitoring Compliance with Judgment*, 2009: operative paras 3-5). As advocates have noted, Court efforts to develop procedures for more specific reporting may help overcome bureaucratic bottlenecks that create obstacles for implementation (*Open Society*, 2010: 84).

Enforcing the Right to Food in India

In 2001, sparked by a crisis caused by severe drought and hunger, the People's Union for Civil Liberties (PUCL) of India filed a constitutional complaint based on the Indian Constitution's right to life against the central government of India, the Food Corporation of India, and several state governments. The complaint, which denounced these entities' failure to provide minimum food requirements, was filed on behalf of poor residents of the State who had not received the required food relief as mandated by law (Human Rights Law Network, *PUCL vs. Union of India & others*). At the time, 73 percent of villages in the country were affected by drought, and 50 percent of children in Rajasthan were malnourished. At the same time, the Food Corporation of India was holding 60 million tons of grains, 40 million above the amount required for buffer stocks. Because the grains were kept outside, the surplus was literally rotting while nearby villages starved (Human Rights Law Network, *PUCL vs. Union of India & others*).

In November 2001, the Court ruled that the Public Distribution System constituted a constitutionally protected right of India's poor, and began to provide suggestions on how the government ought to implement the distribution and, later, other programs⁶ (Birchfield, 2010: 699). The subsequent interim orders issued by the Court in the PUCL case have gradually defined the contents of the right to food in India. While the Court's early orders were mostly related to the Public Distribution System, they went into great detail about general policies and even the day-to-day operation of the program, specifying local, state, and central government obligations (Graham, 2011: 10). As the case continued, the Court began to include other programs affecting the right to food, including targeted public distribution programs, the mid-day meal program, the national old-age pension program, the integrated child development

⁶ *People's Union for Civil Liberties v. Union of India & Others (PUCL)* is a significant case for various reasons. In *PUCL*, the Indian Supreme Court directly addressed the issue of food security and explicitly established a constitutional right to food in India. Generally, the Supreme Court held that specific government food schemes constituted legal entitlements under a constitutional right to food, setting out in great detail the minimum allocation levels of food grains and supplemental nutrients for India's poor. The Court also outlined how such government schemes to implement this right should be carried out (Human Rights Law Network, *PUCL vs. Union of India & others*).

program, the national maternity benefit program, and the national family benefit program (Graham, 2011: 10).

Today, India's Public Distribution System is the world's largest and most comprehensive program designed to ensure food security. Since the inception of the case, the parties have filed over 400 affidavits (Human Rights Law Network, PUCL vs. Union of India & others). As of 2011, the Court had issued some 50 interim orders addressing issues such as food security, children's rights, unemployment, the right to health, and the right to shelter (Graham, 2011: 10).

As others scholars and commentators have noted, the success of the PUCL case was largely due to a particularly ripe and unique legal and political climate, but also to three mutually reinforcing factors: (1) the Court's decision to retain jurisdiction over the case and take an active role in monitoring the State's implementation, (2) the role of PUCL commissioners, and (3) the role of the Right to Food Campaign as a monitor before the Court and as an advocate at the local, grassroots level (Graham, 2011; Birchfield, 2010: 726).

In 2002, less than a year after issuing its first order in the case, the Court used an interim order to create the position of commissioners for the Supreme Court, responding to the request of the petitioners for a monitoring body for the decision's implementation (Birchfield, 2010: 726). The Court appointed two commissioners to address complaints and problems regarding food entitlement schemes, as well as to undertake the tasks of monitoring and reporting in order to achieve effective implementation of the Court's orders (Birchfield, 2010: 726-727). The Court later appointed commissioner assistants, and the commissioners themselves appointed advisors in each state to facilitate communication and respond to complaints from the local level to the Office of the Commission (Birchfield, 2010: 726-727). These state advisors act as liaisons between the commissioners, state governments, and civil society. They are responsible for regularly updating the Commission regarding the status of the food entitlement programs in the nation, relaying state requests for intervention, and improving the implementation of those programs (Birchfield, 2010: 726-727).

In addition to its coordinating role among different levels of the Indian government, the Commission also collects and analyzes government data regarding the programs under Court supervision. The commissioners use this data to work with different levels of government to remedy poor implementation. They maintain close relationships with Court, the Right

to Food Campaign (the main civil society organization that has worked to expand and enforce the case), and relevant government actors at all levels (Graham, 2011: Chapter 4). Thus, an important component of the commissioners' work has been to foster relationships with government officials and use those partnerships to resolve problems in implementation and encourage compliance. While commissioners may bring issues of non-compliance to the Court, commissioners often resolve such issues on their own to preserve the strength of their relationships with government agents and encourage open communication (Birchfield, 2010: 727-730). Additionally, commissioners work directly with the government to negotiate changes in laws, policies, and programs to improve implementation (Birchfield, 2010: 727-730).

The commissioners also contribute to the Court's monitoring activities by collecting and compiling data on the implementation of food entitlement programs. The Commission publishes a comprehensive national report based on that data, which it then submits to the Court and the Right to Food Campaign, which in turn circulates the report among civil society (Graham, 2011: Chapter 4). The commissioners' mandate includes taking assistance from reliable persons and organizations to facilitate its monitoring and reporting duties (Graham, 2011: Chapter 4). Thus, the majority of its data comes from government reports, interviews with key government officials at all levels, and information from the Right to Food Campaign and other civil society organizations (Graham, 2011: Chapter 4). For each program covered, the the Commission's report provides an overview of the program, as well as information regarding levels of coverage, quality, financial information, and obstacles or challenges to implementation (Birchfield, 2010: 729). The report also contains specific recommendations for how to improve each program covered by the Court's orders (Birchfield, 2010: 729).

In spite of the important role played by commissioners in the case, they have quite limited financial resources. Thus, the commissioners must prioritize the monitoring of large policy issues rather than issues affecting implementation at the ground level (Birchfield, 2010: 731). Because of these constraints, the commissioners' strength depends on the work of ground level advisors and support from civil society, mostly the Right to Food Campaign (Graham, 2011: Chapter 4). The commissioners rely on state level government officials to establish functional mechanisms to address local implementation issues (Birchfield, 2010: 731). On the other

hand, the commissioners rely on the Right to Food Campaign for data collection for their reports to the Supreme Court, as well as for becoming aware of aware of problematic government responses, obstacles, and issues facing implementation at the local level (Graham, 2011: Chapter 4).

The Court's use of commissioners has created a positive feedback loop among the differentiated responsibilities of the three main actors in the PUCL case. Thus, the Court identifies the right to food, explains what this right means in terms of policy, and monitors the implementation of those policies. The Right to Food Campaign explains Court decisions to civil society, thereby drumming up public awareness and pressure on public officials, and also provides data regarding implementation to the commissioners. In turn, the commissioners provide the Right to Food Campaign with necessary information to undertake public awareness campaigns, while making use of the Campaign's data to influence Supreme Court orders, and later encourage implementation of those orders through its diplomatic relations with state and central governments (Graham, 2011).

Alleviating a Humanitarian Disaster: The Rights of IDPs in Colombia

Internal forced displacement is one of the most serious human rights problems facing Colombia. A decades-long internal conflict coupled with more recent economic pressures has given Colombia the second highest number of internally displaced persons (IDPs) in the world, at close to 5 million people (Rodríguez and Rodríguez, 2010a: 16-19). IDPs often come from the most economically and socially marginalized groups in the country, such as Afro-Colombians and indigenous people. Displacement, often from rural to urban areas, only exacerbates such difficulties, making IDPs among the most disadvantaged Colombians in terms of economic and educational opportunities, employment, and access to healthcare (Rodríguez and Rodríguez, 2010a: 16-19). Unfortunately, for years, the State response to the problem of IDPs was one of indifference and ineptitude (Rodríguez and Rodríguez, 2010a: 18-19). Thus, State programs for offering assistance to IDPs and for stemming the flow of forced displacement have been nonexistent or inadequate (Rodríguez and Rodríguez, 2010a: 18).

In decision T-025 of 2004, the Colombian Constitutional Court combined 108 constitutional actions that alleged violations of the rights

of 1,150 internally displaced families, due to State authorities' failure to adequately address the families' petitions regarding housing, access to productive projects, healthcare, education, and humanitarian aid.⁷ The Court, determining that the petitioners' situation reflected generalized problems facing IDPs, analyzed forced displacement and the State's related policies from a constitutional perspective. Thus, the Court concluded that forced displacement had caused a massive violation of the human rights of IDPs and that public policy to address the problem was incoherent, insufficient, and not adequately based on standards of fundamental rights. Based on this analysis, the Court declared "an unconstitutional state of affairs,"⁸ and ordered the government to take measures to resolve the problems facing IDPs.

