

Remedies under the Inter-American System

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Implementation of court decisions.

The level of implementation of judgments in the Inter-American Human Rights System is highly connected to monetary reparation measures, and with the legislative reform measures already mentioned. In both cases, some preliminary studies done on the basis of the surveys of compliance with judgments contained in the annual reports of the Inter-American Commission on Human Rights (IACHR) suggest that the highest level of compliance is found within the framework of amicable settlement processes, in which the State autonomously undertakes commitments of this nature.

There are problems of non-compliance with both the IACHR's recommendations and the Inter-American Court of Human Rights' judgments in connection with *criminal investigation of state crimes*, in particular when domestic prosecutions have been closed and reopening the case might affect the rights of the accused. In some countries, there is a serious deterioration of the court systems with widespread impunity not limited to cases of human rights violations. We have seen how the Inter-American Human Rights System has examined structural impunity patterns to nullify court decisions that attempt to put an end to investigations of these types of crimes in general with the purpose of favoring powerful groups and to the detriment of certain groups of victims.¹

Also defective is the compliance with positive obligations with a collective scope imposed on States, for example, changes to policies, or implementation of measures for the protection of groups, organization of social services, public services, or the supply of goods to groups or communities, including the recognition of titles or collective rights.

It is worth noting that there is no in-depth discussion in the Inter-American Human Rights System, or in the legal community, accompanying decisions about the *type of remedies* available as reparations resulting from court cases, or within the framework of precautionary or provisional measures. Very often the remedies awarded are based on suggestions made by the petitioners or representatives of the victims, without there being consistent case law.

Another problem is that the system continues to conceptualize and devise remedies under the model developed in the transition period, putting more emphasis on fact-

¹ In *Carpio Nicolle vs. Guatemala*, the Inter-American Court of Human Rights considered the notion of "apparent or fraudulent double jeopardy" based not only on the circumstances of the court case under analysis but also on the presence of a "systematic pattern of impunity" of certain State crimes. Here again is a perspective that aims at looking at inequalities in the application of the criminal law for the benefit of certain privileged sectors or to the detriment of other subdued social sectors. In this case, inequality before the law serves as the grounds for the nullification of the court decision whereby the case would be closed and it makes it possible to question the principles of double jeopardy and *ne bis in idem*. See the comprehensive paper by Viviana Krsticevic, "Reflexiones sobre la Ejecución de las Decisiones del Sistema Interamericano de Protección de Derechos Humanos", in Tojo, L. and Krsticevic, V. (coordinators), "Implementación de las Decisiones del Sistema Interamericano de Derechos Humanos. Jurisprudencia, Normativa y Experiencias Nacionales", CEJIL, Buenos Aires, p. 15-112

finding and determination of who the perpetrators of the violations are, than on changing the structural problems that such violations expose. This system of classical remedies does not fully match the type of conflicts encountered in the new agenda of equality and collective rights to which we made reference above. Especially when the Inter-American Human Rights System not only decides on events which occurred in the past but also seeks to prevent damages or the worsening of ongoing situations, or tries to influence the reversal of systematic patterns or overcome institutional deficiencies.

When the Court has provided remedies of a structural or collective nature aimed at altering current policies or practices, the weakness of the monitoring systems and implementation mechanisms has been made evident. The rationale of the remedies provided resembles that of remedies resulting from domestic litigation over structural reform. In these types of cases, an attempt is made to strike a balance between numerous conflicting interests and give the government some margin to define measures, presenting medium- and long-term action plans, in addition to protecting access to information and ensuring victims' and their representatives' participation in the processes whereby such policies are designed². Such remedies, which are in themselves problematic in domestic courts, prove to be even more difficult to implement when they come from international tribunals, if they do not have an adequate procedural system and the assistance of local authorities. The persistence of low levels of effectiveness of these types of structural remedies may lead to rethinking the entire Inter-American Human Rights System, and may entail costs in terms the Court's legitimacy. The truth is that the Inter-American Human Rights System has embarked on the development of a structural litigation model for the protection of groups without having first honed and discussed in depth the limits or potential of its procedural rules³, its system of remedies and its mechanisms to follow up and monitor decisions.

