Human Rights Law Implementation Project

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1. Introduction

The Human Rights Law Implementation Project (HRLIP) brought together four academic institutions with a human rights specialism (Bristol, Essex, Middlesex and Pretoria) and the Open Society Justice Initiative (OSJI). It was funded by the Economic and Social Research Council. The aim of the project was to examine the factors which impact on the implementation of human rights judgments and decisions through a study of nine states across Africa (Burkina Faso, Cameroon and Zambia), the Americas (Canada, Colombia and Guatemala), and Europe (Belgium, the Czech Republic and Georgia). The project traced the implementation of (i) selected decisions deriving from individual complaints to UN treaty bodies; and (ii) selected judgments and decisions of the bodies in the three regional human rights systems. Around ten cases (or clusters of cases) per state were examined in detail, in order to elucidate the factors that tend towards compliance (or non- or partial compliance).

In so doing, the HRLIP aimed to provide answers to why states (fail to or only partially) implement rulings, as well as to provide insights which can be used by pro-compliance actors. The HRLIP employed qualitative research methods, combining desk-based document reviews, semi-structured interviews (analysed using NVivo), national and regional workshops, and participant observations at regional and international treaty body meetings.

2. Research questions

The research questions were grouped under two overarching headings:

a) **ACTORS AND SYSTEMS**: questions pertaining to **actors** and their capacity, functions, interactions, attitudes and motivations – thereby capturing how **systems** work as a whole, both formally and informally.

In terms of the literature, these questions explored elements of rational choice and institutionalism (in respect of regime design – sanctions, monitoring, peer-pressure, incentives etc.), liberal theory (the battle of diverse domestic interests with varying degrees of power and influence) and constructivism (transnational processes and influence).

b) **CASE-CENTRED** questions which explore the various factors associated with particular judgments/decisions that influence different actors' **responsiveness** to them, and thus ultimately (the prospects for) implementation. The focus throughout was on the remedial orders.

In terms of the literature, these questions are particularly relevant to norm-centred theories (the compliance 'pull' or 'push' of international human rights norms) and to constructivism.

Each question relates variously to matters of:

a) **structure:** the institutions and formal mechanisms and procedures of the respective systems;
b) **capacity:** the ways in which domestic and supranational actors operate within those systems, taking into account issues such as information, expertise, resources and relationships; and
c) **attitudinal factors:** such as different actors' motivations, interests, incentives and assumptions. We did not infer attitudes from actions (or inaction) but sought directly to engage with interviewees' attitudes, and then compare these with their actions.

a) Actors and systems

Q1: How do the supranational human rights bodies under review identify, measure, and monitor compliance?

Structure: 'top down' focus on how the different systems are set up to follow up on rulings. Within each system, we examined the broadest possible range of relevant actors and not only the institution(s) that bear immediate or formal responsibility.

Capacity: the more informal dynamics of the systems, including the roles of actors other than the formal supervisory body, as well as the capacity of all relevant actors to interact with each other and with domestic actors.

Attitudes: different actors' willingness to make use of the procedures for interaction and means of cooperation or pressure at their disposal. This question addresses inter alia how and to what extent the interests, attitudes and behaviours of specific actors (e.g. individual commissioners or judges, Government agents, etc.) matter in the monitoring of implementation.

Q2: What capacity do the states under review have to implement judgments and decisions of supranational bodies?

Structure: formal institutions and procedures at the domestic level to implement judgments and decisions (such as coordinating bodies within the executive, parliamentary committee(s), ombudsmen, etc.), including, where relevant, in respect of federal structures.

Capacity: capacity in all its (formal and informal) dimensions, in terms of information, expertise, focal institutions, procedures, resources and relationships (i.e. dialogic capacity, which relates in turn to Q3). The capacity dimension involved asking whether formal structures are effective in practice.

Q3: How do actors at the domestic level interact with each other and with actors at the supranational levels, formally and informally, in the process of implementation?

Structure: the channels and opportunities for interaction and the obstacles or disincentives to such interaction (a focus here was on state actors as principal interlocutors of international bodies). We understood 'interaction' to be any kind of exchange in person or by any other means of communication, including the content of judgments and decisions.

Capacity: as above, but involving all relevant actors, including non-state actors. This question enquired whether the various (domestic and supranational) actors have - and view themselves as having - the capacity to interact with others;

Attitudes: extent to which actors view themselves as being pro- or anti-compliance; and/or as having any (legal or other type of) obligation in respect of implementation and compliance; and/or as having the necessary power or influence to achieve compliance. How do actors' perceptions of their own interests impact upon the implementation process – and how do they perceive national or governmental interests and the social context surrounding any particular judgment? Is any given 'pro-implementation constituency' which advocates for the implementation of a particular judgment congruent (in terms of actors, interests and strategies) with any larger 'pro-compliance constituency in the country that promotes human rights compliance more broadly. (→ See also Q7 in respect of strategic litigation and mobilisation around specific cases).

Q4: How does the perceived legitimacy and authority of the bodies issuing the decision/judgment and monitoring its implementation impact upon the process of implementation?

Attitudes: We approached the issue of legitimacy from a perspective that encompassed both **normative** and **social** legitimacy, i.e. what are the criteria that different stakeholders use for viewing human rights courts/tribunals and their rulings as legitimate, and do they consider that the respective bodies conform to those criteria in practice? Similarly, what factors affect stakeholders' view of authority (e.g. the binding or non-binding nature of the body's decisions)?

