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**Identifying and assessing the implementation of human rights decisions**

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# Identifying and assessing the implementation of human rights decisions

## 1. Introduction

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

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

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

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

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3 implementation and an authoritative means of determining whether the measures  
4 taken do, in fact, satisfy the requirements of the decision. If there is no such record  
5 or authoritative determination, supranational bodies cannot perform several  
6 important functions: to render visible any failure to implement a remedial measure;  
7 hold states accountable for their actions or omissions using the tools of persuasion  
8 and admonishment at their disposal; permit the involvement of non-state actors in  
9 the verification and implementation process; and, ultimately, guard against  
10 premature termination of follow-up.  
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22 These are no easy tasks. Supranational bodies face political obstacles, such as  
23 states obfuscating or failing to engage. They also face practical hurdles, like  
24 assessing the adequacy of measures designed to guarantee that a violation will not  
25 be repeated. The bodies may, indeed, have a disincentive to publicise their  
26 implementation records, lest they be criticised for failing to enforce their decisions.  
27 Yet, shortcomings in performing these functions may prevent victims obtaining  
28 justice.  
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39 This article discusses the varying approaches taken by regional human rights bodies  
40 and UN treaty bodies (UN TBs) to following up implementation—differences that are  
41 partly explained by the fact that this role is variously undertaken by judicial, quasi-  
42 judicial or political bodies (see also Sandoval, Leach and Murray, this issue).<sup>2</sup> We  
43 engage not only in technical discussion about how to identify and appraise  
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52 <sup>2</sup> This article is based on research undertaken as part of the Human Rights Law  
53 Implementation Project (HRLIP). Semi-structured interviews were conducted for the  
54 research with actors at the national and supranational levels (see Introduction to this special  
55 issue). This article refers to interviews using an anonymous code, location and date. If,  
56 however, the location risks identifying the interviewee, it has been omitted.  
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3 implementation; our discussion also has a normative dimension, since it is concerned  
4 with the *expectations* that victims of human rights violations may have of  
5 supranational bodies, and of state actors—the executive, legislature and judiciary—  
6 in respect of their engagement, in good faith, in discharging their shared  
7 responsibility in the follow-up process. Moreover, this debate has implications for  
8 non-state actors—victims, litigants, civil society organisations (CSOs)—as well as  
9 national human rights institutions (NHRIs)—who are ideally placed to report on  
10 realities ‘on the ground’ and thereby influence the assessment of implementation.  
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22 Section 2 explores how far supranational bodies can ‘see’ and interpret states’  
23 responses to their decisions. Are they mandated and suitably resourced to play this  
24 role, and do they have sufficiently diverse sources of information? Section 3  
25 examines two cases—one pending and one closed—that exemplify the difficulty of  
26 identifying and assessing implementation. Section 4 examines the merits of  
27 supranational bodies ‘categorising’ the status of implementation, while section 5  
28 discusses how transparent and responsive supranational bodies are in the sense of  
29 enabling ‘real time’ participation by all interested parties. Section 6 concludes with  
30 recommendations both to supranational and domestic actors.  
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## 43 **2. ‘Seeing’ and interpreting what happens: the need for diverse** 44 **sources of information** 45 46

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48 This section examines, first, how far supranational bodies are mandated and  
49 resourced to assess implementation. It argues, secondly, that they cannot rely solely  
50 on state submissions: in some cases, victims’ voices are indispensable, while  
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evidence presented by CSOs, NHRIs, international institutions and academics can also help to assess the veracity and completeness of the state's account.

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

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

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<sup>3</sup> See the DEJ's mandate at <https://www.coe.int/en/web/execution/presentation-of-the-department> (accessed 2 January 2020).

<sup>4</sup> See Article 31 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; and Rules 112(7) and (9) of the 2010 Rules of Procedure of the African Commission.

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3 sporadically). Meanwhile, UN TBs are encouraged to assess the information  
4 provided by states and develop criteria for analysing it (OHCHR 2017).  
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9 A common challenge facing supranational bodies is the scarcity of resources. In the  
10 UN system, as of May 2019, the Petitions Unit within the Office of the High  
11 Commissioner for Human Rights (OHCHR) had 26 staff (15 professional staff; three  
12 general service staff and eight temporary staff),<sup>5</sup> who service all the treaty bodies.  
13 One treaty body member stressed that ‘capacity is an absolute massive problem’  
14 (UN01, 24 January 2019). In Africa, in May 2019 there were nine legal officers  
15 providing support to the ACHPR<sup>6</sup> and seven permanent legal officers at the ACtHR.<sup>7</sup>  
16 These officers work on *all* aspects of the bodies’ mandates. For the ACHPR, with its  
17 broad remit, this means that the individual communication procedure is just a small  
18 part of officers’ duties.  
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32 The Inter-American and European bodies have dedicated staff working on follow-up,  
33 which permits a rough comparison matching the secretariat size to the caseload,  
34 taken from annual reports for 2018. As of May 2019, the IACommHR had five staff  
35 members<sup>8</sup> dealing with the implementation of 229 recommendations in Merits reports  
36 and friendly settlements agreements (IACommHR 2019: 147-56 and 168-73), while  
37 the Court had four staff members (IASHR022, San Jose, 15 February 2018 ) dealing  
38 with 208 cases (IACtHR 2019: 65). The DEJ had 39 staff dealing with legal case  
39 management (many of whom are, however, temporary or seconded)<sup>9</sup> supervising the  
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52 <sup>5</sup> Staff member of the OHCHR, email, 17 May 2019.

53 <sup>6</sup> Staff member of the ACHPR, email, 15 May 2019.

54 <sup>7</sup> Staff member of the ACtHR, email, 16 May 2019.

55 <sup>8</sup> Staff member of the IACommHR, email, 15 May 2019.

56 <sup>9</sup> Head of Division within the DEJ, email, 20 May 2019.  
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3 implementation of some 6,150 cases (Committee of Ministers 2019: 57). Of these,  
4 around 1,250 are 'leading' cases that reveal structural or systemic problems whose  
5 resolution requires that the state concerned adopt general measures to avoid  
6 repetition of the violation. Behind these are some 4,900 'repetitive', cases which are  
7 usually grouped together with a leading case, yet which often present complexities  
8 of their own. The 'cases per staff member' ratio before the European and Inter-  
9 American bodies thus ranges from around 155 in Europe to 50 before the IACtHR  
10 and 45 before the IACommHR. Such comparisons can only approximate their  
11 respective workloads; for example, the 208 cases being followed up by the IACtHR  
12 contain 1,140 separate reparation orders (IACtHR 2019: 181). Certainly, all these  
13 figures underscore that no secretariat body can feasibly do its own detailed fact-  
14 finding, let alone regular country visits, for all the cases under follow-up.  
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## 30 **2.2 Diversifying sources of information**

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33 In the light of these resource constraints, supranational bodies rely considerably on  
34 the information provided to them, which in the first instance comes from  
35 governments. In Europe, this process has become highly prescriptive: governments  
36 are required to submit within six months of a final decision an Action Plan or Action  
37 Report detailing the actions envisaged or taken. Yet, executives may lack the  
38 capacity to present a reliable and comprehensive account. Inadequate reporting may  
39 stem from negligence, incompetence, or weak coordination between domestic  
40 actors.  
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52 Supranational bodies may also need to detect deliberate distortion of the picture:  
53 executives may portray a violation as an isolated event; downplay the need for a  
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3 holistic response to prevent recurrence; exaggerate the scope or effects of reform;  
4 or conceal negative side effects. Accordingly, we submit, there is an onus on  
5 supranational bodies to elicit information from diverse sources, including victims,  
6 CSOs and other international institutions.  
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### 11 12 13 14 2.2.1 *Ensuring that victims are heard* 15