The Court's decision to maintain jurisdiction to monitor the execution of its orders was crucial to its implementation. While such a procedure may be common in other courts, in the Colombian system, the Constitutional Court generally limits itself to issuing orders and delegates monitoring activities to first instance judges (Uprimny and Sánchez, 2010: 300; Rodríguez and Rodríguez 2010). The Court began monitoring the implementation of its decision in two ways. The first was through public hearings, in which the Court requested reports from relevant State institutions, organizations of IDPs, civil society organizations, and international organizations such as the UN Refugee Agency. Based on this information, the Court convened public hearings to monitor implementation. In addition, the Court verified compliance through *Autos*, which are monitoring orders that the Court issues to request information from relevant actors, respond to non-implementation, and address the situation of specific IDP

⁷ For a detailed analysis of this case and the Constitutional Court's role in protecting the rights of IDPs, see Rodríguez Garavito, César and Diana Rodríguez Franco. *Cortes y cambio social: cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia*. Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2010.

⁸ An "unconstitutional state of affairs" is a concept developed by the Colombian Constitutional Court to address exceptional situations in which the collective violation of fundamental rights of a group of people are such that individual resolution on a case-by-case basis would be insufficient to address the problem and would severely backlog the Court. Thus, the Court accumulates a number of constitutional actions regarding the situation of rights violation and hears them together. The Court then formulates general orders that public authorities must follow in order to address the serious human rights problem.

groups. Between 2004 and 2009, the Court issued 84 *Autos* (Uprimny and Sánchez, 2010: 300; Rodríguez and Rodríguez, 2010b).

In each of these processes, the Court has received technical support from the Monitoring Commission on Forced Displacement, an initiative of civil society organizations that wanted to contribute to the development of a new policy for IDPs. The Commission has been fundamental in the monitoring process, through the presentation of reports regarding the situation of IDPs, as well as the technical evaluation of the distinct components of the policy. The Commission has exercised a crucial role in implementing the Court's decision because it has access to information and institutional capacity that the Court does not (Uprimny and Sánchez, 2010: 301-302).

The Court began to monitor the State's compliance with its orders through the evaluation of the State's reports on implementation. It categorized the State's efforts into four groups: (1) non-compliance, (2) low compliance, (3) medium compliance, and (4) high compliance. The Court soon found that this methodology was inadequate, in part because of attempts by the government to derail the follow-up process by inundating the Court with useless information that was impossible to process. To resolve this problem, the Court initiated a dialogue with the government regarding how to obtain precise, objective, and relevant information. A group of technocrats within government agencies responded by proposing the creation of a series of objective indicators that would allow an evaluation of public policies and the results (Uprimny and Sánchez, 2010: 302-303).

The Court decided to make public participation a central tenant of its methodology for monitoring implementation, and began a dialogue among the State, the Monitoring Commission, and the UN Refugee Agency, who all proposed a number of indicators. After evaluating the suggestions, the Court adopted more than 100 indicators⁹ that were divided into 20 groups of principal failures in State policy and that respond to issues regarding civil and political rights, as well as social and economic rights. The 100 indicators were also grouped according to their structure:

⁹ The Court selected indicators that (1) evaluate the degree of advancement in overcoming the unconstitutional State of affairs, (2) measure the effective enjoyment of rights contained in public policies and as applied to subjects of special constitutional protection, and (3) are applicable, reliable, significant, and allow for an evaluation of criteria for all State entities (Uprimny and Sánchez, 2010: 304-305).

indicators of the effective enjoyment of rights, complementary indicators, and sectorial indicators (Uprimny and Sánchez, 2010: 305-306).

The Court began its foray into indicators with the so-called effective enjoyment indicators, which are designed to compare the life conditions of IDPs with the content of fundamental rights in order to make such rights applicable to daily life (Uprimny and Sánchez, 2010: 308). As time went on, the Court realized that while effective enjoyment indicators were capable of measuring the end result (the fulfillment of a given right), they were unable to measure many of the more nuanced changes that led to the eventual fulfillment of rights, and therefore were ineffective at noting gradual progress. Thus, the Court decided to include two additional indicators: complementary and sectorial indicators. Complementary indicators are measures that allow one to appreciate the general advancement, retrogression, or stagnation of actions and policies relevant to each effective enjoyment indicator. Sectorial indicators are measurements that reveal information regarding results obtained by each agency within its sphere of competence (Uprimny and Sánchez, 2010: 309-310).

Once the Court had adopted effective enjoyment indicators, the Monitoring Commission designed two national verification surveys, which were given to 10,000 households in 50 cities, of which slightly more than half were internally displaced and the other half were used as a control group (Uprimny and Sánchez, 2010: 315). These were the first national efforts made to obtain statistical information regarding IDPs (Uprimny and Sánchez, 2010: 315). These surveys have been important tools to measure the level of advancement regarding effective enjoyment indicators (Uprimny and Sánchez, 2010: 315).

The use of indicators has made it possible to verify that the Court's intervention has had a positive impact on the fulfillment of the rights of IDPs in Colombia and has improved public policy regarding this topic (see Rodríguez and Rodríguez, 2010b). While there have not been gains in every area under study, there have been real advances in the right to health and education, among others (Rodríguez and Rodríguez, 2010a: 267). Furthermore, as a result of the case, the national budget directed toward programs for IDPs has greatly increased (Rodríguez and Rodríguez, 2010b). Finally, as a result of the Court's decision, State entities relevant to IDP policies have increased their inter-institutional coordination.

Prison Reform in the United States

Some of the most intensive judicial interventions in the United States have been on the issue of prison reform. These cases involve appalling prison conditions, including overcrowding, poor sanitation, and a lack of medical care, stemming from three interrelated issues: (1) an increase in the prison population without an increase in funding to ensure a minimum standard of prison conditions, (2) a vulnerable population (prisoners) relying on the State for their needs, and (3) recognition by prison administrators that they were unable to meet their obligations toward the petitioners (Weingart, 2010: 3)

For example, in one case, a jail in Washington, D.C., suffered from unacceptably high prisoner suicide rates, widespread tuberculosis, and woefully inadequate treatment program for inmates living with HIV (Kovaleski, 2000). In 1971, advocates filed two class-action lawsuits on behalf of the prisoners (Weingart, 2010: 2). Throughout the course of litigation, the court gave increasingly specific orders in an effort to encourage compliance; and in 1993, it appointed a “special master”¹⁰ to monitor compliance (Weingart, 2010: 3). However, none of these measures were effective. In 1995, more than 20 years after the case was filed, the court appointed a receivership¹¹ upon finding that the defendants had failed to comply with virtually every court order issued in the case (Weingart, 2010: 4). That same year, the special master developed a highly detailed remedial plan designed to improve prison conditions, which was based on the increasingly specific court orders that had been issued over the course of 20 years (Weingart, 2010: 4). Upon appointment, the receiver was tasked with implementing the remedial plan (Weingart, 2010: 6). The receivership lasted five years (Kovaleski, 2000).

¹⁰ A special master is a judge-appointed expert charged with ensuring that the court’s orders are followed.

¹¹ A receivership is the most judicially intrusive method of oversight. In a receivership, the court appoints a “receiver” to completely displace the leadership of an executive agency in order to force the agency to comply with its constitutional obligations to the plaintiffs in the case. The court inserts itself into the management of the agency, completely displacing the defendants: the receiver makes large and small decisions, spends the organization’s funds, and controls hiring and firing. For this reason, receiverships are a remedy of last resort. Short of outright closure, a receivership is the most invasive mechanism that a court may employ to enforce its decision.

The court granted the receivership broad powers to implement the remedial plan, including all those related to the delivery of medical and health services at the Washington, D.C., jail (Weingart, 2010: 7). The court also structured the receivership in such a way that untethered the receiver from the Washington, D.C., procurement process, and thus gave the receiver more freedom to hire (and fire) those necessary to improve the healthcare system in the jail (Weingart, 2010: 7). Additionally, the special master retained the ability to set limits on the authority of the receiver, as well as to monitor his progress and report back to the court.