When domestic actors disagree with a judgment or decision, how is this disagreement articulated and managed? We distinguished between challenges to the **interpretive** authority

of the respective bodies (e.g. when domestic actor(s) propose an alternative interpretation of the meaning or scope of a right in a particular case) and challenges to their **adjudicatory** authority (which may be regarded as a more serious challenge because it relates to the legitimacy and authority of the system as a whole). How, if at all, is the legitimacy and/or authority of the respective systems as a whole being challenged (e.g. proposals for 'democratic override', threats to withdraw, or more 'under the radar' forms of non-cooperation)?

b) Case-centred questions

Q5: How does the nature of the measures[1] required to implement a judgment or decision impact upon the domestic responsiveness towards it?

Capacity: might depend on the number (and interests) of actors involved in the process of implementing a particular reparation order/measure (e.g. the number of ministries involved). Capacity also included the extent to which various actors understand what is required of them by a judgment or decision.

Attitudes: This included the 'political will' to implement a judgment, which may be influenced by the political or financial costs that are associated with different types of reparations, and by how the violation finding sits in the dominant public narratives within the state.

Q6: How does the specificity of a judgment or decision impact upon the domestic responsiveness towards it?

Capacity: How do different domestic actors identify what is required by a judgment or decision, both in respect of the cause of the violation(s) and the reparation measure(s) required? If they do not understand what is required, how do they find out? Do they read judgments and decisions or rely on summaries / intermediaries? (This related back to Q2 on domestic capacity and Q3 on interaction)

Attitudes: Do different domestic actors tend to welcome specificity in respect of reparation measures (on matters of either substance or timing) or do they tend to view specificity as an undue encroachment on domestic decision-making? And how is this issue viewed at the 'system' level? (A spectrum rather than a binary distinction, with the answer differing depending on whether specificity is on matters of substance or timing). A consideration of whether, at least in the European system, indications regarding reparations were included in the operative part of a judgment or not.

The question of specificity was more relevant to some reparations than others, e.g. symbolic reparations are likely by their nature to be specific, whereas complex reparations may not be. Both Q5 and Q6 enabled us to explore different systems' approaches to **subsidiarity** and the extent to which they defer to states in respect of the discretion afforded to design appropriate reparations.

[1] The 'nature of the measures' here refers directly to the disaggregated typology of reparations measures in section 3a.

Q7: What other case-related or external factors influence domestic responsiveness in either a positive or negative way?

Attitudes: this question aimed to identify the characteristics of cases that make them salient at the domestic level, leading to lesser or greater domestic responsiveness. Salience denotes the degree to which something is regarded as important; it might be expressed in terms of 'how high on the agenda' a judgment or decision is. Salience can be negative (leading to controversy and resistance to implementation) or positive (leading to a degree of consensus and impetus towards implementation). Salience may be perceived differently by different actors or over time.

This question is the means by which we tested for the various case-related factors that are not specifically linked to reparations (and therefore not dealt with under Q5 and Q6). These included factors such as the type of violation, the characteristics of the perpetrator, and the number and characteristics of victims. The question encompassed factors such as whether or not there were any separate opinions by judges/committee members, and how these were worded. The involvement or not of NGOs was also pertinent (including whether litigants are linked to any pro-implementation constituency that may follow up on the ruling issued by the supranational body, and whether campaigning happened at the adjudicatory stage or only at the post-judgment stage).

Our process-tracing method enabled us to take into account **external** factors and their impact on implementation; these included both 'ever present' contextual factors and external 'shocks' (i.e. events such as an election, accession to an international organisation, natural disaster etc, which may change the balance of power between pro- and anti-compliance actors).

Capacity: The presence of external factors may also have an impact upon the capacity of the state to implement judgments and decisions.

3. Measuring implementation

Different human rights bodies have varying approaches to reparation measures and varying practices for monitoring and assessing implementation.[2] Further, the various systems use categories of implementation which arguably do not adequately reflect the complexities involved.[3] Terms used include: 'total'/'partial'/'pending' [implementation/compliance][4] or 'reply/action satisfactory'/'partially satisfactory'/'not satisfactory'/'no cooperation'/'measures taken are contrary to the Committee's recommendations'.[5] These can be 'blunt tools' which arguably fail to take into account a range of variables and are not 'specific enough to hold states accountable for their human rights commitments

[2] Darren Hawkins and Wade Jacoby, 'Partial Compliance: a Comparison of the European and Inter-American Courts of Human Rights', 6(1) *Journal of International Law and International Relations* (2010): 37.

[3] Rachel Murray and Debra Long, *Implementation of the Findings of the African Commission on Human and People's Rights* (Cambridge: Cambridge University Press, 2014): 40–41.

[4] Inter-American Commission, see Inter-American Commission on Human Rights, Annual Report 2013, Section D: Status of compliance with the recommendations of the IACHR.