16 How far can or should victims bring their perspective into the follow-up procedure?  
17 Do supranational bodies encourage them to add their voices to the dialogue? The  
18 answer to these questions depends upon the nature of the reparations at issue, and  
19 in particular whether they are aimed at redressing the individual victim(s) or  
20 preventing recurrence of the violation.  
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29 Victims' ability to engage in the monitoring of the implementation of their case relies,  
30 first, on whether they know how, and, secondly, whether supranational bodies  
31 actively encourage them to do so. Interviews at the African and inter-American  
32 bodies and the UN suggest that they strive to gain information on implementation  
33 from both parties to the proceedings. A secretariat member of the IACommHR  
34 stressed that 'our basic mechanism for measuring is contrast and comparison ... We  
35 try not to presume [anything]' (IASHR030, Washington, 2 December 2017). The  
36 IACtHR and the African and UN bodies likewise allow information on implementation  
37 to be submitted by the complainants.  
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50 Yet, it can be challenging even to maintain contact with victims. One member of a  
51 treaty body noted that victims 'often completely disappear' (UN01). This may be due  
52 to treaty bodies' lack of direct engagement with victims, follow-up to individual  
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3 communications being an entirely paper-based process. Similarly, the African  
4 Commission has repeatedly noted ‘challenges with the change of address and/or  
5 focal person by litigants’ (e.g. ACHPR Report 2017: para. 31).  
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11 The IACommHR has found an effective means to address this problem: in 2018, its  
12 secretariat arranged telephone conversations with victims and their lawyers, leading  
13 to an increase in the response rate of more than 200 percent (IACommHR 2019:  
14 para 221). The IACtHR, too, has taken a proactive approach: for example, judges  
15 have had direct contact with victims during country visits (see Saavedra, this issue).  
16 These initiatives stand in marked contrast to the practice in Europe, where we  
17 encountered a general presumption that, in most cases, there was no need for (and  
18 indeed no perceived added value in) victim engagement because ‘the secretariat can  
19 handle the execution process through discussion with the authorities’, as a senior  
20 official from the CoE noted (SXB05, Strasbourg, 18 June 2018). It is perhaps  
21 unsurprising, then, that the DEJ does not routinely have contact with victims or their  
22 representatives, as evidenced by the fact that victims have made submissions to the  
23 CM in less than 2.5 percent of cases;<sup>10</sup> in fact, successful applicants to the ECtHR  
24 are not even updated about important developments in their case once it has been  
25 transferred to the CM. This has prompted a network of CSOs to call for an alert  
26 system, facilitating victims’ access to information on their case (EIN 2018: para 6).  
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47 We submit that a minimum requirement for supranational bodies is to, first, inform  
48 the victim about what individual measures of redress the state must adopt (insofar  
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54 <sup>10</sup> Figures taken from HUDOC-EXEC, where a total of 665 applicants’ submissions have  
55 been recorded compared to a total of 26,662 cases—both pending and closed—as of 9  
56 January 2020..  
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3 as this is not specified in the decision itself), for example steps such as re-opening  
4 of investigations into the disappearance of a relative. Secondly, the victim should be  
5 kept up to date about what the state says it has done. Thirdly, supranational bodies  
6 should, where appropriate, elicit victims' views on the adequacy of reparation  
7 measures. There are certain reparation measures that victims are uniquely well  
8 placed to assess, among them symbolic measures such as memorials or public acts  
9 of acknowledgement of responsibility. These are arguably meaningless, if not  
10 counterproductive, if victims are not satisfied with them. Symbolic measures are a  
11 hallmark of the Inter-American human rights system (and comparatively rare in the  
12 European context), yet in practice victims are not always consulted; one CSO  
13 interviewee ventured that '[t]here are cases where the [IACtHR] has said that ...  
14 [symbolic] measures have been complied with ... [but] we have not agreed that they  
15 really provided redress for the victims' (IASHR06, Costa Rica, 12 February 2018). A  
16 senior lawyer at the IACtHR acknowledged the subjectivity of this evaluation, asking,  
17 '[w]hat are the criteria to determine if a monument is beautiful or the victims like it?'  
18 (IASHR14, Costa Rica, 13 February 2018).  
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39 Another area where the experience of the intended beneficiaries forms an  
40 indispensable basis for assessing the state's response are decisions that require the  
41 provision of services to victims, such as women at risk of domestic violence.  
42 Interviewed about the implementation of the first decision on an individual  
43 communication from Georgia by the UN Committee on the Elimination of  
44 Discrimination against Women (CEDAW Committee), *X and Y v Georgia*, CSOs  
45 welcomed the expansion of shelters for survivors of gender-based violence, but  
46 complained that too little consideration was given to whether the refuges suited their  
47 needs: '[The mere] existence of a shelter as a building is not ... satisfaction of the  
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3 requirements of the CEDAW Committee. There is a need to assess the quality of the  
4 shelters and their user-friendliness to these women, and this assessment is not  
5 there...’ (GE03, Tbilisi, 24 April 2017). Interviews conducted by the Ombudsman with  
6 victims of domestic violence had revealed, they added, a demand for truly  
7 empowering measures, such as enforcement of a law that would require the  
8 *perpetrator* to leave the (common) property.  
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18 There are remedial measures, however, on which victims are less well placed to  
19 pronounce—measures that go beyond the situation of the individual and are aimed  
20 at ensuring that violations are not repeated against others. Complainants cannot, we  
21 submit, be expected to report on the need for, and impact of, broader reforms of a  
22 legislative, administrative, judicial or other nature. With reference to the ‘Cotton Field’  
23 (*González v Mexico*) case, for example, in which the IACtHR asked victims to assess  
24 whether Mexico had put in place an appropriate system to prevent *femicides*, Rubio  
25 and Sandoval (2011: 1088-89) argue that they lacked the requisite knowledge and  
26 access to information. Rather, the Court should have put the onus on the state to  
27 show that the measures adopted would effectively prevent future violations. The  
28 European system acknowledges these constraints by restricting applicants’ right to  
29 make submissions on implementation to providing information regarding individual  
30 measures (Rule 9.1 of the Rules of the CM). Thus, in Europe, unlike in the other  
31 regions and at the UN, it is not even permissible for applicants to comment on general  
32 measures of implementation.  
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### 52 2.2.2 Counterbalancing the executive’s account: civil society input 53 54 55 56 57 58 59 60

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

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31 In Europe, where decisions are usually silent about reparations (Donald and Speck  
32 2019), CSO or NHRI interventions at an early stage, in the form of submissions to  
33 the CM, can help identify appropriate remedial measures and even define the very  
34 scope of the follow-up process. This is exemplified in the CM's endorsement of  
35 repeated CSO calls for the creation of a specialised police unit in Georgia to  
36 investigate homophobic and transphobic violence, a recommendation made in  
37 relation to *Identoba and Others v Georgia* (see 3.1.5 below).