The Washington, D.C., prison receivership is generally considered successful (Weingart, 2010: 13). The receiver appointed by the court had served as an expert to the special master before his appointment; he had also assisted in the development of the remedial plan and therefore knew minute details of the case before commencing his work (Weingart, 2010: 10). Because of his status as an insider on the case, he was able to work cooperatively with public and private partners, since the relevant parties already knew him (Weingart, 2010: 10). The receiver’s relationship with parties was characterized by mutual trust, given that he had worked as the medical director of a jail and could relate to the defendants. But he had also served as an expert for plaintiffs in many other cases and thus understood their side as well (Weingart, 2010: 10). The receiver was able to develop good relationships with both the plaintiffs and the jail’s management, which helped ensure a smooth implementation process with minimal conflict (Weingart, 2010: 10).

Five years after the receiver’s appointment, the plaintiff’s attorney, the special master, and the receiver all agreed that the receivership had met its goals, a position that was echoed by Congressional representatives who investigated the jail conditions (Weingart, 2010: 13). Thus, the Washington, D.C., medical services were returned to D.C. control in 2000 (Kovaleski, 2000).

Forced Eviction in South Africa: The Olivia Road Case

The 2008 *Olivia Road* case¹² involved approximately 400 residents of two decrepit buildings in Johannesburg who were resisting eviction. The eviction was scheduled to take place as part of the city’s urban renewal pro-

¹² *Occupiers of 51 Olivia Road and Others v. City of Johannesburg and Others* CCT 24/07.

gram (Mbazira, 2008). At the trial court level, the applicants argued that they could not be evicted without being provided alternative accommodation (Mbazira, 2008). The High Court (the court of first instance) found that the city's program did not meet constitutional standards regarding the right to housing, and ordered the city to develop a comprehensive and coordinated program to fulfill the right to housing for those in desperate need of accommodation (Mbazira, 2008). On appeal, the Supreme Court of Appeal found that the buildings in question were not suitable for human habitation. It authorized the eviction of their residents, ordering the city to assist those in need of housing find temporary accommodation (Pillay, 2012: 741).

The applicants appealed to the Constitutional Court, which ordered the parties to “engage with each other meaningfully...in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned” (Constitutional Court interim order 20 August 2007 in *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v. City of Johannesburg*, CCT 24/07, para. 1, cited in Ray, 2009: 3). The Court determined the subject matter, as well as the objectives of the meaningful engagement (Pillay, 2012: 741). The parties were also ordered to file affidavits regarding the results of the engagement. Finally, the Court provided an interim order suspending the eviction of the buildings' residents (Mbazira, 2008).

By the end of the engagement process, the applicants and the city had reached an agreement whereby the city would make the buildings in question habitable (Mbazira, 2008) and, subject to Court approval, provide alternative accommodation for the buildings' residents (Pillay, 2012: 741). Such alternative accommodation would be temporary, as the city would work with the residents to find permanent housing (Pillay, 2012: 741). Less than a year after the Court approved the agreement, the legal aid clinic representing the applicants indicated that the order resulting from the settlement had been implemented satisfactorily (Mbazira, 2008). The interim order was implemented, and before the residents were relocated, the city provided them with water, portable toilets, refuse removal, and fire extinguishers (Mbazira, 2008). Later, the buildings' residents were voluntarily relocated to better housing, with access to water, electricity, sanitation, and shared cooking and bathroom facilities (Mbazira, 2008).

Strategies to Improve the Implementation of ESCR Decisions

In this section, we will examine some of the strategies and mechanisms that courts and advocates used in the cases above, as well as others that have served to successfully implement court decisions in ESCR cases. Based on the success of these strategies at the domestic level, we propose suggestions for how some of these strategies may be adapted and applied at the regional and international levels. These strategies could be useful for many different types of actors implementing ESCR decisions, including domestic courts, regional and international quasi-judicial and judicial human rights bodies, civil society, and national human rights institutions.

Let's review again the suggestions listed in the prior section. At the domestic level, the main strategies that we consider are (1) courts' retention of monitoring jurisdiction, (2) the use of human rights indicators to measure implementation, (3) the use of expert committees, (4) structural reform, in particular receiverships, and (5) meaningful engagement. At the regional and international levels, we consider (1) defining and coordinating responsibilities between regional/international and domestic actors, (2) the use of pilot judgments, (3) encouraging friendly settlements, and (4) compliance meetings between courts, State actors, and petitioners, in addition to suggestions regarding how to incorporate successful domestic strategies at the regional and international levels.

Strategies for Domestic Courts

Retain jurisdiction for monitoring

The most important step that a domestic court can take to increase the likelihood that its decision is implemented is to retain jurisdiction of the case throughout the implementation process. Every other strategy discussed below is dependent upon the court that issued the decision having the power to review State action regarding implementation. Of course, most courts lack the technical, human, economic, and time resources to carefully monitor every ESCR case that comes before them. Therefore, in several of the strategies detailed below, courts delegate the time-intensive aspects and specialized knowledge requirements of monitoring to experts, committees, or even civil society groups. With the court's authority, these groups can carry out monitoring activities, such as obtaining information from State authorities and groups affected by the litigation, analyzing vast quantities of information, overseeing surveys, and providing

technical and expert information that the court does not have the time or resources to find on its own. In each case, the court retains the power to make the final decision based on the information and advice provided by such committees or experts. This way, the court can continuously pressure and communicate with relevant State actors to ensure that its decision is implemented, instead of waiting for petitioners to request contempt-of-court proceedings for noncompliance.

Indicators

Over the last several decades, the use of indicators, both qualitative and quantitative, in monitoring the implementation of human rights has grown substantially. Social scientists, and increasingly jurists, view indicators as useful tools for articulating and advancing claims about a State's fulfillment of its regional or international human rights treaty obligations, particularly regarding ESCR. Indicators help States evaluate their progress, and they also provide precise, relevant information to policy and decision-makers¹³ (UN OHCHR, 2012). Courts have begun to use indicators as important information upon which to base their decisions and draft remedies, as well as a reliable method for measuring State compliance with their decisions.

The OHCHR has defined human rights indicators as “specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that addresses and reflects the human rights concerns and principles; and that can be used to assess and monitor the promotion and protection of human rights” (UN OHCHR, 2007: 24). In human rights litigation, these measures try to capture how well the parties have complied with orders and have met human rights standards defined by the court.

¹³ For an in-depth analysis of the use of indicators to measure States' compliance with obligations contained in international human rights instruments and the ICESCR in particular, see Rosga, AnnJanette and Satterthwaite, Margaret L., *The Trust in Indicators: Measuring Human Rights* (November 9, 2008). *Berkley Journal of International Law (BJIL)*, Forthcoming; NYU School of Law, Public Law Research Paper No. 08-59. Available at SSRN: <http://ssrn.com/abstract=1298540> or <http://dx.doi.org/10.2139/ssrn.1298540>. See also United Nations Office of the High Commissioner on Human Rights (UN OHCHR). *Human Rights Indicators: A Guide to Measurement*. 2012.

Quantitative and qualitative indicators

Indicators are generally divided into two categories: quantitative and qualitative. Similar to their use in social sciences, quantitative indicators are numerical or statistical (e.g., numbers, percentages, or indices), while qualitative indicators cover a broad range of non-numerical information that helps reveal the level of enjoyment of a certain right (UN OHCHR, 2012). For example, in the Colombian case regarding the right of IDPs to education, the Constitutional Court looked at the percentage of school-age children enrolled in classes. Examples of qualitative indicators include narrative information regarding a situation relevant to a specific human right, checklists, questions, and other forms of information gathering that can add more depth to the information provided by quantitative analyses (UN OHCHR, 2007: 24-25). Quantitative and qualitative indicators and methods of analysis provide complementary information, given that each type compensates for biases and lacunae inherent in the other (UN OHCHR, 2012).

Benchmarks

In addition to quantitative and qualitative analysis, benchmarks are another indicator used to measure States' fulfillment of their human rights obligations. According to the OHCHR, benchmarks are indicators “constrained by normative or empirical considerations to have a pre-determined value” (UN OHCHR, 2007: 26). Such normative considerations may be based on legal standards, political aspirations of the State, or, in the case of litigation, the standards set by the court (UN OHCHR, 2012). For instance, the Colombian Constitutional Court determined that a relevant indicator is the number of internally displaced persons who have access to healthcare. Using a benchmark for this indicator may mean deciding that the indicator should reach a certain level—for example, increasing it to 80 percent or improving current access levels by 20 percentage points (UN OHCHR, 2007: 26). As demonstrated by the Colombian case regarding IDPs, benchmarks can become tangible goals and expectations for State actors charged with implementing court decisions regarding ESCR.