[5] E.g. UN Human Rights Committee, see e.g. Report of the Special Rapporteur for follow-up on concluding observations of the Human Rights Committee, 107th session, 11-28 March 2013, CCPR/C/107/2.

and reward them for their human rights successes'.[6] Thus, when considering how to monitor compliance, it is crucial that there is clarity on what is being measured as well as the method of doing so.[7]

a) A disaggregated typology of reparations

Different reparation measures may raise different issues in terms of monitoring and measuring compliance; there can be considerable variance among the type of reparation measures called for and the ease with which one can measure compliance with them.[8] For instance, it could be presumed that reparation measures calling for payment of compensation or just satisfaction might be easier to monitor than more ambiguous or open-ended, general reparation measures, such as 'preventive measures'.[9]

Hillebrecht's study of the European and inter-American systems employs a five-part typology of measures: (i) paying reparations; (ii) providing symbolic redress by acknowledging the state's responsibility and honouring the victims; (iii) holding perpetrators to account and reopening domestic trials; (iv) changing laws and practices to ensure that similar violations do not happen in future; and (v) taking individual measures aimed at providing remedy to the victim.

Alternatively, Basch et al. identify four 'central objectives'[10] of reparations within the Inter-American system: (i) reparation of persons or groups (carried out through monetary economic compensation, non-monetary economic compensation, symbolic reparations, and the restitution of rights); (ii) the prevention of future violations of rights (through training public officers, raising social awareness, introducing legal reforms, creating or reforming institutions, and other preventive measures); (iii) the investigation and punishment of human rights violations, an action that may occasionally require legal reforms; and (iv) the protection of victims and witnesses.[11]

At the inter-American level, Hawkins and Jacoby code compliance with the type of reparation, following a typology of reparations proposed by Jo Pasqualucci,[12] as follows: (i) enjoyment of right or freedom violated; (ii) remedy the consequences of the violation (including (a) investigate, identify, publicise and punish; (b) amend, repeal, or adopt domestic laws or judgments; (c) take action or refrain from taking action; and (d) apologise); and (iii) pay fair compensation (including (a) material damages; (b) moral damages; and (c) costs and expenses).

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[6] Courtney Hillebrecht, 'Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals', 1(3) *Journal of Human Rights Practice* (2009): 368. See also Murray and Long (n 3): 38–40.

[7] Murray and Long (n 3): 38.

[8] Hawkins and Jacoby (n 2): 36-7. See also Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge: Cambridge University Press, 2014): 46.

[9] Murray and Long, (n 3)*:* 40. See also Frans Viljoen, 'Exploring the theory and practice of the relationship between international human rights law and domestic actors', *Leiden Journal of International Law* (2009): 177 and 180; and Frans Viljoen and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights', 101(1) *American Journal of International Law* (2007): 1.

[10] Note that this is a subtly different approach, since it is a typology of outcomes rather than reparation measures as such.

[11] Basch et al. (n 11): 12–14.

[12] Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2003).

The HRLIP developed the following typology, derived expressly from the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (IX. Reparation for harm suffered) in order to ensure that it covered all possible types of reparation in any or all systems.[13] The sub-categories in the following typology are not exhaustive:

1. **Monetary orders**
    - Compensation
    - Pecuniary damages
    - Non-pecuniary/moral damages
    - Costs and expenses
    - Legal aid

2. **Restitution**
    - Restitution of or to property (to include any type of restitution of an object or land)
    - Return of displaced persons
    - Judicial restitution (to include any re-trial, review of convictions, release from imprisonment, annulment of a sentence or the commutation of a sentence)
    - Employment restitution
    - Restitution of family relationships

3. **Satisfaction**
    - Dissemination of facts/truth about what happened
    - Search, identification and delivery of the mortal remains of a person
    - Acknowledgment of violations (in public or in private)
    - The judgment itself as a form of satisfaction
    - Apologies (in public or in private)
    - Building a monument or an art object that would help to remember the victims
    - Naming a place after a victim
    - Translation, publication and dissemination of the judgment
    - Scholarships in memory of victims and to provide with education particular groups of people
    - Creation of a particular post (the establishment of a chair in journalism)
    - Compilation/writing of a publication
    - Building a museum
    - Creating a mechanism to monitor compliance with the reparations ordered

4. **Rehabilitation**
    - Providing physical and/or mental health services for the victims
    - Providing victims with compensation to pay for such rehabilitation services
    - Providing education (access, scholarships) and/or employment opportunities to individual victims

5. **Guarantees of non-repetition**

[13] This typology did not preclude the use of autonomous concepts, such as “transformative remedies” used by the Inter-American Court (in the Cotton Field judgment), which involves theoretical trends that are not easy to find in the concept of guarantees of non-repetition.

This form of reparation has two dimensions: a) they are sector-specific as they target a particular state (or sometimes non-state) **sector**; and b) they require a specific **action** from the state such as a legal reform, training of personnel, establishment of institutions, etc. Flexibility was maintained when analysing the data.