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

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3 perpetrator of the violations (D2, 20 April 2017). Such was the case when a coalition  
4 of CSOs and the international NGO, Minority Rights Group, successfully lobbied for  
5 the first ever African Commission hearing on implementation, in the Endorois case,  
6 a landmark decision in which the Commission declared the Endorois community's  
7 eviction from its ancestral lands in Kenya illegal. Longstanding CSO engagement  
8 with the affected community thereby ensured that the Endorois' voices were heard  
9 at the supranational level.  
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20 CSOs or NHRIs will sometimes be the *only* domestic actors monitoring the less  
21 visible—and possibly unintended—effects of reforms, as an example from Europe  
22 shows: in December 2018, nearly six years after the ECtHR's ruling had become  
23 final, supervision of *Bureš v the Czech Republic*, concerning the use of restraints in  
24 'sobering-up' centres of private psychiatric hospitals, was closed (CM Resolution  
25 Bureš 2018). The government's Action Report (Bureš Action Report 2018)  
26 convincingly describes measures including legislative amendments and new  
27 instructions on the use of restraints, following multi-stakeholder consultations, and  
28 taking into account a study by the National Preventive Mechanism. There is nothing  
29 in these materials, however, to suggest that the CM was aware of a problem to which  
30 we were alerted by a Czech CSO (CZ05-07, Brno, 20 June 2017), whose monitoring  
31 had revealed that patients were increasingly being sedated instead of fastened to  
32 beds, potentially causing fresh violations. It would appear that, because the CSO did  
33 not submit this information to the CM, the latter was unable to assess implementation  
34 holistically. This example, especially when contrasted with *Identoba v Georgia*,  
35 presented at 3.1—where CSOs *did* intervene and thereby exposed recurrent  
36 violations arising from homophobic and transphobic violence—shows how a CSO  
37 submission not made is an opportunity missed to 'set the record straight'. Such  
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3 missed opportunities are especially regrettable given that our review of CSO  
4 submissions in the cases selected for our research reveals that they were generally  
5 of high quality, presenting detailed, accurate and well-researched evidence and  
6 information.  
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13 While supranational bodies are open to diverse non-state sources, in no system  
14 does reality fully meet ambition. CSO submissions are not routinely published by  
15 African and inter-American bodies and therefore cannot be quantified—although  
16 CSO interventions at the follow-up stage do appear to be on the increase before the  
17 IACommHR and the IACTHR (see Saavedra, this issue). In Europe, CSOs make  
18 submissions to the CM in only five percent of leading cases (EIN 2019: 12). Within  
19 the UN system, CSOs can submit information on the implementation of decisions to  
20 TBs, under the state party reporting system. This practice is beneficial if case-level  
21 recommendations are leveraged to promote reforms demanded in the treaty bodies'  
22 concluding observations—and by CSOs in their 'shadow' reports. We discuss at 3.2  
23 how follow-up of a decision against Burkina Faso by the Human Rights Committee  
24 (known as the CCPR, since it monitors implementation of the International Covenant  
25 on Civil and Political Rights, or ICCPR) was 'kept alive' in this way. Yet there is a  
26 concomitant risk that subsuming specific reparation measures into the reporting  
27 cycle could cause them to get lost in this broader process of monitoring compliance  
28 with treaty obligations—creating another reason for vigilance on the part of CSOs  
29 and the supranational body.  
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51 Where CSOs have failed to engage, what are the obstacles? Civil society  
52 interviewees identified several reasons for the lack of engagement: lack of  
53 knowledge about how follow-up works and what avenues exist for civil society input,  
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3 and about how to make a submission effective in the absence of hard data. One CSO  
4 workshop participant in Belgium (Brussels, 1 February 2017) ventured that for CSOs,  
5 follow-up to ECtHR decisions was:  
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11 time consuming and ... unclear; you don't know when the case will be  
12 reviewed [by the CM] ... or at which stage they will accept ... the views of  
13 the victim or [if] they are sensitive [to] the victims.  
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18 Several CSO and NHRI representatives in Europe (e.g. BE01, Brussels, 8 November  
19 2016; CZ11, Prague, 21 June 2017) said they had never been invited to make  
20 submissions. This is problematic where supranational bodies are aware that a  
21 particular organisation is well placed to assess implementation, for instance because  
22 it litigated the case or submitted an *amicus curiae* at the adjudication stage. An  
23 important step towards encouraging CSO involvement in the follow-up process has,  
24 however, recently been made in Europe, where the DEJ created a new website<sup>11</sup>  
25 providing guidance on CSO interventions. So pressing was the perceived need to  
26 bring the voices of CSOs and NHRIs to the table that it led to the creation, by a group  
27 of human rights academics and practitioners, of the European Implementation  
28 Network (EIN),<sup>12</sup> which provides a platform for advocacy in Strasbourg and supports  
29 non-state actors to influence the course of implementation, inter alia by making high-  
30 quality interventions at the most opportune moment.  
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### 48 2.2.3 Whom to trust? 49 50 51 52 53

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54 <sup>11</sup> See DEJ website at <https://www.coe.int/en/web/execution/nhri-ngo> (accessed 2 January  
55 2020).

56 <sup>12</sup> See <http://www.einnetwork.org/> (accessed 17 January 2020).  
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3 In the previous two sections, we have argued for supranational human rights bodies  
4 to be proactive in eliciting the views of victims and non-state actors, as a way of  
5 detecting incomplete, inaccurate or bad faith reporting by governments. Where  
6 counterbalancing evidence is lacking, there is a risk that undue deference might be  
7 given to the state's assessment. Where, on the other hand, supranational bodies  
8 *have* received information from the victim or another credible source, we submit that  
9 the 'default' should be for the systems to attribute significant value to this material in  
10 the absence of a state reply. Inspiration may be drawn, in this respect, from the  
11 European system, which sets a clear expectation, in the Rules of the CM, that the  
12 state should respond to submissions by applicants, CSOs or NHRIs within five  
13 working days, failing which their information will be shared with CM members and  
14 ultimately published online, even if the state has not commented on it. The system is  
15 thus set up to 'punish' non-cooperation by states, with the presumption that civil  
16 society reports that remain unrefuted reflect badly on the state—in stark contrast to  
17 the practice of the CCPR, where states are almost incentivised to be uncooperative  
18 because the follow-up procedure is discontinued unless the government presents its  
19 views (OHCHR 2017: 5) (see section 4).

### 3. Knowing when enough has been done

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

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3 discrimination, reveals the challenges inherent in assessing guarantees of non-  
4 repetition, especially where violations are rooted in prejudicial attitudes or other  
5 systemic causes and where the judgment does not indicate specific remedies. This  
6 is a task that all supranational bodies find demanding; as a CSO representative in  
7 the inter-American system put it (IASHR035, Washington, 1 December 2017):  
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16 I believe that no system ... has clear indicators of what would [count as]  
17 implementation of more abstract elements such as ... non-discrimination  
18 ... How could you measure that you discriminate less today than  
19 yesterday? The fact that you have a law does not mean that you  
20 discriminate less.  
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26 *Identoba* also exemplifies how CSOs can mitigate this problem by submitting  
27 evidence that supplements or corrects the state's account and proposing qualitative  
28 and quantitative benchmarks to assess implementation.  
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34 The second example, *Sankara v Burkina Faso*, a CCPR decision on a complaint by  
35 the family of the murdered President of Burkina Faso, highlights the risk that follow-  
36 up may end prematurely and against the expressed wish of victims. It exemplifies,  
37 too, the opportunities and challenges presented when follow-up of a UN TB decision  
38 is diverted to the state party reporting system.  
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### 47 **3.1 Tackling homophobia and transphobia: *Identoba and Others v***

#### 48 ***Georgia***

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52 On 17 May 2012, around 30 lesbian, gay, bisexual and transgender (LGBT) activists  
53 gathered peacefully in Tbilisi to mark the International Day against Homophobia and  
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3 Transphobia, or IDAHOT. The organisers had warned the police about violence by  
4 groups linked to the Orthodox Church—warnings that materialised when counter-  
5 demonstrators attacked the IDAHOT activists. Police refused to intervene and  
6 proceeded to arrest and detain several IDAHOT protesters. In its judgment three  
7 years later, the ECtHR found violations of Article 3 of the European Convention on  
8 Human Rights (ECHR) (prohibition of inhuman and degrading treatment), in  
9 conjunction with Article 14 (prohibition of discrimination), on account of the  
10 authorities' failure to fulfil their positive obligation both to protect the IDAHOT  
11 marchers and launch effective investigations to identify the perpetrators and unmask  
12 their discriminatory motives. The Court also found a violation of Article 11, the right  
13 to freedom of peaceful assembly. Aside from awarding sums of up to 4,000 euros in  
14 non-pecuniary damages, which were paid on time, the judgment was silent about  
15 reparations.  
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32 At the time of writing, the CM is still supervising *Identoba* under its enhanced  
33 procedure—reflecting the complexity of the required implementation steps—in  
34 conjunction with other cases concerning violence against Jehovah's Witnesses (CM  
35 Notes on *Identoba* 2019). For reasons of space, we examine only *Identoba*. While  
36 the government's latest submission in September 2019 calls for the CM to close  
37 supervision of this case (*Identoba* Action Report 2019: para 86), a joint CSO  
38 communication, submitted the same month, raises numerous concerns suggesting  
39 that this would be premature (*Identoba* CSO submission 2019)—a conclusion with  
40 which the CM concurred (CM Decision on *Identoba* 2019).  
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### 54 3.1.1 *The perspective of victims and beneficiary groups*