Identification of indicators and data collection

In practical terms, in order to use indicators to measure the implementation of human rights decisions, a right must be translated into a small number of characteristics or attributes that can then become indicators. For example, when the Colombian Constitutional Court recognized the

right to housing of IDPs, it used indicators such as “adequate space,” “appropriate materials,” “safety of location of housing,” and “access to subsidized housing” to help translate that right into tangible characteristics and components that could be measured. By identifying a right’s major attributes or characteristics, the link between the indicators and the corresponding human rights standard become more explicit (UN OHCHR, 2007: 26).

Once these attributes are identified, the next step when using indicators to implement human rights is for State actors to identify a set of structural, process, and outcome indicators that allow for the measurement of those attributes (UN OHCHR, 2007: 26). An example of a process indicator for the right to education used by the Colombian Constitutional Court is the proportion of internally displaced children enrolled in school. Process indicators help define a relationship of cause and effect between a State policy or program and any changes in the fulfillment of the right in question. Additionally, process indicators are better than outcome indicators in their ability to gauge changes (UN OHCHR, 2007: 29).

Outcome indicators reflect achievements that measure the fulfillment of human rights. Outcome indicators consolidate the long-term impacts of many underlying causes and processes. These indicators may change slowly, and they are less adept at capturing changes than process indicators. In the Colombian case regarding IDPs, the Court’s “effective enjoyment” indicators were similar to outcome indicators (UN OHCHR, 2007: 29).

Appointing experts and expert commissions

Often, petitioners in cases regarding ESCR are low-income individuals represented by overworked NGOs. Both the petitioners and the courts often lack access to critical information regarding their case. The court can help overcome this obstacle by appointing third-party experts, such as journalists, lawyers, mental health professionals, bureaucrats, and others with access to such information. Furthermore, courts can appoint expert committees to help them better understand the implementation issues present in the case, given that they often involve complex issues of economics, science, public policy, or other topics that the court may not sufficiently understand. The court may also appoint expert committees to help them determine how to structure orders and facilitate and monitor the State’s implementation of those orders.

In structural litigation cases, like the prison reform case described above, these committees have independent authority and power with respect to the implementation of the case. The court grants such committees the authority to request information or documents from the parties, who are under an obligation to comply with such requests, and the committees can make certain decisions regarding the case without the court’s permission (Weingart, 2010). As we saw in the prison reform case, courts must carefully consider what decisions and powers they wish to delegate to such experts, as well as how they plan to monitor the experts (Weingart, 2010). To be successful, courts must achieve a balance: they should use experts’ knowledge to the extent that it spares them from having to engage in minor details, but they also need to always question the experts’ decisions and be careful not to delegate too much control, since the courts remain ultimately accountable for the results of the litigation (Weingart, 2010).

Even when the court itself makes decisions, these decisions may be heavily influenced by the information and opinions of the expert committees (Sood, 2006: 24; Rodríguez & Rodríguez, 2010). In both the Indian case regarding the right to food and the Colombian case regarding forced displacement, the courts, in making their orders, relied heavily on the information provided by the expert commissions involved in the cases. The information provided by these commissions ensured that the courts’ orders were relevant and appropriate and that they addressed any challenges with implementation.

Another common way to involve experts in cases is through the use of *amici curiae*. The use of *amici curiae* is common across various legal traditions as way to clarify or explain the finer points of an argument or to address certain angles of a case that the petitioners themselves did not include in their presentations to the court. In the Indian context, courts often appoint a senior counsel as *amicus curiae* participation in order to obtain a neutral, objective point of view regarding relevant matters. The *amicus curiae* assists the court in addressing the issue in legal terms, sifting out relevant facts from the petitioner’s submissions and sharpening the focus of discussion (Muralidhar, 2002: 3).

In this sense, *amici curiae* perform a similar function to expert committees in that the court often asks them to obtain relevant information regarding the case or the implementation of court orders. The information provided by *amici curiae* is then referred to when the court makes de-

terminations regarding rights violations, effective remedies for such violations, and the level of State implementation of the remedies (Sood, 2006: 24). Finally, *amicus curiae* also ensure continuity in cases throughout the hearing and implementation processes, regardless of whether the original petitioner loses interest or cannot continue the case for whatever reason (Muralidhar, 2002: 3).

Meaningful engagement

The South African Constitutional Court has gained international attention for its rulings on ESCR cases, in particular those regarding the right to housing¹⁴ and the right to healthcare.¹⁵ That Court has developed tools that it uses to approach such cases, including “meaningful engagement,” which allows the Court to measure State action through an individualized, case-by-case evaluation of State action.

The idea that the government has a duty to consult with parties affected by its policies appeared in early Constitutional Court judgments regarding the right to housing, such as *Grootboom* and *Modderklip Boerdery* (Pillay, 2012: 740). This idea led to the creation of “meaningful engagement” in the *Olivia Road* case discussed above. The essential premise of meaningful engagement is that when State actors intend to pursue a policy that will require the eviction of individuals or a community, the Court requires that actor to negotiate with affected individuals and communities and come to an agreement regarding the eviction (Ray, 2009). The Court may provide a list of specific topics to be addressed during this engagement, as well as request the participation of civil society organizations to support more vulnerable individuals or communities. The Court also orders the parties to report back to the Court at a certain date, with both a complete record of the engagement process and the terms of the agreement reached. Similar to a consent decree, the agreement does not become binding until the Court approves of its terms. The parties may return to Court to establish compliance or non-compliance with this decree, or in the event that the parties are unable to reach an agreement.

While engagement is a fluid process, and the objectives and issues for discussion depend on the dispute, the Court has developed certain stan-

dards to ensure that it is a productive process that allows those affected by a possible eviction to actively participate in developing policies and plans. First, the engagement may not be ad hoc; a government agency that plans a project that may lead to eviction must incorporate engagement with affected individuals from the outset (*Occupiers of Olivia Road v. City of Johannesburg*, 2008 (5) BCLR 475 (CC), para. 16, cited in Ray, 2009: 5). Also, the government entity responsible must ensure that relevant administrative and bureaucratic agencies have the skills and capabilities necessary to undertake such a negotiation (*Occupiers of Olivia Road v. City of Johannesburg*, 2008 (5) BCLR 475 (CC), para. 19, cited in Ray, 2009: 6). The Court has also established a standard to ensure that individuals and communities actually influence the policy: the State must address the serious power imbalance between State actors and affected communities inherent in such processes by including civil society organizations (*Occupiers of Olivia Road v. City of Johannesburg*, 2008 (5) BCLR 475 (CC), para. 15, cited in Ray, 2009: 6). Finally, the State actor involved in engagement must maintain a public record of the process, which permits courts to later review the process and determine whether it constitutes meaningful engagement (*Occupiers of Olivia Road v. City of Johannesburg*, 2008 (5) BCLR 475 (CC), para. 21, cited in Ray, 2009: 9). When issuing meaningful engagement orders, the Court has also stated that “the absence of engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an eviction order” (*Occupiers of Olivia Road v. City of Johannesburg*, 2008 (5) BCLR 475 (CC), para. 21, cited in Ray, 2009: 9). This means that the failure to meaningfully engage with affected communities can be the basis for a court to deny an eviction request.

Processes like this in South Africa are effective responses to common criticisms of ESCR litigation. First of all, meaningful engagement may help avoid claims of judicial “legislation” and disruption of the democratic separation of powers (Pillay, 2012). Meaningful engagement promotes institutional dialogue and amicable settlements, which can help ensure the realization of ESCR while minimizing court involvement (Pillay, 2012). Similarly, some argue that government actors are more likely to accept and implement remedies when they have been involved in the process of interpreting rights and determining how to best meet their constitutional obligations (Mbazira, 2008). This approach may be more successful than the usual antagonistic relationships that develop between the courts and

¹⁴ See *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001 (1) SA 46 (CC).

¹⁵ See *Minister of Health v. Treatment Action Campaign (TAC)*, (2002) 5 SA 721 (CC).

State actors in other implementation approaches, such as structural litigation (Mbazira, 2008). In these less friendly relationships, the government waits for specific instruction from the court before acting to correct the rights violation. The government may decide what action to take to comply with the letter—but not the spirit—of the court order, so that it can continue with its policy agenda even if it is at odds with the court (Mbazira, 2008). Most importantly, meaningful engagement ensures that those affected by the decisions are active participants in finding solutions (Pillay, 2012).