This, in my opinion, has been made most evident within the framework of the Court's provisional measures in connection with prison systems. These cases relative to the existence of inhumane detention conditions and practices of structural violence tolerated by state and federal authorities work as a sort of international collective "habeas corpus". In such cases, there has been an interesting debate about the types of remedies needed and international and domestic monitoring mechanisms. The Court, at the request of petitioners and the Commission, has been gradually changing the types of remedies imposed on the federal State and, through it, on the provincial states, but adequate compliance with the orders issued has not been achieved yet.

This implementation problem is also seen in connection with decisions of the Inter-American Court of Human Rights in provisional measures for the protection of social groups exposed to situations of violence. Such protection measures derive from the

² See Sabel, C. and Simon, W. "Destabilization rights: How Public law litigation succeeds", in Harvard Law Review, 117:1016, 2004. Gauri, Varun and Brinks, Daniel M., "A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World", in Gauri, Varun and Brinks, Daniel M. eds. "Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World. New York: Cambridge University Press. 2008. Víctor Abramovich, "El Rol de la Justicia en la articulación de políticas y derechos sociales", in V. Abramovich and L. Pautassi (compilers), "La Revisión Judicial de las Políticas Sociales. Estudio de casos". Editores del Puerto, Buenos Aires, 2009, p.1-91.

³ For example, there is a debate about the degree of precision required in identifying victims in collective cases. In all cases it is necessary to name each person affected, or else, the Inter-American Human Rights System, which started addressing structural patterns and the recognition of "group rights", should adapt its procedures to the new agenda and accept the identification of groups or "classes" of victims, in particular at the stage of reparations and within the framework of precautionary measures. The risk is to fall into a certain schizophrenia, or the development of conflicting positions, between case law in equality cases and decisions related to procedure.

obligation to respect and guarantee certain cultural rights of ethnic groups, for example, restrictions imposed on certain military activities to protect the integrity of indigenous people's and collective territories of black communities' in Colombia, and to protect community leaders and territory against non-state actors, in addition to the obligation to provide certain differentiated and culturally relevant social services⁴. The enforcement of Court decisions in cases relative to indigenous peoples also presents the same kind of problems. In such cases, the Court ordered the demarcation and the granting of titles for community territories and imposed on the State the obligation to provide basic social services⁵.

It is worth noting some issues that should be included in an agenda for discussion about the enforcement of remedies in collective procedures.

1. No significant progress has been made in terms of domestic mechanisms for the implementation of decisions issued by the Inter-American Human Rights System organs⁶. The Convention stipulates that the Inter-American Court's judgments are binding and they are to be executed in accordance with a procedure governing execution of judgments. The existence of an execution system in domestic courts would be essential for the implementation of certain decisions about social rights, for example, the reinstatement of dismissed workers or the collection of labor credits or pensions with the possibility of attachment of State assets. In this sense, only the domestic courts have jurisdiction to issue these types of execution measures.

2. The processing of an international case and compliance with the reparation measures imposed requires a high degree of coordination among different government agencies, which is not usually achieved. This significantly hinders the processing of the case, the work of the Inter-American Human Rights System organs and enforcement of decisions. Coordination inside of the relevant government is complex, but more so is coordination between the government and Parliament or the Judiciary, when the measures involved in a case require legal reforms or court processes. Things are even more difficult when it comes to coordination between agencies of the national government and those of provincial governments in federal systems. In general, the agencies that litigate cases on behalf of the State are linked to the Ministries of Foreign Affairs or specific human rights departments that operate within the framework of, for example, the Ministries of Justice (Argentina, Brazil), Education (Uruguay) and sometimes the Office of the Vice-president (Colombia or Guatemala). Implementation of decisions relative to social services is the job of the Ministries of the Economy or Social Action, which are not directly involved in the litigation, nor are they familiar with the Inter-American Human Rights System or the positions of the State. Some States engage at an early stage -even while the case is being heard by the Inter-American Court- all the government agencies concerned with the litigation so that they provide specific technical information and so that they are jointly responsible for the position of the State in the international arena. In general, coordination is done based on ad-hoc rules designed on a case by case basis, depending on which are the competent

⁴ See the Inter-American Court of Human Rights' provisional measures in the case of the Kankuamo indigenous people and of the African-Colombian communities of Jiguamiandó and Curbaradó, among many others. To illustrate the type of collective situations mentioned within the framework of the Colombian armed conflict, see also IACtHR; "*Informe sobre la visita al terreno en relación con las medidas provisionales ordenadas a favor de los miembros de las comunidades constitutivas por el Consejo Comunitario del Jiguamiandó y las familias del Curbaradó, Municipio del Carmen del Darién, Departamento del Chocó, República de Colombia*", November, 2008.