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3 The government and CSO submissions give divergent accounts of how, if at all,  
4 IDAHOT has been marked in Georgia since 2012—a crucial indicator of the state’s  
5 success in ensuring non-repetition of the violation. CSOs lament the ‘egregious’  
6 failure of the authorities to face down threats of violence by far right groups and  
7 guarantee the safety of LGBT activists, causing the 2019 Tbilisi Pride March to be  
8 cancelled (Identoba CSO submission 2019: Appendix 2), a situation also deplored  
9 by Georgia’s NHRI, known as the Public Defender (Identoba Public Defender  
10 submission 2019: 4-5). By contrast, the latest government submission is silent on  
11 this aspect of implementation. Nor has the government acknowledged in  
12 submissions to the CM that in 2013, IDAHOT protesters suffered even more  
13 aggravated violence than in 2012, as 20,000 counter-demonstrators armed with iron  
14 batons attacked them with apparent police collusion, and that no events took place  
15 in 2014, due to the trauma of those events, or in 2016, because of violent  
16 homophobia surrounding the impending general election—events laid bare in  
17 evidence provided by CSOs (Identoba CSO submission 2016: paras 6-21), and in  
18 complaints lodged with the ECtHR relating to the 2013 events.<sup>13</sup>  
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39 The dissonance between the official and CSO accounts persists in respect of the  
40 investigation into the events of 2012 and 2013. For example, the latest CSO  
41 submission (2019: paras 29-31) recalls that, despite video evidence, just four  
42 individuals were charged with criminal offences for the ‘mob violence’ of 2013, all of  
43 whom were later acquitted—developments that are absent from the government’s  
44 Action Reports. Moreover, our interviews suggest that some of the government’s  
45 reported investigative activity was, as one applicant put it, a ‘facade’, with victims  
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55 <sup>13</sup> Identoba and others v Georgia (Application no. 74959/13) and Women's Initiatives  
56 Supporting Group v Georgia (Application no. 73204/13).  
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3 being summoned for police interviews repeatedly to create the illusion of progress  
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5 without serious intent (GE01, London, 17 January 2017).  
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11 The foregoing demonstrates the crucial role of CSOs not only in filling information  
12 gaps but also in inserting the victims' perspective; for example, with respect to the  
13 traumatising effects of the violence of 2013.  
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### 18 19 20 3.1.2 *Statistical data* 21

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23 Interviewees emphasised the importance of statistical data to provide 'hard-edged'  
24 measures of implementation. For *Identoba*, the focus is on statistics for criminal  
25 proceedings initiated on grounds linked to sexual orientation and gender identity.  
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27 Again, the government and CSO submissions diverge. Moreover, they reveal that  
28 statistics may be presented misleadingly. For example, the 2018 Action Report (para  
29 42) states that criminal convictions for homophobic or transphobic crimes doubled  
30 from 2016 to 2017—but neglects to highlight that this was an increase from four to  
31 eight cases out of a total of 49 'examined' (Identoba CSO submission 2018: para  
32 19).  
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44 Paucity of disaggregated data is another concern. For instance, the government  
45 reported in 2019 (para 53) that 81 hate crime judgments were delivered in 2018, but  
46 failed to indicate how many of these concerned homophobic or transphobic crimes  
47 (Identoba CSO submission 2019: para 22).  
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3 Statistics on prosecution of hate crimes against sexual minorities are, as one CSO  
4 interviewee ventured, a 'key litmus test' for implementation of *Identoba* (GE02,  
5 London, 17 January 2017). The onus on government agencies to provide reliable,  
6 disaggregated data is a primary focus for advocacy by CSOs and the Public  
7 Defender (GE09, Tbilisi, 24 April 2017). Indeed, one CSO interviewee ventured that  
8 generating and interpreting such data has become integral to their activism: 'you  
9 have to ... [target] a particular statistical thing and then you can keep the battle going'  
10 (GE02).  
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### 22 3.1.3 *Monitoring changes in domestic case law*

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25 It is not only aggregate figures for homophobic and transphobic crimes that are  
26 potentially misleading, but also the interpretation of domestic court decisions. Again,  
27 CSO evidence acts as a corrective to the official account. For example, five domestic  
28 court decisions were presented in the 2018 Action Report (para 45) as illustrating the  
29 'effectiveness' of hate crime investigations. One of these, a Supreme Court  
30 judgment, was cited approvingly by the CM (CM Notes on *Identoba* 2018). The CSO  
31 submission, however, explains that in this case—in which a transgender woman was  
32 murdered and set alight by an assailant with a history of transphobia—the  
33 Prosecutor's Office had, in fact, failed to identify a transphobic motive, which meant  
34 that the Supreme Court was unable to use the 'aggravated circumstances' provision  
35 of Article 53 of the Georgian Criminal Code, which would have permitted the  
36 imposition of a higher sentence. Indeed, CSOs deplore the 'almost non-existent'  
37 (Identoba CSO submission 2019: para 5) use of Article 53, which was not applied in  
38 any case concerning homophobia or transphobia until 2016.  
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3 The case cited above exemplifies the difficulty for supranational bodies of monitoring  
4 changes in case law, especially where, as in Georgia, there are ‘inadequate systems’  
5 for publishing court decisions (Identoba CSO submission 2018: para 22), making the  
6 supranational body reliant on executive summaries. In such instances, CSO  
7 evidence—in the form of contextual information about cases or different rulings  
8 showing that the original problem persists—may at least prompt the supranational  
9 body to interrogate the executive’s account of judicial behaviour. Such scrutiny can  
10 ensure that isolated domestic rulings are not misrepresented as a trend and that  
11 changes to bring domestic case law into conformity with Convention requirements  
12 are truly embedded, especially in the absence of a unifying opinion by an apex court.  
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#### 26 3.1.4 *Assessing measures aimed at changing attitudes and behaviour*

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29 *Identoba* epitomises the difficulty of assessing guarantees of non-repetition which  
30 require changes to discriminatory attitudes and behaviour through measures such  
31 as training of law enforcement officers, judges and prosecutors. Here, both  
32 qualitative and quantitative indicators are needed. For instance, the government  
33 presents an impressive figure of 2,300 prosecutors who were trained in 2017 on  
34 discrimination and investigation of hate crimes (*Identoba Action Report 2018: para*  
35 *49*). This development was welcomed by CSOs; yet, organisations involved in  
36 delivering training raised doubt as to its efficacy: for example, at the police academy  
37 of the Ministry of Internal Affairs (MIA), ‘insensitive and somewhat discriminatory  
38 attitudes’ were evident during the training (*Identoba CSO submission 2018: para 32;*  
39 *see also ECRI 2016: paras 64-68*).  
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3 These limitations suggest that supranational bodies should insist that governments  
4 provide not only statistics for numbers trained, but also qualitative data about  
5 curricula and measures of impact. This also has implications for the timescale over  
6 which implementation is assessed, since the impact of training aimed at shifting  
7 attitudes and behaviour is only likely to be visible in the longer term, through, for  
8 example, changes in the way that complaints concerning homophobic and  
9 transphobic abuse are handled. Moreover, supranational bodies—and CSOs at the  
10 domestic level—should promote the participation of civil society and affected  
11 communities in the planning, delivery and evaluation of anti-discrimination training.  
12 This is an issue on which CSOs may share experience internationally: we  
13 encountered instances in the African and inter-American regions, too, where  
14 governments argued that training had effectively tackled discrimination, only to see  
15 such claims challenged by civil society. A CSO (IASHR010, San Jose, 8 February  
16 2018) acknowledged the difficulty for the IACtHR in identifying when follow-up can  
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34 [When can] the Court ... say: 'I am satisfied with the level of compliance?'  
35 When [the state] has trained a hundred, when it has trained a thousand,  
36 when there are no new cases? ... What is the criterion that the Court will  
37 have when [reparation] measures ... are so general?  
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43 Indeed, assessment of implementation is even more fraught when it comes to  
44 gauging the impact of measures to combat intolerance not only among state  
45 agencies but also at a societal level. In respect of *Identoba*, attention has focused on  
46 measures to tackle discrimination against sexual minorities such as those adopted  
47 as part of Georgia's National Human Rights Strategy and accompanying action  
48 plans. CSOs lament the fact that, while Parliament approved the latest action plan  
49 for 2018-20, the chapter on 'gender identity and equality' has still not been approved  
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3 half-way through the implementation period—a point omitted from the government's  
4 Action Report to the CM (Identoba CSO submission 2019: para 14). Perhaps  
5 unsurprisingly, then, the Public Defender concludes that 'the problem of  
6 homophobia, transphobia and xenophobia remains systematic and there are hardly  
7 any measures on the part of the state to overcome [it]' (Public Defender submission  
8 2019: 4).  
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### 18 3.1.5 *When to end follow-up?*