Not every review of the South African Constitutional Court’s engagement doctrine has been positive. Engagement has been criticized as a weak, administrative law review model that fails to address the substantive content of ESCR or grant individual relief in specific claims (van der Berg, 2012). Meaningful engagement avoids the substantive interpretation and enforcement of rights by deferring to the engagement process. Without sufficient and active judicial oversight of the process, it becomes a mere procedural hurdle that State actors must overcome in order to undertake evictions (van der Berg, 2012).

Additionally, recent cases have upheld the reasonability of eviction notices despite glaring deficiencies in the engagement process—for example, when “engagement” was essentially an information dissemination process. If meaningful engagement becomes simply another factor considered in assessing the reasonableness of government action, rather than a necessary precondition for that action, it is unlikely that the government will undertake engagement processes seriously and in good faith (Pillay, 2012: 751).

As the Court itself noted, engagement works best when it is built into the policy development process from the start, and is likely to have little impact on policy decisions if undertaken once substantive decisions have been made and the relevant authority is committed to those decisions (Ray, 2009). If the government agency has committed and invested considerable resources in implementing a policy that conflicts with the goals of meaningful engagement, engagement is less likely to be successful (Ray, 2009). In the *Olivia Road* case, the high court’s early injunction meant that the eviction plan was slowed down; by the time the Constitutional Court ruled on the matter, negotiations were already underway to change the plan, and no additional resources had been spent on the original plan (Ray, 2009).

Courts must actively manage the engagement process. To move beyond substantive issues that are unlikely to be resolved through negotiation, the court can resolve the substantive issues that will permit negotiations to move forward by altering the bargaining positions of the parties and giving the parties control over policy details, while also ensuring that substantive issues comply with rights standards. As part of actively managing the engagement process, courts must be willing to issue temporary injunctions enjoining the challenged activity to ensure that the project does not become a *fait accompli* during the engagement and judicial processes.

Furthermore, meaningful engagement is an inherently political process and thus requires incentives for State actors to take the process seriously to be successful (Ray, 2009). The uncertain nature of the engagement process may lead to government resistance, which can cause the entire process to fail or to become a mere notification or information dissemination requirement if there are no political constraints (Ray, 2009). Therefore, courts must be willing to impose sanctions on parties who fail to meaningfully engage (Ray, 2009).

Structural reform

An injunction is a judicial order that requires a party to refrain from acting or to take specific actions. It is enforced by the judge’s power to hold the person against whom an injunction is applied in contempt for failure to obey. Structural injunctions are a variation on that idea, as they are injunctions used “to alter broad social conditions by reforming the internal structural relationships of government agencies or public institutions” (Grossenbacher, 1992). The target of a structural injunction lawsuit is the bureaucratic dynamics that produce that undesired condition.

The goal of structural injunctions is to take forward-looking, affirmative steps to prevent future rights violations. In general, these affirmative steps involve the restructuring of public institutions, as well as changes to social resource allocation. They can therefore affect entire populations, communities, or countries. Courts in the United States pioneered the use of structural injunctions, beginning with school desegregation cases in the 1950s and 1960s, and later applied the methodology developed in those cases to other institutional litigation, such as mental healthcare and prison reform (Grossenbacher, 1992).

Structural injunctions have been quite controversial in the United States (Gilles, 2004: 146). Criticisms have tended to focus on the blur-

ring effect that such cases have on the separation of powers between the judiciary and the legislative branch, the cost of such interventions, and the reliance on experts that may dilute judicial supervision and thus the legitimacy of the intervention (Tushnet, 2011: 118, Rodríguez and Rodríguez, 2010b). For these reasons, along with other more recent criticisms,¹⁶ structural injunctions are rare in comparative constitutional law, although there are some examples from South Africa, Colombia, India, and Argentina.

At a practical level, structural injunctions require the court to take an active role in monitoring and implementing its decision, combining aspects of administrative, executive, and judicial power (Gilles, 2004: 144). They also tend to be of long duration and resource intensive. Structural injunctions often involve court orders that are expensive to implement. For example, if a court orders a prison to reduce its population by one-third or provide healthcare to IDPs, this may require the State to build a new prison or increase healthcare services across the country. Additionally, monitoring compliance with the court's orders takes a long time and requires a large amount of economic and human resources (Chemerinsky, 2008: 313). As we saw in the numerous orders in the Washington, D.C., prison case and the Colombian IDPs case, the parties must often return to the court periodically to report on compliance, implicating economic and human resources for both the parties and the court. For the court to evaluate those reports and review the State's compliance, it must either invest the time and resources necessary to become an expert on the issue at hand or hire outside experts, such as the special masters discussed in the Washington, D.C., prison case. (A third option is to enlist the help of capable volunteers, like those that formed the Monitoring Commission in the Colombian IDPs case.) Finally, because cases calling for structural injunctions arrive at the courts only after the legislature and executive have failed to act over a period of time, it is no surprise that the successful implementation of structural injunctions can take decades (Chemerinsky, 2008: 312).

Giving effect to a structural injunction involves several steps. The court must first issue an order identifying the rights violation and the relevant reforms that are required to remedy that violation (Hirsch, 2007:

21). In the second phase, the State actor responsible for remedying the violation presents an action plan that details the actions it will take to achieve the required reforms (Hirsch, 2007: 21). Following the court's approval of this plan, the State must then implement it, while the court retains a monitoring role by requiring the State to periodically report back to the court on its progress (Hirsch, 2007: 22). During such progress-report hearings, the petitioners and other interested parties may present their opinions regarding the State's implementation progress (Hirsch, 2007: 22). The court may order adjustments or new orders if the State encounters problems during the implementation of the plan (Hirsch, 2007: 21). These final reporting steps are repeated until the court determines that its order has been adequately implemented, or until the State's non-implementation urges it to adopt more aggressive measures. We can see these aspects of structural litigation and reform in action in the multiple monitoring hearings and additional orders held and ordered by the courts in the cases regarding US prison healthcare conditions, Colombian IDPs, and the right to food in India.

Strategies for Regional and International Courts

The implementation of ESCR decisions at the regional and international levels poses additional challenges to those faced in domestic litigation. Generally, the courts or human rights bodies issuing decisions at the regional or international level do not have the same level of knowledge about the local legal, social, economic, and political context as the domestic courts and actors do about the case. This can make both the decision-making process and the implementation process more challenging. Furthermore, as mentioned above, the State actors that appear before such international bodies may not have the authority to make the necessary changes in domestic policy or institutions to implement the decision. As a result, human rights tribunals such as the European and Inter-American Courts of Human Rights have developed their own strategies to combat non-implementation. In the following section, we will review the strategies that they use: (1) defining and coordinating responsibilities between regional/international and domestic actors, (2) the use of pilot judgments, and (3) compliance meetings between courts, State actors, and petitioners. We will also consider how to use successful domestic strategies at the regional and international levels.

¹⁶ See Ferraz, Octavio, (2011) "Health Inequalities, Rights and Courts: The Social Impact of the 'Judicialization of Health' in Brazil," in Yamin and Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* Harvard University Press.

Defining responsibilities for implementing regional or international decisions

As mentioned above, the fact that States often separate their foreign policy from their domestic policy complicates the implementation of regional or international court orders. The State agents who appear before or work with regional or international bodies often represent the foreign policy ministries, which are usually part of the executive branch. These agents have little contact or communication with the agencies responsible for national public policy and whose officials are often responsible for the violations of international human rights law. Therefore, when a regional or international human rights body issues orders or recommendations to change domestic policy, the State agents who appear before these tribunals often have little or no capacity to enact such changes. It is crucial for States to have connection mechanisms between the officials representing the State before regional or international courts and the national officials who have the authority to make the necessary domestic policy changes to implement the decisions. These mechanisms can take various forms and can vary in their level of comprehensiveness and permanency.

Below, we describe cases that illustrate this variation: permanent laws for implementation (Peru), official and unofficial policies to improve coordination among relevant branches (United Kingdom), and ad hoc inter-ministerial committees (Poland and Romania).