Sectors, e.g.:

- Security sector reform (all types of reform of the military and police forces)
- Justice sector reform (reform of the judiciary, exhumation programmes, establishment of DNA banks, legislative changes to ensure victims participation in criminal proceedings)
- Socio-economic reforms (reforming the health sector, preventing the spread of contagious diseases)

Actions, e.g.:

- Legal reform (to include ratification of international treaties and constitutional or legal reform)
- Administrative reform
- Lustration and vetting (investigating and removing from office all those rotten apples, preventing them from being elected as public officials, etc.)
- Cultural reform (such as the design and implementation of specific campaigns, setting up gender programmes or adopting a zero tolerance policy towards violence against women)

6. **Protective measures**

- Refrain from removing a person to country where she suffers risk of death penalty, torture, or CIDTP
- Provide protection to members of the justice system or witnesses involved in the investigation of a particular case

7. **Obligation to investigate, prosecute and punish**

- Re-opening investigations
- Investigate, prosecute and punish the perpetrators
- Investigate and sanction those responsible for irregularities/obstacles in the investigation of the facts

8. **Collective reparations**

Collective reparations with a development edge

- Improve/provide basic health care for particular groups of people (building a health centre)
- Improve/provide education (building education centres – schools)
- Implementation and support to put together productive projects for the victims
- Building the required infrastructure and providing basic services for the victims of the community

Cultural collective reparations

- Maintaining a sacred place for the victims such as a chapel

9. **Duty to report** to the bodies that have ordered/recommended the measure

We were aware that some of these types of reparation measures were entirely absent from some systems, while some were common to all.

b) Measuring full, partial and non-implementation

Disaggregated methodologies to identify and measure case-level compliance permit identification of what is variously termed partial or 'à la carte' compliance.[14] Given that outright refusal by states to implement judgments is rare, the HRLIP started from the premise that the concept of **partial implementation** is a helpful explanatory device which transcends the cruder binary distinction between full implementation and non-implementation of a judgment or decision. Disaggregating the various measures required to implement a judgment above allows for not being limited to such a crude binary distinction.

Hawkins and Jacoby identify four types of partial compliance within the European and inter-American systems.[15] These are:

1. 'split decisions', where a state complies with some but not all measures required (e.g. complying with individual but not general measures, or implementing a judgment in only part of the state's territory);
2. 'state substitutions', where a state sidesteps particular requirement(s) of a judgment and offers a different response, which may or may not be deemed adequate by the supervisory body;
3. 'slow motion' compliance, where a state takes some but not all required steps towards remedying a violation, whilst not excluding the possibility that it might do more; and
4. 'ambiguous compliance amid complexity', where the required steps are exceptionally demanding and/or political conditions are unfavourable, often leading to a stark disparity between what a judgment requires and what a state does.

The HRLIP used Hawkins and Jacoby's typology as a starting point for our own analysis. However, by taking a largely (though not exclusively) **inductive approach** to this question, we were able to identify additional or alternative patterns of partial implementation from the data obtained (as well as examining how far the existing typology holds for patterns of implementation in Africa). An additional category was also required which captured cases where there was inadequate information to assess whether or not implementation had occurred. Our typology of reparations is relevant here, since partial implementation may be more prevalent, or have a different cause, in respect of different types of reparation; for example, can states 'partially' comply with non-repetition measures and if so, what would that look like?

The HRLIP did not, as some authors do,[16] use the *speed* of the process as the key indicator of the effectiveness of implementation. The assumption that 'faster is better' may work at the aggregate level to indicate the overall implementation record of a state, and to make comparisons between states. However, speed is not the only criterion of effectiveness and delay does not necessarily denote resistance or procrastination in respect of specific judgments; the 'quality' of the implementation

[14] Hawkins and Jacoby (n 2): 77–83; Hillebrecht (n 8): 41–2.

[15] Hawkins and Jacoby (n 2): 77–83.

[16] See, e.g., Basch et al. (n 11): 27; Sharanbir Grewal and Erik Voeten, 'Are New Democracies Better Human Rights Compliers?', 69(2) *International Organization* (2015): 497.

process had to be factored in, including, for example, public consultation and legislative debate to inform a complex legal or administrative reform.

In order to identify reasons for any periods of protraction of particular actions in the implementation process, we created, as part of the qualitative analysis, a **chronological account** of the implementation process, e.g. in the form of a 'timeline of relevant events in the implementation process', in respect of each judgment/decision. The relevant information was gathered by way of desk research (with the help of the In-Country Liaison Consultants), complemented by factual data obtained through interviews and in-country workshops. This enabled us to look at the interaction between time and the different types of measures that were required to give effect to a ruling, thus investigating some researchers' assertion that states tend to implement some measures more rapidly than others on the basis of data from three regional systems and the UN system pertaining to a range of thematic issues.

4. Selection of states

The HRLIP tracked selected judgments and decisions against nine states:

- Burkina Faso, Cameroon, Zambia
- Canada, Colombia, Guatemala
- Belgium, Czech Republic and Georgia.

Certain states were eliminated at the outset, on the basis of the number of judgments and decisions from both international and regional human rights bodies. Some states were eliminated because of the practical difficulty of accessing data and/or security concerns.

A mapping exercise was then undertaken to ensure the selection of three states in each region on a spectrum of strong-medium-weak in respect of the quality of democracy and the rule of law, including political rights and civil liberties, as derived from several global indices and factors such as the existence or not of domestic structures and processes for implementation and compliance (e.g. NHRI/ombudsmen compliant with Paris Principles).

Other criteria were then used to eliminate 'also possible' states. In particular, it was decided to select states with at least some (even if weak) 'pro-compliance' structures and constituencies (including civil society) and engagement with supranational systems - hence not the weakest state and, correspondingly, not the strongest in the respective regions.

Some specific regional considerations were also taken into account, e.g. the research team working on Europe considered it necessary to choose one former Soviet state, given the specific political legacy shared by these states in terms of the nature of prevailing human rights problems, and a lack of human rights structures or 'culture', which make this group of states an interesting case study in terms of structural, capacity-related and attitudinal factors. In the Americas, it was deemed important to include both centralist and federal states in the selection, and in respect of Africa, it was decided to include both anglophone and francophone states.