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21 Successive CM examinations of Identoba lend weight and credence to submissions  
22 by CSOs and the Public Defender, whose influence on the follow-up process is  
23 palpable. The question remains as to what criteria the CM should use to determine  
24 when to close the case.  
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31 The process of supervision has identified measurable benchmarks, such as statistics  
32 on prosecution of hate crimes. Other remedial measures, such as training, require  
33 both quantitative and qualitative assessment. Our analysis suggests the need for  
34 vigilance when interpreting such data, since governments may, through neglect or  
35 bad faith, misrepresent the true extent of progress. Another key criterion is for the  
36 IDAHOT march to proceed in Tbilisi in a way that meets the requirements of both  
37 Articles 3 and 11 ECHR; that is, neither subject to inhuman and degrading violence  
38 or so circumscribed as to be effectively invisible. Given the lamentable record since  
39 2012, we submit that progress should be demonstrated not only once but across  
40 successive years.  
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3 *Identoba* further highlights how, when a judgment is silent on the matter of  
4 reparations, CSO interventions can define the scope of follow-up. For example, ECRI  
5 (2016: para 68) recommended the creation of a specialised police unit to deal with  
6 racist, homophobic and transphobic hate crime—a move that several CSO  
7 interviewees (e.g. GE13 & GE14, Tbilisi, 25 April 2017) insisted should be a  
8 prerequisite for the CM to close *Identoba*. In September 2019, for the first time, the  
9 CM encouraged the government to create such a unit—a measure the authorities  
10 have so far rejected. *Identoba* thus illustrates the dynamic nature of the follow-up  
11 process whereby, when a decision does not specify reparations, the wide discretion  
12 initially afforded to the state to design appropriate measures gives way to a more  
13 exacting approach that demands evidence of impact and effectiveness before  
14 supervision can end. Supranational bodies may be, at least initially, indifferent to  
15 which domestic actors are involved in implementation where, for example, an  
16 outcome may be achieved either by an executive order or legislation, or where a  
17 change in judicial interpretation of a law may suffice. Yet, *Identoba* illustrates how  
18 the supranational body may (have to) become more prescriptive over time, especially  
19 where the authorities are inactive and models for reform are proposed by expert  
20 bodies.

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

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46 On 15 October 1987, a coup d'état took place in Burkina Faso during which the  
47 (then) President Thomas Sankara was killed. No investigation was undertaken into  
48 his death and the whereabouts of his remains were not disclosed. In January 1998,  
49 a death certificate was issued stating that he had died of natural causes. In 2002,  
50 after trying to instigate court proceedings and an inquiry, his widow, Mariam Sankara,  
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3 and his sons submitted a complaint to the CCPR. In 2006, the Committee found the  
4 state in violation of Article 7 of the ICCPR (prohibition of torture or other ill-treatment)  
5 noting that the refusal to conduct an investigation into Sankara's death, the lack of  
6 official recognition of his place of burial, and the failure to correct the death certificate  
7 constituted inhuman treatment of Ms Sankara and her sons. The CCPR also found  
8 a violation of Article 14(1) (right to equality before the law) on account of the failure  
9 to instigate judicial proceedings (*Sankara v Burkina Faso*: paras. 12.1, 12.4-6 and  
10 13).

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12 The CCPR stated that Burkina Faso was 'under an obligation to provide the family  
13 with an effective and enforceable remedy' in the form of official recognition of the  
14 burial site and compensation for their 'anguish and trauma', and that it was 'required  
15 to prevent such violations from occurring in the future' (*Sankara v Burkina Faso*: para  
16 14).

### 3.2.1 *Deciding when to close follow-up*

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19 The government responded within the Committee's 90 day deadline, saying it was  
20 ready to acknowledge Mr Sankara's grave to his family and had amended the death  
21 certificate. It had also declared him a national hero and was erecting a monument in  
22 his honour. It added that Mr Sankara's military pension had been liquidated for the  
23 benefit of his family and that compensation had been offered to the family but had  
24 been refused (CCPR 2006-7: 664). However, the complainants disputed the  
25 adequacy of the proposed remedies and stated that '[t]rue "official recognition" of the  
26 place where his remains are buried could only come after a judicial inquiry had  
27 established the circumstances of his death and burial by direct witness evidence,  
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3 burial record, DNA analysis, autopsy or forensic reports' (CCPR 2006-7 665). They  
4 noted that the Prosecutor continued to hinder a judicial inquiry, in violation of Article  
5 14. The complainants had also been unaware of the decision to modify the death  
6 certificate, which had been taken unilaterally and in *ex parte*, secret proceedings,  
7 which they claimed constituted a further violation of Article 14(1). They added that  
8 the military pension and compensation did not constitute an effective remedy, in part  
9 because accepting compensation would require them to waive their right to have the  
10 circumstances of Mr Sankara's death established by judicial inquiry and to seek  
11 remedies before the courts (CCPR 2006-7: 664-5).  
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24 The CCPR did not make any assessment following this initial exchange and the  
25 decision remained under its follow-up procedure. No new information was provided  
26 by the government but in 2007 the complainants twice contacted the CCPR to  
27 reiterate their objections to the government's response. They argued that, despite  
28 the Committee's failure to specifically mention it in the decision, the only appropriate  
29 remedy was the initiation of an inquiry, which the Prosecutor had repeatedly rejected.  
30 They referred to the CCPR's own jurisprudence to demonstrate that this had been  
31 the type of remedy it had requested in similar cases and recalled the Committee's  
32 decision on the admissibility of their complaint, which had affirmed that the failure to  
33 hold an inquiry was a violation of Article 7 (CCPR 2007-8: 517-8).  
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47 Following this exchange, the CCPR recalled that it had not included a specific  
48 reference to the need for an inquiry in its decision and that its 'decisions are not open  
49 to review and that this applies equally to its recommendations for reparation' (CCPR  
50 2007-8: 518). The Committee considered the measures the state claimed to have  
51 taken were 'satisfactory' and therefore decided that it would discontinue the follow-up  
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3 procedure (CCPR 2007-8:518). The impact of this was to close the dialogue with the  
4 parties concerned in April 2008.  
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9 The CCPR's approach appears problematic, not just for this case but potentially  
10 others, too, in three ways. First, it suggests that categorisation of implementation can  
11 be a blunt tool and may lead to premature closure of a case. At the time, the CCPR  
12 categorised state responses to its decisions as 'satisfactory', 'unsatisfactory', or 'no  
13 follow-up response received'. The CCPR would review the remedy as a whole rather  
14 than evaluating the state's response to each reparation measure. It would consider  
15 replies to be 'satisfactory' if 'they display the willingness of the State party to  
16 implement the Committee's recommendations or to offer the complainant an  
17 appropriate remedy' (CCPR 2008-9: para 232). This was arguably too low a bar and  
18 it is notable that in 2013 and again in 2016, the CCPR refined its approach to  
19 categorisation, mitigating but not eradicating this problem, as explained in section 4.  
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34 Secondly, the decision to terminate follow-up raises questions about the need to  
35 counterbalance the executive's account: as one human rights professional told us  
36 'I'd simply like to say that the ... efforts made and actions undertaken were not in line  
37 with the spirit and principle of the Human Rights Committee' (A3, Burkina Faso, 13  
38 December 2017). Where there are conflicting views from the state and victims on  
39 matters of reparation, we submit that there is an even greater imperative to draw on  
40 diverse sources in order to avoid undue deference being given to the state's  
41 assessment—especially in a politicised case like *Sankara* (the President at the time  
42 the case was closed was Blaise Compaoré, who had been involved in the 1987  
43 coup). Indeed, a member of a UN treaty body acknowledged that 'we are often not  
44 in a very good position to judge these things. We are very far removed from the  
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3 ground' (UN01). In cases of unlawful killings and disappearances, where families  
4 typically prioritise truth-seeking measures, it appears even more problematic that  
5 follow-up is closed against the victims' express wishes.  
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11 Thirdly, the Committee's approach appears to have been unduly rigid in insisting that  
12 its reparation measures could not be open to review, especially since the original  
13 decision lacked clarity as to the necessity of an inquiry. It is not unreasonable for the  
14 complainants to have interpreted the CCPR's call for 'official recognition of the place  
15 where Mr Sankara is buried' (*Sankara v Burkina Faso*: para 14) as requiring an  
16 inquiry. Indeed, the CCPR stated in its consideration of the merits that 'any complaint  
17 relating to acts prohibited under article 7 of the Covenant must be investigated rapidly  
18 and impartially by the competent authorities', and subsequently reiterated its finding  
19 of a violation of Article 7 as a result of the refusal to conduct an investigation (*Sankara*  
20 *v Burkina Faso*: para 12.2).  
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### 35 3.2.2 *Diverting follow-up to the state party reporting system*