Comprehensive models of implementation: Peru

Peruvian law provides possibly the most comprehensive model in the Americas of national implementation legislation for decisions by regional/international human rights bodies (Corasaniti, 2009). In 2000, the Peruvian president issued a supreme decree to “Regulate the Procedure to Follow-Up on the Recommendations of International Human Rights Bodies” (Supreme Decree 014-2000-JUS) (Open Society, 2010: 85). This decree regulates procedures for following up on recommendations and decisions of regional and international human rights bodies. It requires the Ministry of Foreign Affairs to communicate all recommendations and observations to the National Secretariat of Human Rights, and charges the Ministry of Justice with following up on all such decisions. Upon receipt of the recommendations and the Ministry of Foreign Affairs’ observations, the Secretariat must communicate them to the National Committee on Human Rights (CNDH). The president of the CNDH determines

which actions fall under the purview of the numerous executive offices. But the CNDH is limited to implementing general remedies and making recommendations to the legislative and judicial branches. It can also request that these branches inform the CNDH of any actions that they decide to take (Open Society, 2010: 85).

In 2001, the Peruvian president issued another executive decree, which approved the CNDH’s recommended regulations. These regulations created the Special Commission to Follow-Up on International Procedures, responsible for receiving and responding to all communications from international human rights bodies, the OAS, or any other multilateral organization in which Peru participates (Supreme Decree no. 015-2001-JUS). The Commission is composed of the president of the CNDH, a representative from the Ministry of Foreign Affairs, and an international law expert named by the Ministry of Justice, as well as a technical committee. The Commission is responsible for supervising the implementation of decisions and recommendations issued by regional and international human rights bodies. This involves leading compliance activities, coordinating relationships with NGOs, and recommending compliance measures to the CNDH (Open Society, 2010: 86).

While these presidential decrees were extremely important in improving Peru’s relationship with the Inter-American System, it is noteworthy that these executive decrees are dependent on executive policy to remain effective. In 2002, the Peruvian Congress passed Law No. 27775 regulating the procedure for the execution of judgments emitted by regional and international tribunals. Under this law, the Ministry of Foreign Affairs should first send the tribunal’s decision to the Peruvian Supreme Court, which then should send it to the appropriate national court for implementation. The law also contemplates a procedure for the resolution of conflicts between national law and the decisions of regional or international courts (Open Society, 2010: 86).

This type of legislation provides a useful guide for advocates to follow once an Inter-American Court decision is issued. While no Peruvian case has been fully implemented to date, this legislation seems to have improved the country’s implementation record. From 1996 to 1999, Peru had not submitted a single compliance report on Inter-American Court judgments. By 2000, it had almost fully complied with one decision and had undertaken efforts to comply with the Court’s orders in six cases (Open Society, 2013: 45).

Increased coordination among government actors:

The United Kingdom

In the early 2000s, the United Kingdom began to develop a formal relationship with the European Court of Human Rights through coordinated efforts by all three government branches to improve the implementation of Court decisions and increase compliance with Convention norms. The United Kingdom's domestic approach to the execution of judgments now involves improved communication and coordination between relevant actors (Open Society, 2013: 44). The Ministry of Justice has taken a lead role in the execution of judgments, as a "light touch coordinator for the implementation of adverse judgments" (Open Society, 2013: 44). This means that the Ministry is responsible for coordinating information between relevant departments in certain cases and then transmitting this information to the Foreign and Commonwealth Office and to the State's COE delegates (Open Society, 2013: 44). As part of this coordinated approach, the UK has developed an implementation form advising key departments on how complete the action plan, in addition to ensuring that the COM and Foreign and Commonwealth Office have the necessary information (Open Society, 2013). The form also contains information on how to communicate with the Ministry of Justice and other relevant ministries (Open Society, 2013: 44). The form requires the identification of a lead department, lead minister, lead department lawyer, and lead policy official (Open Society, 2013: 44, appendix 158). Poland and the Netherlands have similar forms called the "algorithm" and the "blue letter," respectively (Open Society, 2013: 44).

Ad hoc inter-ministerial committees:

Poland and Romania

Ad hoc inter-ministerial committees are useful in bringing together key State officials from various State agencies, who need to be involved with the case to provide an effective remedy to ESCR violations. These committees can help resolve a specific case or can become a more permanent forum to help address various cases. In 2010, Romania established a working group to develop a policy response to over 700 petitions filed at the European Court involving property that had been nationalized during the communist period (Open Society, 2013: 50). This was a committee working to resolve a specific case. Other committees can become more permanent and work on resolving cases over a longer period. For example,

in 2006, Poland established an inter-ministerial task force made up of experts from 14 ministries, including finance, economy, construction issues, labor and social policy, treasury, justice, interior and administration, foreign affairs, transport, and health (Open Society, 2013: 46-47). In 2007, the task force submitted an action plan to improve the implementation of European Court judgments and prevent new violations (Open Society, 2013: 46-47). The action plan focuses on rules that have led to many repeat cases, including the length of domestic proceedings, and addresses implementation issues regarding pilot judgments against Poland (Open Society, 2013: 46-47).

Pilot judgments

Since 2004, the European Court of Human Rights has used pilot judgments, such as the one used in *Broniowski v. Poland* discussed in section 3, to address repeat violations. These cases often involve systemic problems within the State that violate the ESCR of a large group of people. The Court's former president, Luzis Wildhaber, identified eight possible features of a pilot judgment: (1) the finding of a violation by the Grand Chamber that demonstrates a problem affecting the rights of a group of individuals, (2) a finding that the aforementioned problem has or may cause many petitions on the same matter to be filed before the European Court, (3) a decision of the Court to advise the State regarding general measures to help resolve the problem, (4) an indication that such general measures apply retroactively to other similar cases, (5) the Court's dismissal of all other pending cases regarding the same issue, (6) use of the operative paragraphs of the judgment to "reinforce the obligation to take legal and administrative measures," (7) a suspension of orders regarding individual or just satisfaction until the State takes steps to address the underlying issue, and (8) updates to the Council of Europe regarding progress in the case (Buyse, 2009: 2). While not all pilot judgments contain all of these features, at a minimum they involve specific orders to address a systemic problem that has or will cause widespread rights violations.

Pilot judgments are also unique because the European Court retains monitoring jurisdiction in the case and because the State must report back to the Court regarding the measures it has taken to implement the judgment and remedy the violations. Only after the Court is satisfied that adequate measures have been taken will it transfer supervision of the judgment to the COM (ECtHR, *Wolkenberg and others*, 4 December 2007

(Appl.no. 50003/99), para. 76 in Buyse, 2009: 5). Since issuing the *Bug River* judgment in 2005, the Court has used pilot judgments with growing frequency. In 2012, the Court issued eight pilot judgments (Council of Europe, 2013: 139-140).

Encouraging friendly settlements

As discussed in previous sections, the Inter-American Commission on Human Rights has the power to facilitate friendly settlements between States and petitioners in individual cases. In these cases, the Commission acts as a mediator between the two parties and helps them reach a mutually acceptable agreement regarding reparations and non-repetition measures. Once such an agreement has been reached, both parties sign it, and it becomes binding upon the parties. If the State fails to comply with a friendly settlement, the Commission may refer the case to the Inter-American Court. Friendly settlements offer some of the advantages of meaningful engagement discussed above. The presence of the Commission and the petitioners' representatives helps correct power imbalances. Furthermore, as with meaningful engagement, the State participates in determining acceptable reparation measures and is free to help decide what form these measures will take. The hope is that through its participation, the State will be more likely to abide by this type of agreement—as opposed to a court order, which may be more politically or institutionally difficult to implement.

Borrowing from domestic courts

Like domestic courts, regional and international tribunals can retain jurisdiction over cases to monitor the State's compliance and help encourage implementation of their decisions. Both the European and the Inter-American Courts of Human Rights have adopted this strategy, although in different forms.

Two-track monitoring: As mentioned above, in the European Human Rights System, the COM is responsible for monitoring the implementation of the Court's judgment once the respondent State has developed an action plan. Since 2011, the COM has used a two-track system for managing cases: standard monitoring and enhanced monitoring (Cali and Bruch, 2011: 13). Unless the case presents special concerns, it is automatically placed on the standard track, in which the Secretariat assumes responsibility for the implementation process, working with the State to ensure implementation (Cali and Bruch, 2011: 13). On the standard track, the

COM does not take an active role in implementation and merely makes formal decisions, such as acknowledging the receipts of reports (Cali and Bruch, 2011: 13).