⁵ The Court ordered the provision of certain essential health, water and education services to an indigenous community evicted from their collective territory in *Sawhoyamaxa vs Paraguay*, November 29, 2006, and subsequent decisions to supervise enforcement.

⁶ Colombia and Peru have enacted rules about inter-governmental implementation and coordination, which are models to be considered.

agencies. Few countries have adopted stable institutional systems that set inter-agency coordination rules for human rights matters and, in particular, for the management of international litigation. For example, Colombia has a coordination mechanism that is worth analyzing. Peru has also recently created a prosecutorial unit for the legal defense of the State in international systems, the role of which is to coordinate agencies in the framework of cases.

When the implementation of decisions requires the intervention of the courts, the action of agencies of the Executive branch face the obvious limitation of the independence of the Judiciary. Judiciary officials are usually part of the delegations and participate in the hearings of cases and also in follow-up hearings. This is usual practice in Colombia and Guatemala in cases that demand criminal investigation of crimes.

The coordination of federal and state agencies is much more complex in those countries that have a federal system of government, like Mexico, Brazil and Argentina. Coordination problems and some strategies developed to solve them may be observed in cases about overpopulation of prisons in Brazil and Argentina, and even in the execution of an amicable composition agreement about the implementation of a protocol for non-punishable abortions in Baja California, in Mexico, in the *Paulina* case. Since in these types of cases the implementation of decisions, from the international perspective, concerns the federal State only, it is common for local authorities to take no notice of the litigation and the resulting judgments. There are no mechanisms to involve the local levels in these types of cases. Petitioners and the federal governments themselves have on occasion resorted to the federal courts to request compliance measures from provincial governments relative to judgments or provisional measures issued by the Inter-American Court of Human Rights

In the coordination among State agencies, the civil society organizations involved in the litigation of a case have an important role to play in terms of negotiation and supply of information about the conflict under analysis in each case. As has been said, it is common for many organizations to litigate cases in the Inter-American Human Rights System to promote changes in public policies, which entails a willingness to negotiate and interact with governments and State agencies. This scenario has facilitated amicable composition agreements and even the development of discussion tables during the processes of execution of the Inter-American Court's judgments.

4. The Commission and the Court submit a report before the OAS Assembly about non-compliance, but the time they have to propose and set in motion the State's collective guarantee mechanisms is minimal. Nor is there a serious debate within the system about how to improve compliance mechanisms of a political nature and how to achieve a higher degree of commitment from the various OAS organs.

5. As regards the system to follow up decisions, so far, the most effective mechanism to achieve results in terms of compliance has been the creation of international supervision mechanisms, like *follow-up hearings before the Commission or the Court*. Many organizations that represent victims prefer these international monitoring mechanisms to domestic execution systems, since they understand that going back to the domestic level means bringing the victims back to a situation of imbalance of power vis à vis the State, which may be avoided only by the intervention of the international body⁷. The follow-up hearings before the Inter-American Court are usually as formal as a trial hearing. The advantage of this is that States are obliged to adopt formal

⁷ See M. Abregú and O. Espinoza, "La Eficacia de la Comisión Interamericana de Derechos Humanos y la Aplicación de sus Decisiones por los Estados Parte", in V. Abramovich, A. Bovino and C. Courtis, op. cit. p. 191-216.

positions that involve all the relevant government agencies, which sometimes facilitates the efforts of the agencies engaged in compliance to involve those that are more reluctant. These hearings often force petitioners and the State to hold regular working meetings in the countries to exchange information about the progress made in the implementation of judgments and decisions, with the purpose of presenting their viewpoints to the Court. In the hearings held at the Court it is common for the parties to put forth the commitments made at the meetings previously held in the countries. Such negotiation tables for implementation serve as negotiation fora but also, with the Court acting as a third party that will assess the final agreements resulting from the settlements reached, they somehow overcome the imbalance of power between victims and the government. They could be described as *supervised working meetings* with the ultimate intervention of the international tribunal before which the parties must appear. In this regard, it is important to hold these types of formal hearings before the Court in order to set processes in motion and require submission of updated information about the evolution of the processes. *Public coverage* of hearings by the press and in some cases by an Internet system, as is the case with hearings before the IACtHR, would make it easier to put pressure on States to provide information and account for the progress made. Such hearings could serve as an accountability mechanism.