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37 The Committee's decision to cease follow-up meant that there was no process for  
38 the complainants to submit further information or for pressure to be maintained on  
39 the state. However, opportunities for follow-up were kept alive through the state party  
40 reporting procedure. In 2015, the CCPR requested Burkina Faso to include  
41 information on *Sankara* as part of the consideration of its initial state party report,  
42 which was submitted in April 2016. Under this process, the state included information  
43 on steps taken to exhume the presumed remains of Mr Sankara and companions in  
44 2014 (although the forensic results were inconclusive) and to commence criminal  
45 proceedings against several soldiers. It also noted that an international arrest warrant  
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3 had been issued for Blaise Compaoré in December 2015 for his alleged involvement  
4 in the death of Mr Sankara (Burkina Faso State Report 2016: para 5). Similar  
5 information was submitted by CSOs in their joint report to the CCPR, which also  
6 noted that the case 'had not experienced a significant judicial evolution given its  
7 highly political nature' (Burkina Faso CSO Report 2015: 12).  
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16 The state party reporting system therefore provided opportunities for follow-up  
17 despite the closure of the case. Yet, this avenue for continued scrutiny has  
18 limitations. First, there can be a long delay before a state party report is considered;  
19 many states submit reports late or not at all (CCPR Report 2017-18: para 62).  
20 Secondly, there is no guarantee that implementation of the decision will be raised  
21 under the procedure, which considers state compliance with all its obligations under  
22 the relevant treaty. Thirdly, although the CCPR allows all concerned individuals,  
23 bodies and CSOs to submit relevant information to it during the preparatory stages  
24 of the state party reporting,<sup>14</sup> only CSOs and NHRIs can submit formal reports which  
25 are published online. Therefore, individuals must rely on those organisations to raise  
26 their views on implementation formally and publicly.  
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41 Ultimately, the complainants' argument that follow-up of *Sankara* was closed  
42 prematurely appears to be borne out by subsequent events: efforts to verify where  
43 Mr Sankara was buried were only undertaken almost three decades after his murder  
44 in 2014, after a regime change, and the promise in 2007 to erect a monument was  
45 not fulfilled until 2019 (BBC News Afrique March 2019). More broadly, the case  
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54 <sup>14</sup> See OHCHR website at  
55 <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx> (accessed 2  
56 January 2020)  
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3 exemplifies the reasons why cases requiring investigations are among the worst  
4 implemented across all regions (Baluarte 2012: 298; Hawkins and Jacoby 2010: 58)  
5 because they are often 'old, costly and difficult to investigate, and politically volatile'  
6 (Huneeus 2011: 517). This creates an onus on supranational bodies to exercise  
7 particular caution when deciding to terminate follow-up of such cases.  
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#### 16 **4. Categorising implementation**

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19 Supranational bodies adopt different approaches to categorising the status of  
20 implementation of their decisions, and sometimes also the degree to which states  
21 have cooperated. Does categorisation provide an accessible means of 'measuring'  
22 implementation or is it a blunt instrument which may mask, rather than reveal,  
23 complexities?  
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32 Among regional human rights bodies, the most elaborate approach to categorisation  
33 has been developed by the IACommHR. In its 2018 Annual Report, the Commission  
34 categorises the overall status of compliance with 121 friendly settlement agreements  
35 (IACommHR 2019: 147-56) and recommendations issued in 109 Merits Reports  
36 (IACommHR 2019: 168-73) according to whether it is 'full' (or 'total'), 'partial' or  
37 'pending'—categories that the Commission has used since the early 2000s. These  
38 categories mean, respectively, that the state has fully complied with all of the friendly  
39 settlement clauses or recommendations; that it has complied with some, but not all,  
40 of them or has taken some, but not all, required steps for each of them; or that it has  
41 taken no steps, or has taken steps that have yielded no concrete results, or has  
42 expressly indicated that it will not comply with the friendly settlement clauses or  
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3 recommendations, or has not reported to the Commission and there is no information  
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5 from other sources to suggest otherwise (IACommHR 2019: 146).  
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9 The Commission's 2018 Annual Report is innovative in the way it further  
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11 disaggregates information on compliance, indicating its rapidly evolving approach to  
12  
13 this function. First, for friendly settlement agreements, a percentage is given,  
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15 indicating the number of clauses that have been complied with as a proportion of the  
16  
17 total number of clauses, enabling the parties to 'visualize' the level of implementation  
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19 (IACommHR 2019: 147). Secondly, tables indicate progress made during 2018 for  
20  
21 discrete friendly settlement clauses (IACommHR 2019: 159-65) and individual  
22  
23 recommendations (IACommHR 2019: 175-78). For these smaller units of analysis,  
24  
25 two further categories are introduced: 'substantial partial' (as distinct from 'partial')  
26  
27 compliance, meaning that the state has provided evidence that it has adopted the  
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29 relevant measures but these have not yet been completed (IACommHR 2019: 146);  
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31 and 'non-compliance' (as distinct from 'pending' compliance) where, due to the  
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33 state's conduct, it is not possible for it to comply or it has expressly advised that it  
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35 will not comply with the measure. In addition, the outcomes of each measure are  
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37 listed as being either 'individual' or 'structural'. Thirdly, detailed narrative reports for  
38  
39 each case summarise information provided by the parties and provide the  
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41 Commission's analysis of the status of compliance with each clause or  
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43 recommendation and its individual or structural results. For its part, the IACtHR also  
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45 categorises compliance as full, partial or pending and lists on its website cases at  
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3 the monitoring stage with narrative reports on completed and pending reparation  
4 orders.<sup>15</sup>  
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9 In the UN system, the Human Rights Committee was among the first of the TBs to  
10 categorise implementation of recommendations contained in its decisions on  
11 individual communications (OHCHR 2017). Under the current criteria, where a state  
12 has made some response, the Committee categorises it according to whether the  
13 reply or action is: 'largely satisfactory', meaning that there is 'evidence of significant  
14 action' towards implementation; 'partially satisfactory', meaning that additional  
15 information or action remains necessary; or 'not satisfactory', meaning that action  
16 taken or information provided by the State party is irrelevant or does not implement  
17 the recommendation. In addition, the Committee notes when there has been 'no  
18 cooperation', meaning that no follow-up report has been received even after  
19 reminder(s); or where 'the information or measures taken are contrary to or reflect  
20 rejection of the recommendation'. Other treaty bodies that use similar approaches  
21 (some more and some less elaborate) are the Committee against Torture, the  
22 Committee on the Elimination of Discrimination against Women, the Committee on  
23 Enforced Disappearances and the Committee on the Rights of Persons with  
24 Disabilities (OHCHR 2017).  
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44 In contrast to the IACommHR and some UN treaty bodies, neither the African nor the  
45 European human rights bodies categorise the status of implementation of decisions.