Cases that require urgent individual measures, pilot judgments, and cases that reveal major structural or complex problems are placed on the enhanced track (Cali and Bruch, 2011: 14). Under this system of monitoring, the COM takes an active role (Cali and Bruch, 2011: 14). During its four annual human rights meetings, the COM reviews any progress made by the State, urges the State to take necessary actions, and sets timetables for compliance (Cali and Bruch, 2011: 14). The Secretariat also plays a more proactive role, providing technical assistance to the State in the development of the action plan, determining necessary actions, and developing bilateral or multilateral programs (Cali and Bruch, 2011: 14). Additionally, when cases on the enhanced track suffer delays or obstacles in implementation, a member State or the Secretariat may propose an oral debate on implementation in which the State explains problems related to implementation to the COM (Cali and Bruch, 2011: 14).

A member State or the Secretariat may propose that a case on the standard track be moved to the enhanced track at any time during the implementation process (Cali and Bruch, 2011: 14). Additionally, a case may be moved to the enhanced track if the State fails to provide action plans or action reports, if there is a disagreement between the State and the Secretariat regarding necessary implementation measures, or if there is a serious delay in implementation (Cali and Bruch, 2011: 14). On the other hand, if a case on the enhanced track demonstrates considerable implementation progress, it may be moved to the standard track (Cali and Bruch, 2011: 14).

Compliance orders: Unlike the European Court, the Inter-American Court of Human Rights retains monitoring jurisdiction in every case in which it issues a decision. The Court does not rely on the Commission or other OAS bodies to monitor implementation, which makes monitoring compliance one of the most time- and resource-consuming tasks of the Court. As discussed in section 1, one of the ways the Court encourages implementation is through compliance orders. We have briefly discussed the usefulness of compliance orders to set deadlines regarding the implementation of court orders. But compliance orders do more than serve to set deadlines—the Court has also used them to require parties to take actions that it deems necessary to achieve compliance with a decision. The

Court may use compliance orders to focus on issues of particular concern or to put more pressure on a State by increasing its reporting requirements (Open Society, 2010: 82-84). For example, in a case against Guatemala, the State agency representing Guatemala before the Inter-American Court informed the Court that it was unable to implement certain aspects of a decision because the domestic entities necessary for implementation refused to respond to the agency's requests. In response, the Court used a compliance order obligating Guatemala to name the State agents who would serve as interlocutors for implementation of the orders (*Case of Molina Theissen v. Guatemala, Monitoring Compliance with Judgment, 2009: operative para.3-5*).

Working with State actors through meaningful engagement: In recent years, the Inter-American Court of Human Rights has begun to hold compliance hearings to provide parties with the opportunity to present their evidence and arguments orally (Inter-American Court, 2010: 6). The Court began holding public hearings in 2009 and has since made them standard practice (Inter-American Court, 2010: 65). Around the same time, the Court began to hold hearings for multiple cases from the same country with similar reparations orders. This innovation was incorporated into the Court's Rules of Procedure as part of the Court's 2010 reforms. In each type of hearing, the Court seeks to establish agreements between the parties, suggesting alternatives for problem resolution, encouraging compliance, and calling attention to incidents of non-compliance. The Court encourages the State and petitioners to work together to establish timetables for implementation (Inter-American Court, 2013: 25).

NGOs

NGOs can and have successfully used many of the strategies outlined above. The case studies that we have described show many instances where NGOs have used these strategies to effectively encourage State implementation of court decisions. The success of any strategy depends on the interests, strengths, capacity, and goals of the NGO. In order to have a maximum impact, it is best for NGOs to coordinate and combine strategies with State and non-State actors.

Civil society mobilization

Perhaps the most obvious role for NGOs is in ensuring civil society mobilization around the implementation of favorable ESCR decisions. As demonstrated by the Right to Food Campaign case in India described

above, effective mobilization ensures that rights holders know their rights and demand them. Civil society mobilizations are crucial for increasing public support and providing vital information to decision makers from the ground level. Mobilization can take many forms. It may consist of conducting a "know your rights" campaign to create greater public awareness around ESCR cases; participating in media campaigns to ensure that underlying social issues involved in case are included in the public discourse; organizing protests and marches; or, as the Right to Food Campaign did, employing a combination of all of these. The Right to Food Campaign prepared and published primers on Supreme Court orders, entitlement schemes, and accessing information from the government in various languages and easy-to-read and understand terms, which it distributed throughout the country (Birchfield, 2010: 723). It also maintained a website containing information on events, the Supreme Court's orders, and articles and reports regarding the right to food (Birchfield, 2010: 723). The Campaign created alliances with other NGOs working on similar issues, and advocated at all levels of the government (Birchfield, 2010: 724).

Become experts for the court

Several of the strategies outlined above involve the use of expert commissions and indicators. Although it is up to a court to decide whether to use such strategies, the court often lacks the expertise and resources to form a commission or use indicators on its own; it depends on third-party experts to undertake such work. Thus, an important role for NGOs is to become experts for the court or decision making body charged with implementing a court decision.

In the Colombian case regarding IDPs, the Monitoring Commission was made up of members from several Colombian NGOs who were experts on the issue of IDPs in Colombia. Their knowledge, commitment, and expertise ultimately led the Constitutional Court to rely heavily on their information and opinions (Uprimny and Sánchez, 2010: 301-302). Although the NGOs involved were never official parties to the case, their constant presence and invaluable information made them indispensable to the implementation process. Similarly, NGOs with the knowledge of and capacity to use indicators in monitoring human rights implementation should consider presenting that information to courts in relevant cases, in order to demonstrate their usefulness to the court.

National Governmental Human Rights Institutions

Many of the strategies available to NGOs are also applicable to national governmental human rights institutions. Like NGOs, they can become experts on topics related to the implementation of ESCR, including human rights indicators, budget analysis, and public policy analysis. Government human rights institutions can contribute unique insights, for, as part of the State, they are insiders to the implementation process. They may have contacts with other relevant government institutions and agencies, which they can use to press for implementation.

When a court issues a ruling in an ESCR case, the decision may seem straightforward enough: change a certain program, ensure potable water to a certain area, provide healthcare to certain individuals or groups. Yet the actual implementation of that decision may involve various agencies and actors who do not appear before the court and may not have communication with one another. By developing implementation roadmaps for domestic courts, national governmental human rights institutions may be able to help avoid institutional bottlenecks or situations in which no one claims responsibility because everyone is partially responsible. These roadmaps should identify the key agencies and actors needed to implement the decision and help coordinate these agencies. Governmental human rights institutions can also serve as liaisons between relevant government agencies and actors and can keep the court informed about whether these actors are doing their part.

Governmental human rights institutions may serve a similar role at the regional or international levels. As we identified above, a challenge to implementing decisions from regional or international human rights bodies is the disconnect between the State actors representing the State before the tribunal and national authorities who can actually implement the decision at the domestic level. Thus, a useful role for governmental human rights institutions, if a State allows it, is to liaise with regional and international organs, even if informally. These governmental human rights institutions should stay informed of new regional or international decisions and recommendations and inform the relevant domestic actors of their responsibilities regarding the implementation of these decisions. They can also provide regional or international bodies with roadmaps similar to those mentioned above to ensure that recommendations or orders identify the correct agency or actor. Guatemala's case before the Inter-American Court, mentioned above, is a good example of such a strategy. It was only

after Guatemala's Presidential Commission for Coordinating Executive Policy on Human Rights informed the Court that the State was refusing to respond to the Presidential Commission's requests that the Court was able to direct its orders to the relevant actor. Had the Court known which entity was responsible for which aspects of its orders, it could have included this information in initial orders before non-compliance became an issue.

Conclusion

In this document, we have examined the challenge of implementing ESCR decisions at the domestic, regional, and international levels. First, we have considered various factors that influence the implementation of ESCR decisions and have provided an overview of existing implementation mechanisms in regional and international law. Second, we have used case studies to illustrate aspects of successfully implemented decisions at the domestic, regional, and international levels. Finally, based on the successful case studies, we have outlined several implementation strategies that may be useful to domestic courts, regional and international courts, civil society, and human rights institutions.

For many petitioners in ESCR cases, the courts are their last hope. They see their legal case as the only way to ensure that their rights will be respected and that violations will not continue. While there is a growing jurisprudence in favor of ESCR, unfortunately many of the victories remain solely on paper and have yet to transform the realities of those whose rights have been violated. We hope that the mechanisms and strategies outlined in this document encourage domestic courts, regional and international courts, civil society, and human rights institutions to keep looking for new ways to implement ESCR decisions. The challenge of implementing ESCR decisions requires creative and intelligent solutions so that these rights can become a reality, and not just an aspiration.