Another criterion was the nature of the judgments and decisions against the various 'also possible states'. Given the HRLIP's interest in the nature and specificity of reparation measures (derived from research Qs 5 and 6), the researchers chose to select only those states which had some adverse

judgments involving reparations of a complex nature (addressing systemic or widespread violations) and involving a degree of specificity in the reparations measures required.

A number of controlling factors (i.e. subsidiary to the eliminatory criteria described above) were then applied to arrive at the final selection. These factors largely related to the predominant themes in the available case law (cases involving the rights to freedom of expression / assembly / religion; deaths or ill-treatment in detention; domestic violence; conflict-related cases, among others). Other controlling factors were also considered but considered weighty enough to override the criteria outlined above (e.g. the option of including at least one common law European state (Ireland or UK) was rejected).

This approach recognised that compliance with judgments and decisions, the legal framework of the particular state, and the responses of various actors all take place within a particular social, political, economic and cultural context. The project aimed to 'look beneath the law' to better understand the context in which it functions in a particular jurisdiction.[17]

5. Selection of cases

The research team was aware of the constraints posed by the relatively small sample of cases and the plurality of interrelated variables that could potentially impact on the process of implementation of judgments. It did not, therefore, expect to be able to make any definitive, **generalisable** findings such as, to give but one example, that UN decisions are always less likely to be implemented than rulings emanating from regional commissions or courts. Rather, it was ensured that the case selection would allow for investigating more fine-grained questions, e.g. how the non-binding nature of UN TB decisions impacts on the implementation process.

With this overall aim of **ensuring that the final case selection would permit the researchers to investigate the research questions, using the typology of reparations** set out in Section 3a. above, the selection of cases to be analysed in the framework of the HRLIP was done in a two-step process.

a) Eliminatory selection criteria

In an initial step based on **practical considerations**, a number of possible cases were eliminated on the basis of two preliminary criteria:

- ***complexity*** – rulings not giving rise to the need to adopt a range of reparation measures – usually of both an individual and general nature – were eliminated upfront since they would not allow the team to address the research questions;
- ***the time passed since the ruling has been issued*** – the team wished to explore both older cases (where it might be expected that implementation was advanced or completed, or where protracted delay in implementation may be illuminating) and more recent cases (allowing us to track (non)implementation in 'real time'). It was also agreed that each regional team would retain the option to analyse more recent rulings if there were compelling reasons to do so, i.e. cases decided between the start of the project and the end of December 2016. These would, depending on their significance, either be added to their list of cases to be examined as

[17] Edward J. Eberle, 'The Method and Role of Comparative Law', 9(3) *Washington University Global Studies Law Review* (2009): 452.

objects of analysis in their own right; or be monitored in the framework of thematically similar or identical cases already selected.

As a result of this first set of criteria, the project team was able to limit the scope of the project, whilst retaining a broad enough 'basket' of possible cases to look at all the types of reparations identified.

b) A selection allowing for studying the research questions, using the HRLIP typology of reparations

There were a number of hypotheses underlying the research questions from which the team derived further criteria in order to arrive at a final case selection. The following factors were deemed to potentially impact on the implementation of judgments or decisions, and were used by the researchers in such a way as to ensure **diversity** of the final selection of cases **in respect of these variables**:

- ***the types of rights involved*** (civil and political; economic, social and cultural; individual and collective rights; isolated and systemic violations);
- ***whether the judgment/decision formed part of a cluster or group of cases*** – these groups or clusters of cases could point to systemic or large-scale problems, which was relevant in relation to Q5, but might also yield findings in respect of Q7. Moreover, there was an issue about case volume: it was to be expected that a state's response to one of only few violation judgments may differ from another state's response to one of hundreds or thousands of adverse rulings (including, but not limited, with regard to Q4);[18]
- ***the reparation orders made in the ruling*** in terms of specificity, novelty, and financial or political implications, including any orders or agreements which might facilitate implementation – these features of the judgment or decision itself might impact on implementation, directly addressing Q6;
- ***the (initial) perpetrator of the violation*** (state- or non-state actor(s)) – the rationale for selecting both cases where the initial perpetrators of the violation(s) found were state agents (e.g. domestic courts, law enforcement officers, ...) and cases pertaining to violations by non-state actors (e.g. family members, private hospitals, paramilitary groups, etc.) was the researchers' expectation that these factors raise issues under Qs 5 and 7 (and Qs 3 and 4);
- ***the victim's characteristic(s)*** (affiliation to the state; or the victim's/victims' belonging to a marginalised group (e.g. migrants), to an 'unpopular' group (e.g. prisoners or defendants in criminal trials), or to civil society), which might be relevant in relation to Qs 3 and 7;
- ***the number of victims*** – (individual/family or numerous), which might be relevant in relation to Qs 2, 3 and 5; and
- ***the legal representation (if any) of the victim(s)*** (unrepresented; represented by a lawyer; represented by an NGO), factors which might be relevant in relation to Qs 3 and 7.