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47 The ACHPR does not systematically make formal assessments of implementation or  
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52 <sup>15</sup> See 'Cases in supervision stage',  
53 [http://www.corteidh.or.cr/cf/jurisprudencia2/casos\\_en\\_etapa\\_de\\_supervision.cfm?lang=en](http://www.corteidh.or.cr/cf/jurisprudencia2/casos_en_etapa_de_supervision.cfm?lang=en),  
54 which includes brief narrative reports, and 'Monitoring compliance with judgment' [sic],  
55 [http://www.corteidh.or.cr/cf/jurisprudencia2/busqueda\\_supervision\\_cumplimiento.cfm?lang=en](http://www.corteidh.or.cr/cf/jurisprudencia2/busqueda_supervision_cumplimiento.cfm?lang=en),  
56 which includes more detailed reports (accessed 2 January 2020).  
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3 make public information submitted by the parties; at most, the Commission may, in  
4 its activity reports, summarise such information, if any has been received. For its  
5 part, the ACtHPR publishes in its activity reports a table on the status of  
6 implementation, listing the reparation measures ordered and summarising what, if  
7 anything, the state has done, without providing a qualitative analysis. For the CM,  
8 cases are either pending or closed. The CM does, however, indicate the relative  
9 urgency and complexity of a case by classifying it under one of two different  
10 supervision tracks—standard or enhanced.). Moreover, as the monitoring process  
11 progresses, it may signal its displeasure with a state's response by using, in cases  
12 under enhanced supervision, incrementally stronger language. Moreover, in contrast  
13 to the approach of the African bodies, information received from governments and  
14 other actors is systematically synthesised, analysed and published, as discussed in  
15 section 5.

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

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3 been fully or partially implemented or to which there has been no response by the  
4 state. Moreover, it could in principle allow comparison ‘across cases, states or  
5 tribunals’ as a means of learning from successes and identifying systemic  
6 shortcomings (Hillebrecht 2009: 370).  
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13 The risk, however, is that the ‘broad and ambiguous’ (Hillebrecht 2009: 366) category  
14 of partial compliance does not explain either the various forms or degrees that partial  
15 compliance takes or its causes. Insufficient differentiation may have the perverse  
16 effect of increasing states’ existing tendency to take minimalistic steps in response  
17 to a judgment (von Staden 2018), by creating an incentive for them to earn the status  
18 of partial compliance by picking ‘the lowest-hanging fruit’, such as payment of  
19 reparations or symbolic reparations, rather than implementing more ‘durable’ and  
20 politically challenging measures, like the prosecution of perpetrators (Hillebrecht  
21 2009: 366). This risk is mitigated if categorisation is accompanied by a detailed  
22 narrative account of implementation—and, crucially, informed by the perspective of  
23 victim(s), CSOs and NHRIs. A lawyer in the case of Dos Erres, concerning a  
24 massacre of civilians by the Guatemalan army in 1982, recalled that when the case  
25 was under consideration by the IACommHR, a friendly settlement was signed, and  
26 Guatemala began to comply with the measures except those relating to justice for  
27 the victims (GUA021, Ciudad de Guatemala, 14 April 2018). He added that the  
28 IACommHR used to say ‘let’s congratulate ... Guatemala because sixty or seventy  
29 percent of the measures have been implemented’; yet, for the victims, the most  
30 important measure was justice, and therefore the friendly settlement was eventually  
31 terminated and the case referred to the IACtHR. One solution proposed by  
32 interviewees was to differentiate among reparations by giving greater weight to those  
33 that matter most to victims, such as measures to hold perpetrators to account(e.g.  
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3 IASHR035), which studies show are among the least well implemented across  
4 regions (Basch et al 2010: 18; Hillebrecht 2014: 51). Hillebrecht (2009: 376) likewise  
5 proposes weighting certain remedial measures according to the 'value' placed on  
6 them by victims and other actors. This presupposes, however, that the supranational  
7 bodies are in contact with all relevant stakeholders, which, as we have seen in  
8 sections 2.2.1 and 2.2.2, is not always the case.  
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18 A member of the IACommHR Secretariat acknowledged that partial compliance  
19 encompasses a wide spectrum of possibilities; hence, the category is merely  
20 intended to show 'where the door is open' to implementation or, conversely, closed  
21 in respect of pending or non-compliance (IASHR030). Alongside these categories,  
22 the detailed narrative reports provide 'a vehicle to evaluate change year by year'.  
23 Certainly, the Commission is to be commended for its recent adoption of a  
24 disaggregated approach which, as proposed by Hillebrecht (2009: 371; 2014: 41-  
25 44), makes visible where states have implemented—or failed to implement—  
26 financial reparations, individual measures and/or guarantees of non-repetition.  
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39 The utility of categorisation should also be assessed by examining the *consequence*  
40 of a particular category being applied. Here, the practice of the CCPR gives cause  
41 for concern in terms of the criteria for when the follow-up procedure is discontinued  
42 (OHCHR 2017: 5). This occurs when a state's response is 'largely satisfactory' or  
43 when it has provided three substantive replies, posing the risk that follow-up may  
44 cease even if the victim(s) are not satisfied or their view has not been ascertained,  
45 as happened in the Sankara case discussed at 3.2. Moreover, as noted at 2.2.3, the  
46 Committee—alone among the treaty bodies—discontinues follow-up if the state fails  
47 to cooperate (ibid). This creates a perverse incentive for states not to respond—and  
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3 the fact that, in such instances, the ‘no cooperation’ grade is made public offers scant  
4 reassurance to the victims.  
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9 In summary, categorising can provide a user-friendly ‘snapshot’ of the implementation  
10 of a decision or its constituent parts—showing whether the door is open or closed—  
11 as well as permitting aggregation for the purposes of comparison. While  
12 categorisation is technically demanding, as Hillebrecht (2009: 377) notes, when  
13 carried out in a suitably disaggregated way, it will help supranational bodies tasked  
14 with follow-up to ‘redistribute their human and financial capacity to the areas most in  
15 need of attention’. Yet, categorisation must not be reduced to a tokenistic operation,  
16 conferring a spurious precision on matters which are, in fact, uncertain or contested.  
17 Supranational bodies must also guard against creating perverse incentives for states  
18 either to ‘earn’ the status of partial compliance through deliberate minimalism, or to  
19 disengage altogether, lest laggardly behaviour or outright non-cooperation appear to  
20 be ‘rewarded’. Finally, categorisation, where it is undertaken, should be  
21 substantiated through a qualitative assessment of the state’s response, informed by  
22 the views of victims and other interlocutors as well as state submissions—input that  
23 should, wherever possible, be made public. Such are the demands of transparency  
24 and responsiveness which are discussed in the next section.  
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## 45 **5. Being transparent and responsive**