References

- African Commission on Human and Peoples' Rights, (2013) 32nd and 33rd Annual Activity Report
- Baluarte, David C., (2012) "Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives." *American University of International Law Review*. 27.2: 263-321
- Birchfield, Lauren and Jessica Corsi, (2010) "Between Starvation and Globalization: Realizing the Right to Food in India." *Michigan Journal of International Law*. 31: 691-764
- Buyse, Antoine, (2009) "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges." *Greek Law Journal*. 1-15
- Caflich, Lucius, (2006) "The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond." *Human Rights Law Review*. 6:2: 403-415
- Cali, Basak and Nicola Bruch, (2011) *Monitoring the Implementation of Judgments of the European Court of Human Rights: A Handbook for Non-Governmental Institutions*. London: University College
- Chemerinsky, Erwin, (2008) "The Essential but Inherently Limited Role of the Courts in Prison Reform." *Berkeley Journal of Criminal Law*. 12.2: 307-317
- Corasantiti, Victor, (2009) "Implementación de las sentencias y resoluciones de la Corte Interamericana de Derechos Humanos: un debate necesario." *Revista IIDH*. 49: 13-28
- Council of Europe, (2013) *Annual Report 2012 of the European Court of Human Rights*. Strasbourg: Council of Europe
- Dejusticia, ESCR-Net, University of Oslo, "Informe del simposio internacional sobre cumplimiento de sentencias sobre derechos ESC." Bogotá, Colombia, 6-7 May 2010
- Ferraz, Octavio, (2011) "Health Inequalities, Rights and Courts: The Social Impact of the 'Judicialization of Health' in Brazil," in Yamin and Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* Harvard University Press
- González-Salzburg, Damián, (2010) "The Effectiveness of the Inter-American Human Rights System: A Study of the American States' Compliance with the Judgments of the Inter-American Court of Human Rights." *International Law, Revista Colombiana de Derecho Internacional*. 115-142
- Graham, Nora, (2011) "The Right to Food in India: From 'Parchment Victories' to Legal Enforcement: Utilizing the Judicial System to Gain Social and Economic Rights." Political Science Senior Thesis. Haverford College
- Grossenbacher, Karla, (1992) "Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist." *Georgetown Law Journal*. 80: 2227-2258
- Hawkins, Darren and Wade Jacoby, (2011) "Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights." *Journal of International Law and International Relations*. 6.1: 35-85
- Hillebrecht, Courtney, (2012) "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights." *Human Rights Law Review*. 13: 279-301
- Hirsch, Danielle Elyce, (2007) "A Defense of Structural Injunctive Remedies in South African Law." *Oregon Review of International Law*. 9.1: 1-65
- Human Rights Law Network, "PUCL vs. Union of India & others." Socio Legal Information Centre <http://www.hrln.org/hrln/right-to-food/pils-a-cases/255-pucl-vs-union-of-india-a-others-.html>
- Inter-American Commission of Human Rights, (2002) *2001 Annual Report*. OEA/Ser./L/V/II.114 <https://www.cidh.oas.org/annualrep/2001sp/indice.htm>
- Inter-American Court of Human Rights, (2010) *2009 Annual Report*. <http://www.corteidh.or.cr/tablas/26530.pdf>
- Inter-American Court of Human Rights, (2013) *2012 Annual Report*. OEA/Ser.L/V/II.147 Doc. 1. http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf
- Kovaleski, Serge F., "Jail Medical Services Are Returned to D.C. Control: Judge Cites Progress and Ends Receivership." *The Washington Post* 19 September 2000. <http://www.washingtonpost.com/wp-srv/WPcap/2000-09/19/034r-091900-idx.html>
- Krsticevic, Viviana, (2007) "Reflexiones sobre la ejecución de sentencias de las decisiones del sistema interamericano de protección de derechos humanos." Krsticevic, Viviana, and Liliana Tojo. *Implementación de las Decisiones del Sistema Interamericano de Derechos Humanos: Jurisprudencia, Normativa y Experiencias Nacionales*. Buenos Aires: Centro por la Justicia y el Derecho Internacional
- Langford, Malcolm, Ben Cousins, Jackie Dugard and Tshepo Madlingozi, T. (eds), (2013) *Socio-Economic Rights in South Africa: Symbols or Substance?*. Cambridge University Press

- Langford, Malcolm, Julieta Rossi and César Rodríguez-Garavito. Forthcoming.
- Mbazira, Christopher, (2008) "You Are the 'Weakest Link' in Realising Socio-Economic Rights: Goodbye; Strategies for Effective Implementation of Court Orders in South Africa." *Socioeconomic Rights Project*. Community Law Project of the University of the Western Cape
- Open Society Justice Initiative, (2010) *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*. New York: Open Society Foundations
- Open Society Justice Initiative, (2013) *From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions*. New York: Open Society Foundations
- Pillay, Anashri, (2012) "Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement." *Journal of International Constitutional Law*. 10.3: 732-755
- Ray, Brian, (2009) "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy." *Cleveland State University*
- Rodríguez-Garavito, César, (2011) "Beyond the Courtroom: The Impact of Judicial Activism on Socio-Economic Rights in Latin America." *Texas Law Review* 89 (7)
- _____. "The Judicialization of Health: Symptoms, Diagnosis, and Prescriptions," (2013) in Peerenboom, Randall & Tom Ginsburg, eds. *Law and Development of Middle-Income Countries*. Cambridge University Press
- Rodríguez-Garavito, César and Diana Rodríguez-Franco, (2010) *Cortes y cambio social: cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia*. Dejusticia
- Rodríguez, Cesar and Diana Rodríguez Franco, (2010) "El Contexto: El desplazamiento Forzado y la Intervención de la Corte Constitucional (1995-2009)" in César Rodríguez Garavito (Coord.). *Más Allá del desplazamiento: Políticas, derechos y superación del desplazamiento forzado en Colombia*. Bogotá: Universidad de los Andes
- Shaver, Lea, (2010) "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?" *Washington University Global Studies Law Review*. 9.4: 639-676
- Sood, Avani Mehta, (2006) *Litigating Reproductive Rights: Using Public Interest Litigation and International Law to Promote Gender Justice in India*. New York: Center for Reproductive Rights
- Supreme Decree no. 015-2001-JUS, Approve the Regulations of the National Human Rights Advisory and Create the Special Commission to Follow-Up on International Procedures. 27 April 2001
- Tushnet, Mark, (2011) "Reflections on Judicial Enforcement of Social and Economic Rights in the Twenty-First Century." *NUJS Law Review*. 4: 117-187
- United Nations Office of the High Commissioner on Human Rights (UN OHCHR), (2012) *Human Rights Indicators: A Guide to Measurement* http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf
- United Nations Office of the High Commissioner on Human Rights, (2007) *Using Indicators to Promote and Monitor the Implementation of Human Rights: Some Questions and Answers. Background Material*, Asian Sub-regional Workshop, New Delhi, 26-28 July 2007
- Uprimny, Rodrigo and Mauricio García Villegas, (2004) "Corte Constitucional y emancipación social en Colombia," in Boaventura Santos and Mauricio García (eds.). *Emancipación social y violencia en Colombia*. Editorial Norma.
- Uprimny, Rodrigo Yepes and Nelson Camilo Sánchez, (2010) "Juzgar y medir: el uso de indicadores de derechos humanos por la Corte Constitucional colombiana" in Abromavich, Víctor and Laura Pautassi. *La medición de derechos en las políticas sociales*. Buenos Aires
- Van der Berg, Shanelle, (16 November 2012) "Conceptualising Meaningful Engagement in South Africa: Eviction Cases' Exclusive Gem?" *Oxford Human Rights Hub*. <http://ohrh.law.ox.ac.uk/?p=621>
- Ventura Robles, Manuel E, (2006) "La Supervisión del cumplimiento de sentencias en el Sistema Interamericano de Protección de los Derechos Humanos." *Proceedings of the XXIV Congreso, Granada, Spain, September 11-16, 2006*. Ed. Secretaría General. Madrid.
- Viljoen, Frans and Lurette Louw, (2007) "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994-2004." *American Journal of International Law*. 101.1: 1-34
- Weingart, Liat, (2010) "Receiverships in the Prison Litigation Context: Factors Necessary for an Effective Judicial Remedy of Last Resort." *Cardozo Public Law, Policy and Ethics Journal*. 9: 193-227
- Yamin, Alicia and Siri Gloppen, eds., (2011) *Litigating Health Rights: Can Courts Bring More Justice to Health?* Harvard University Press

• WORKING PAPER 1

Addicted to Punishment:

The disproportionality of drug laws in Latin America

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