➢ The researchers were conscious of the challenges posed by the use of a plurality of variables in a way so as to retain, rather than limit, diversity in case characteristics. We were aware that the HRLIP's actor- and perception-centred approach was likely to render controlling for specific, isolated factors that may impact on implementation impossible. The multitude of possible dependent variables and the resulting difficulty of controlling for them to generate

[18] By this, we meant that the ruling either pertains to the same facts that have given rise to several applications decided by the same or another international body; or that it has been joined to other rulings (that found violations originating from the same legislative, practical or other shortcomings) for the purposes of monitoring its implementation.

generalisable findings about a particular factor studied as independent variable therefore necessitated adopting a partly deductive (applying certain criteria based on hypotheses derived from the research questions) but predominantly inductive approach of reasoning at the stage of data analysis. A mainly inductive approach was deemed not only necessary, but also possible in the light of the relatively small sample of cases. The team was mindful of the implications of these constraints for data analysis in the process of designing the questionnaire used during interviews.

On the basis of a pre-selection thus arrived at, comprising up to 25 cases per country, a mapping exercise was undertaken with a view to ensuring that the final selection of between six and nine cases, or clusters of cases,[19] per country would correspond to the methodology set out in the foregoing. The following **subsidiary criteria** were taken into account in this final step:

- ***the thematic issue(s) raised by the case*** – it was decided to focus on judgments raising issues that could be broadly subsumed under one or several of the following headings: freedom of expression/assembly; human rights violations occurring in the context of armed conflict; discrimination cases; gross human rights violations; gender-based violence; fair trial guarantees; prisoners; rights; immigration/deportation cases; family rights; collective rights; and economic, social and cultural rights;
- ***the body issuing the decision or judgment*** (regional commission or court; all possible UN treaty monitoring bodies; Chamber or Grand Chamber of the European Court of Human Rights) – this variable was of relevance in respect of Qs 1, 3, 4 and (to a more limited extent) Q2. Since a key contribution that the HRLIP intended to make to the existing literature was to explore the implementation of judgments handed down by various UN and regional human rights bodies, the team was mindful of including cases from a broad range of supranational bodies;
- ***the type of judgment/decision*** (merits or friendly settlement) – the type of judgment might be relevant in relation both to system- and case-centred research questions. Whilst acknowledging that the limited number of friendly settlements selected for analysis may diminish the generalisability of any findings in this respect, the researchers decided to include friendly settlements, since these helped to test a number of hypotheses which were derived from Qs 1, 3, 4, 5 and 6.

  The HRLIP aimed to establish not only how the selected cases were responded to, but above all why specific cases were responded to in a certain way. We were conscious of the need to avoid viewing the selected rulings as primary drivers of the analysis, which could have resulted in a large-scale, but not necessarily purposive, data collection task. Instead, the cases were intended as lenses through which to test the hypothesis underlying the research questions; they were vehicles to explore the various stakeholders' interests, attitudes, and participation in the compliance process.

  When analysing the data gathered, we also isolated certain internal (i.e. case-specific) factors that appeared to have 'tipped the scale' in the process of implementation of a particular judgment. The project team thus took into account and prompted for the role of external factors that could have had implications for implementation.

[19] Namely, (a) applications concerning similar complaints that formed part of one decision or judgment; and (b) judgments on the same issue(s) that were grouped together for the purposes of monitoring their implementation.

6. Selection of interviewees

Whilst not being the only facet of our qualitative methods, interviews were crucial to find answers to most of our research questions. Interviews were conducted with a range and number of actors, i.e. stakeholders at the relevant domestic or supranational level occupying (largely) equivalent places/performing (largely) equivalent functions.

By 'actors' to be interviewed we meant, at the domestic level:

- representatives of the executive (including civil servants and interlocutors with supranational bodies)
- parliament (including parliamentary staff)
- courts and prosecutors
- NHRIs/ombudsmen and other statutory bodies
- civil society (including NGOs, academics)
- victims and their legal representatives
- other experts.

At the supranational level, we meant the various institutions that make up the 'system' (e.g. the regional courts and commissions and their secretariats as well as the political organs; the UN treaty bodies and OHCHR staff) or that are influential with respect to the system (e.g. the EU, AU, etc.).

Aside from these, the project team was mindful of the relevance of interviewing third party interveners, as well as those actors who acted as 'transmission belts' between supranational bodies and domestic decision-makers, such as secretariat bodies at both levels, Government agents, and other actors (potentially) enhancing the capacity, at both levels, for exchange and interaction.

7. Contribution to the literature on implementation/compliance

The HRLIP started from the premise that human rights 'systems' are a complex web of interaction and interdependence between institutional actors, both domestic and supranational, each of which has different functions, expertise, competence, and claims to legitimacy – and none of which can secure the objectives of the 'system' alone, but only through their interrelationships, whether of collaboration, coordination, competition, or oversight.

The HRLIP was principally concerned with literature that sought to explain why states comply – or fail to comply – with standards and obligations under international human rights treaties and, more importantly, existing literature on case-level implementation, rather than the (related) literature about why states create and ratify human rights (or other international) treaties in the first place.[20] This compliance-related literature draws extensively from theoretical approaches adopted by international relations (IR) scholars, with which international law scholarship interacts in different ways – the 'conversation' between the two is of relatively recent origin and is still evolving.[21] The HRLIP thus drew upon writings from the international relations, political science and international law perspectives, and

[20] See, e.g., Oona Hathaway 'Why Do Countries Commit to Human Rights Treaties?', 51 *Journal of Conflict Resolution* (2007): 588.