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48 Implementation is hampered when information is outdated or not made public,  
49 precluding meaningful participation from all interested actors. Some supranational  
50 institutions have become more transparent and responsive in respect of information-  
51 sharing; however, few work in ‘real time’, in the sense that information submitted to  
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3 the supranational body is published rapidly enough, and in a suitably accessible form,  
4 so as to enable CSOs to challenge the state's version of events and adjust their  
5 advocacy for implementation in the light of the supranational body's assessment.  
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11 The CM comes closest to meeting these expectations. One of the DEJ's primary  
12 objectives is to 'ensure transparency and visibility of the results of the supervision  
13 process'.<sup>16</sup> It does so through various means. Chief among these is the HUDOC-  
14 EXEC searchable database, launched in 2017, which provides a repository of  
15 relevant CM decisions, government action plans and reports, and submissions from  
16 injured parties, CSOs and NHRIs. In addition, the CM has since 2007 published  
17 annual reports, which contain extensive statistical information that is helpful in  
18 discerning trends in implementation. Country factsheets, meanwhile, provide  
19 additional statistical and other information on new, pending and closed cases.  
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32 Aside from the CM, no supranational body operates such a database or routinely  
33 publishes in full all submissions received. As noted in section 4, the IACommHR has  
34 recently improved the presentation of disaggregated information about  
35 implementation in its annual report. Yet, reports published annually or intermittently  
36 do not facilitate timely participation by all interested parties. Litigants and CSOs  
37 urged African institutions, in particular, to be more proactive in alerting complainants,  
38 and CSOs that have taken the initiative to submit information when a state  
39 submission has been received (D1, 20 April 2017). One step towards finding a  
40 technical solution to this problem has been taken by the DEJ in Europe, which now  
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55 <sup>16</sup> See DEJ website at [https://www.coe.int/en/web/execution/presentation-of-the-](https://www.coe.int/en/web/execution/presentation-of-the-department)  
56 [department](https://www.coe.int/en/web/execution/presentation-of-the-department) (accessed 2 January 2020).  
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3 operates an RSS feed,<sup>17</sup> allowing interested parties to subscribe to updates  
4 regarding the publication of new documents (albeit country, and not case specific).  
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6 Among the UN TBs, the Committee on Economic, Social and Cultural Rights  
7 (CESCR) alone elicits responses to states' submissions on the implementation of  
8 general recommendations (CESCR 2017: 2). Those submissions are in turn  
9 transmitted to the state for its response and taken into account in the CESCR's  
10 assessment. In the interests of 'visibility and transparency', the Committee may  
11 upload submissions from the state, victims (suitably anonymised) or other entities,  
12 or summaries thereof, on its website.  
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24 A further requirement is for supranational bodies to make visible how influential, if at  
25 all, submissions by victims or CSOs have been. One CSO litigant argued with respect  
26 to the ACHPR, 'There's no point in [the Commission] getting ... information and then  
27 just using it for confidential talks with the state ... [T]hey need to share the information  
28 with both sides and then ... make their own analysis—and make that analysis public'  
29 (D3, 20 April 2017). Indeed, as Murray (2019: 2) ventures, the Commission appears  
30 to operate under a 'shroud of secrecy' since the policy of confidentiality applied to its  
31 communication procedure is applied, by default, to the post-decision phase.  
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43 Victims and CSOs will hardly be incentivised to invest resources engaging with the  
44 follow-up process if their submissions appear to be disregarded. Nor can civil society  
45 actors exercise leverage in their domestic advocacy if their evidence is not given  
46 credence by supranational bodies. The determinative weight given by the CM to CSO  
47 submissions in *Identoba* (section 3.1) is exemplary and illustrates the potential for  
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55 <sup>17</sup> See DEJ website at <https://www.coe.int/en/web/execution/rss-feeds> (accessed 2 January  
56 2020).  
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3 non-state actors to influence follow-up if supranational bodies adopt transparent and  
4 responsive working methods.  
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## 10 **6. Conclusion**

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13 Implementation is a dynamic and iterative process: the desired end point might not  
14 become evident for months or even years, and may only emerge through the—  
15 possibly repeated—participation of multiple actors in the design of reparations that  
16 are both congruent with the decision and politically realisable. It falls to supranational  
17 bodies to solicit, analyse and publicise information from these diverse sources and  
18 thereby reach an authoritative assessment of implementation at any point in time.  
19 This, in turn, relies upon states engaging in good faith, victims having a voice, and  
20 CSOs and NHRIs seizing the opportunity to influence the follow-up process.  
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32 We have identified strengths and weaknesses in every supranational body: none has  
33 found all the answers yet—in part, because none is adequately resourced to perform  
34 all the functions identified above. Within these constraints, we indicate the direction  
35 they might take, while recognising that their differing institutional frameworks  
36 preclude any 'blueprint' for reform.  
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45 The respective bodies' mandates do not preclude the kind of transparent and  
46 responsive approach we recommend. Within these remits, it is open to the bodies—  
47 subject to resources—to be proactive in eliciting the views of victims, especially  
48 where *only* the victims can reasonably assess the quality of implementation.  
49 Likewise, there is potential for each supranational body to become more dynamic in  
50 its interactions with CSOs and NHRIs; for example, by inviting them to make  
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3 submissions both at the start of the follow-up process and in response to state  
4 submissions; creating alert mechanisms to keep them updated; and making public  
5 its agenda so that CSOs and NHRIs know *when* a submission is likely to exert impact.  
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7 Supranational bodies can incentivise such engagement by issuing guidance as to  
8 what makes a strong submission and by giving visible evidential weight to such  
9 interventions. The bodies should also set clear expectations for states as to the  
10 timing and scope of their own submissions (such as the ‘action plan’ system in  
11 Europe) and the imperative for the state to respond to non-state submissions. Where  
12 appropriate, the bodies should also urge the state to ensure the participation of the  
13 victims, beneficiary groups, CSOs and NHRIs in the fashioning of remedies at the  
14 domestic level; for instance, in the design and delivery of anti-discrimination training.  
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16 The bodies should also establish the necessary infrastructure to integrate all sources  
17 of information at their disposal, including that generated by other parts of their own  
18 mandates or by other international institutions.  
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35 We submitted at section 4 that categorisation of the status of implementation is a  
36 useful tool to aid transparency, provided that it includes a suitably disaggregated  
37 assessment of discrete reparation orders. This assessment should ideally include  
38 the supranational bodies’ synthesis and evaluation of all material submitted and, at  
39 a minimum, publication in full of the various submissions—a relatively ‘quick win’ for  
40 the bodies that do not already do this. Certainly, categorisation should not create  
41 perverse incentives for states not to cooperate, as the CCPR presently does.  
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51 These functions may not presently be feasible for all supranational bodies, in the  
52 absence of secretariats with dedicated staff that are equipped to perform them. The  
53 starting point, then, is for these bodies to give strategic priority to their follow-up  
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3 function—and not to relegate it to being ‘almost [like] a hobby’, as one staff member  
4 of the OHCHR lamented (UN03, Geneva, 5 October 2017). States, too, have broader  
5 responsibilities to ensure that human rights bodies are supported to perform all  
6 aspects of their mandate, as well as cooperating in good faith by making timely and  
7 accurate submissions on implementation.  
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15 We have identified multiple opportunities for litigators, CSOs and NHRIs to influence  
16 follow-up. Where cases have a strategic dimension, litigators’ route to influence starts  
17 by phrasing their pleadings so as to indicate at an early stage the root of the alleged  
18 violations and the reparation measures deemed necessary (see Murray and  
19 Sandoval, this issue; Donald and Speck 2019: 115). For their part, CSOs and NHRIs  
20 can fill information gaps in states’ accounts, guide supranational bodies as to where  
21 to focus their scrutiny, and propose reparation measures which may determine the  
22 very scope of the follow-up process. Within the UN system, CSOs or NHRIs may  
23 keep follow-up of certain decisions alive by making use of state reporting procedures.  
24 Further the importance of CSO and NHRI engagement in follow-up—exemplified in  
25 the supervision of *Identoba*—creates an onus on funding agencies to support this  
26 aspect of CSOs’ work alongside their litigation.  
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43 Our discussion reveals the potential for a virtuous cycle to be established, with  
44 supranational bodies incentivising and being responsive to submissions from  
45 multiple sources, which in turn strengthens follow-up of their decisions and,  
46 ultimately, ensures justice for victims and non-repetition of violations. This is how the  
47 ‘shared responsibility’ for implementation becomes a reality.  
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