The Court adopts *compliance resolutions* that serve as interlocutory orders and which in the case of complex collective remedies are essential to gradually provide more precision to and adjust the general orders established in judgments of cases or in the initial provisional measures. Such interlocutory resolutions also establish important duties regarding the provision of information and deadlines to comply with each particular order. This makes it easier to organize the judgment execution process and retrieve the positions adopted by the parties in their written reports and their presentations during follow-up meetings.

The Court recently started adopting the system of *working meetings for the follow-up of judgments* that the IACtHR had been using. It is a more informal mechanism that favors open and straightforward negotiation and dialogue, in particular about problems related to implementation and coordination, which governments refuse to discuss in public fora. This system also encourages Court judges to play a mediating role, by allowing them to more freely voice their opinions about the evolution of processes.

Regarding compliance with its precautionary measures or recommendations, the IACtHR has the possibility of holding informal follow-up meetings in the countries, with the presence of the countries' Rapporteurs. Holding such working meetings in the countries facilitates the participation of victims and organizations, as well as of the relevant State agencies responsible for implementing orders, all of which expedites implementation of decisions. However, the IACtHR has refused to have an active involvement in the implementation of the Court's final decisions.

5. An issue open for debate is whether these types of international supervision measures can be effective without the active involvement of the domestic judicial system and of national public agencies that are in the position to assess and monitor the situation on the ground. Precisely in cases about the prison system in Argentina and Brazil, as was said before, the federal government and petitioners resorted to the supreme courts of the federal State so that they would urge provincial states to provide information and undertake the pending public policy reforms.⁸. In the case of Urso

⁸ See the case "Lavado, Diego Jorge y otros vs. Provincia de Mendoza sobre acción declarativa de certeza". Supreme Court of Argentina. September 6, 2006. The Supreme Court of Argentina discusses the

Branco in Brazil, the Federal Court Supreme, at the request of the prosecutor and the organizations that are the petitioners in the international case, are discussing federal intervention in the State of Rondônia due to the situation of the prison system and based on decisions of the Inter-American Court. With the processing of the international case and the file to decide federal intervention, federal mechanisms have been set in motion and they are now more prone to intervening in matters related to prison policy, which under the Constitution is within the jurisdiction of sub-national governments. One important element to be noted is the fact that in these two cases, the involvement of the national supreme courts was not the result of a request for help or cooperation by the Inter-American Court, but, rather, the parties in the international litigation resorted to the domestic courts to unlock the execution process.

6. On occasion it is necessary for local actors to participate as impartial assistants to the Inter-American Court, submitting relevant information about the state of play and progress in terms of compliance with judgments. It is not a usual practice of the Inter-American Court of Human Rights to request such assistance and there are no procedural rules expressly providing for such participation at the stage of judgment execution, nor are there rules prohibiting it. In cases of structural litigation, the Argentine Supreme Court and the Colombian Constitutional Court engaged autonomous government agencies, and universities and research centers at the stages of execution so that they would provide statistical data, censuses, technical studies about the situation under analysis, and even so that they would assess the reasonableness of the programs and policies put forth by governments as strategies for compliance with court orders. This participation of independent experts is key due to the technical complexity of the issues and because claimants and the Inter-American Court do not always have the technical resources needed to produce and evaluate information about structural situations and public policies.

Within the framework of the Inter-American Human Rights System, the Court has on occasion requested the IACtHR to make use of its power to observe and diagnose situations on the ground, as in the provisional measures relative to prisons in the province of Mendoza, Argentina, as well as in the provisional measures about the Jiguamiandó and Curvaradó communities in Colombia. The problem is that in court cases the IACtHR acts as a claimant before the Court, which may affect its impartiality to submit information about the status of compliance. The change in the IACtHR's role before the Court with the recent reform of the rules of procedure of both organs could facilitate the IACtHR's assistance at the execution stage.