[21] See, e.g., Martha Finnemore, 'New Directions, New Collaborations for International Law and International Relations' in Thomas J. Biersteker et al. (eds), *International Law and International Relations* (Abingdon; New York: Routledge, 2007), Chapter 17.

sought to contribute to the wider conceptual and inter-disciplinary debates about implementation/compliance.

Within the compliance-related body of literature, there is an evolving strand focussing on case-level compliance[22] from which the HRLIP most directly drew and contributed to, since this was where the domestic politics of implementation was visible. HRLIP sought to exploit its potential to bring some of the more general compliance-related literature into the literature on implementation with judgments, i.e. to test some of the political science and IR theories outlined above on the basis of empirical data about the implementation of particular judgments across four systems, thus adding to the limited literature that uses IR theories in case-centred implementation debates.

As illustrated in the diagram below, IR theories cluster under two main approaches: **rationalism** and **constructivism**. Viewing the strands of IR theories as a spectrum, at one end is the **(neo)realist approach**, which emphasises power, coercion, and sanctions, and views the state (and its interests and identity) as having a unitary character. At the other end is **constructivism** – an eclectic body of work which lays emphasis on the non-coercive norm-shaping and socialising role of international law, and on processes of argumentation, interaction, exposure to norms among different (domestic and transnational actors), and 'domestication' of international legal norms. Constructivists place greater emphasis on 'the role that culture, ideas, institutions, discourse and social norms play in shaping identity and influencing behaviour'.[23] Thus, for constructivists, 'repeated interactions, argumentation, and exposure to norms characterise and construct state practice'.[24] Constructivists do not to tend to argue that ideas and norms operate as direct causes of action or behaviour; rather, they 'constrain, enable and constitute actors in their choices'.[25] Constructivism is diverse in respect of the breadth of explanatory accounts as to precisely *how* states come to internalise and identify with human rights (or other (international) legal) norms. Other approaches that lie along this spectrum are **rational choice**[26]; **institutionalism**[27]; **liberal theories**[28]; and **norm-centred approaches.**[29]

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[22] See Hillebrecht (n 6 and n 8); Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', 25(1) *European Journal of International Law* 205 (2014); Dia Anagnostou, 'Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Jjudgments on Minority-related Policies', 14(5) *The International Journal of Human Rights* 721 (2010); id., 'Mainstreaming European Human Rights Case Law Domestically: A Policy Brief on State Implementation of Strasbourg Court Judgments', JURISTRAS Project (2009), available at: http://bim.lbg.ac.at/files/sites/bim/JURISTRAS_Policy%20Report_Europe.pdf; Tom Barkhuysen and Michiel L. van Emmerik, 'A Comparative View on the Execution of judgments of the European Court of Human Rights', in Theodora Christou and Juan Pablo Raymond (eds), *European Court of Human Rights: Remedies and Execution of Judgments* (British Institute of International and Comparative Law, 2005), 1-24; Başak Çalı and Anne Koch, Lessons Learnt from the Implementation of Civil and Political Rights Judgments (June 2011), SSRN eLibrary, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1858663; Başak Çalı and Alice Wyss (n 4); Andreas von Staden, 'Rational Choice within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights' (February 2012), SSRN eLibrary, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000024.

[23] *Ibid*. 121.

[24] Elizabeth Stubbins Bates, 'Sophisticated Constructivism in Human Rights Compliance Theory', 25(4) *European Journal of International Law* 1169 (2015): 1170.

[25] Jutta Brunnée and Stephen J. Toope, 'Constructivism and International Law', in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: the state of the Art* (Cambridge: Cambridge University Press, 2013): 124.

[26] See, e.g., Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford, New York: Oxford University Press, 2005); Emilie Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights

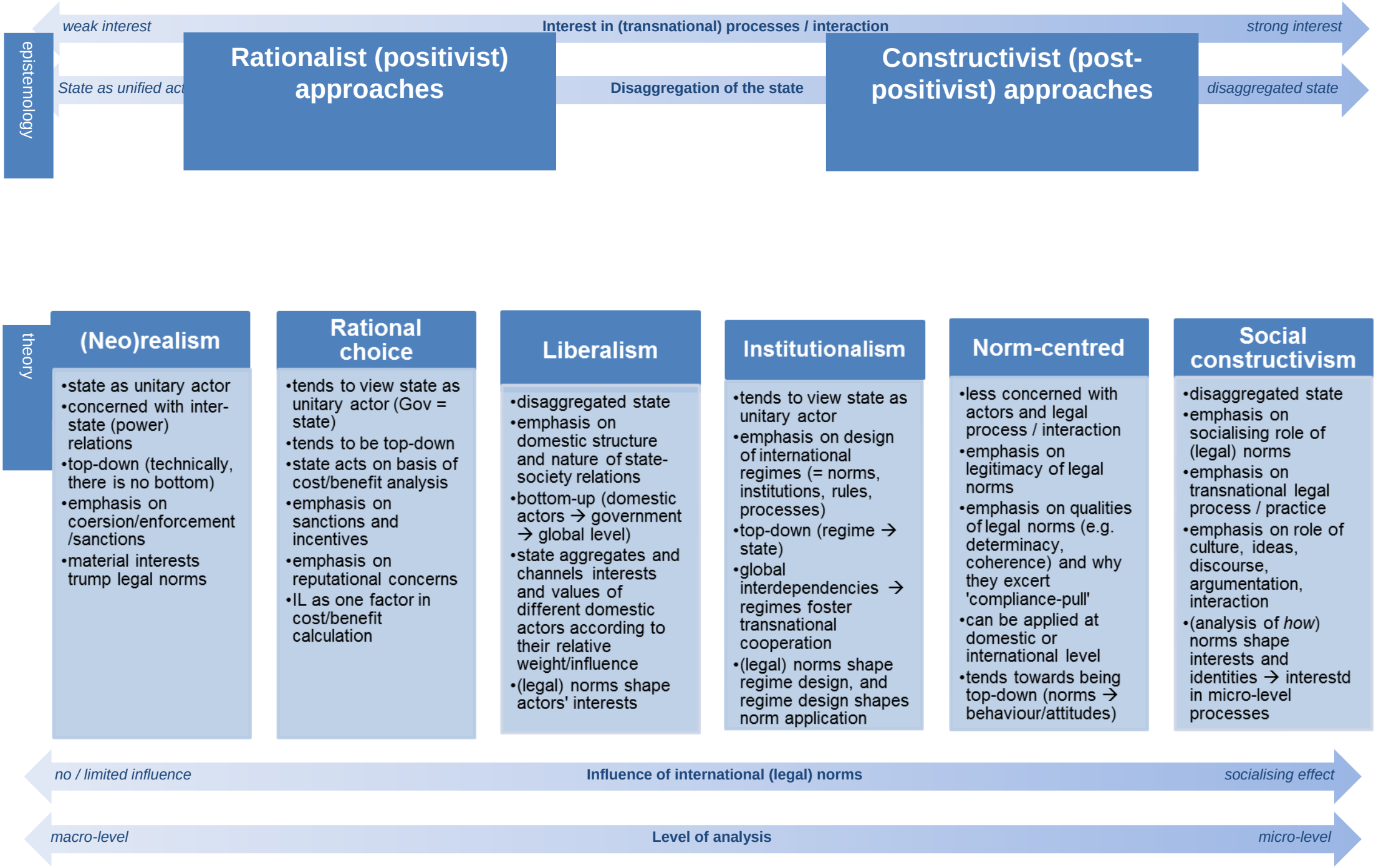
Except at the far ends of the spectrum, these approaches are not mutually exclusive. The HRLIP integrated different aspects of them and, in so doing, focused on empirical observation of domestic political bargaining and collaboration, as well as interaction between domestic actors and supranational bodies. More specifically, the HRLIP drew from, and contributed to, emerging integrated approaches, using constructivist, liberal and rational choice arguments to explain (non- or partial) implementation. The project's multi-layered, qualitative approach – which, as noted above, combined desk-based document reviews, semi-structured interviews, national and regional workshops, as well as participant observations at regional and international treaty body meetings – lended itself particularly well to exploration of different actors' attitudes, discourse, motivations, behaviour, and participation in processes.

Enforcement Problem', 62(4) *International Organization* (2008): 689; and Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (New York and Oxford: Oxford University Press: 2010).

[27] Barbara Koremenos, 'Institutionalism and International Law' in Dunoff and Pollack (eds) (n 25): 59–60.

[28] Andrew Moravcsik, 'Liberal Theories of International Law', in Dunoff and Pollack (eds) (n 25): 83–4.

[29] Thomas M. Franck, *The Power of Legitimacy among Nations* (New York; Oxford: Oxford University Press, 1990).


epistemology
weak interest
Interest in (transnational) processes / interaction
strong interest
Rationalist (positivist) approaches
State as unified act
Disaggregation of the state
Constructivist (post-positivist) approaches
disaggregated state
theory
(Neo)realism
•state as unitary actor
•concerned with inter-state (power) relations
•top-down (technically, there is no bottom)
•emphasis on coersion/enforcement /sanctions
•material interests trump legal norms
Rational choice
•tends to view state as unitary actor (Gov = state)
•tends to be top-down
•state acts on basis of cost/benefit analysis
•emphasis on sanctions and incentives
•emphasis on reputational concerns
•IL as one factor in cost/benefit calculation
Liberalism
•disaggregated state
•emphasis on domestic structure and nature of state-society relations
•bottom-up (domestic actors → government → global level)
•state aggregates and channels interests and values of different domestic actors according to their relative weight/influence
•(legal) norms shape actors' interests
Institutionalism
•tends to view state as unitary actor
•emphasis on design of international regimes (= norms, institutions, rules, processes)
•top-down (regime → state)
•global interdependencies → regimes foster transnational cooperation
•(legal) norms shape regime design, and regime design shapes norm application
Norm-centred
•less concerned with actors and legal process / interaction
•emphasis on legitimacy of legal norms
•emphasis on qualities of legal norms (e.g. determinacy, coherence) and why they excert 'compliance-pull'
•can be applied at domestic or international level
•tends towards being top-down (norms → behaviour/attitudes)
Social constructivism
•disaggregated state
•emphasis on socialising role of (legal) norms
•emphasis on transnational legal process / practice
•emphasis on role of culture, ideas, discourse, argumentation, interaction
•(analysis of *how*) norms shape interests and identities → interestd in micro-level processes
no / limited influence
Influence of international (legal) norms
socialising effect
macro-level
Level of analysis
micro-level