Enforcement of ESC Rights Judgments

International Symposium, Bogota, Colombia 6-7 May 2010

Analytical Report

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I. Overview of Symposium and Book Project[1]

In the last two decades, there has been a remarkable rise in the numbers of economic, social and cultural rights (ESC rights) decisions issued by judicial bodies. Judgments can be found in all regions, all types of legal systems and covering all aspects of the rights. This trend is most pronounced in Latin America, South Asia, Eastern Europe, South Africa and less so in sub-Saharan Africa, the Middle East and South-East Asia while the situation is varied across and within Western countries (Langford, 2008; Coomans, 2006; Rossi and Filippini, 2009). The phenomenon is only likely to accelerate with a growing use of litigation strategies amongst civil society, the continued constitutionalisation of ESC rights and the recent adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which is also likely to prompt domestic courts to consider adjudicating these rights in order to avoid cases being appealed internationally.

However, in many jurisdictions there are some or many judgments that remain unimplemented, although the extent to which there is a systematic or isolated problem appears to differ. For example, Hossain and Byrne (2008:143) note that South Asian cases have provided a rich and varied jurisprudence but that "many significant judicial decisions are not implemented fully or even in part". They highlight that "advances in jurisprudence urgently need to be matched by action on the ground to ensure compliance of all concerned authorities with the judgments and orders of national courts, to ensure effective enforcement and

[1] This overview is an excerpt from a larger concept note for this project, developed jointly by ESCR-Net, Norwegian Centre for Human Rights and Dejusticia, "Enforcement of Judgments on Economic, Social and Cultural Rights: Towards a Theory and Practice", (Dec. 2009), available at: http://www.escr-net.org/actions/actions_show.htm?doc_id=1156637.

enjoyment of economic and social rights." In South Africa and Latin America, compliance levels have been comparatively higher but practitioners have faced myriad obstacles and delays in the implementation phase. In addition, there have been debates as to the level of implementation of some cases such as the *Grootboom* case from South Africa (Cf. Liebenberg, 2008 and Berger 2008). In Europe there have been struggles to implement some decisions concerning Roma minorities and migrants (MSF, COHRE and ERRC, 2007). The deficient implementation of decisions has also been pointed out as a serious problem in the Inter-American and African System of Human Rights (CEJIL, 2002; Wachira and Ayinla, 2006). The lack of implementation affects directly and most prominently the victims of the case but it also challenges the relevance and impact of human rights law as a useful framework for ensuring economic and social justice. A second challenge is that some of the judgments are now yielding more complex remedies which have been expected when positive obligations of ESC rights are involved. In Latin America, recent assessments by both practitioners and scholars have identified a growing trend towards court rulings establishing complex remedies to address structural violations of human rights, from the situation of internally displaced people in Colombia (Rodríguez-Garavito and Rodríguez Franco, 2009) to that of prisoners in overcrowded jails in Argentina (CELS, 2009; Abramovich, 2009; Fairstein, Kletzel and García Rey, 2009; Maurino and Nino, 2009). Complex remedies are not necessarily a new phenomenon in human rights or law generally (Roach, 2008). In the US there have been many lessons learnt in implementing groundbreaking decisions on civil rights but also on racial segregation and financing of education (Albisa and Schultz, 2008).

In the growing literature on judicialisation of ESC rights the research has been largely dominated by studies that have primarily taken up the *theoretical* question of how to justify the judicial application of ESC rights in terms of democratic political theory (Vierdag, 1975; Fabre, 2000; Dennis and Stewart, 2005; Bilchitz, 2008) or the legal question of systematizing, refining, critiquing and challenging legal standards and doctrines on ESC rights in order to promote their application by national and international courts and governance agencies (Gargarella, Roux and Domingo, 2006; Langford, 2008; Abramovich and Courtis, 2001; Dugard and Roux, 2006; Young, 2008, ICJ, 2008). While these fields are themselves still in development, the least advanced area has been studies on the implementation and impact (both positive and negative) of judgments. Nonetheless, the field is quite advanced in the United States (Horowitz, 1977; McCann, 1994; Rosenberg, 1991) and some comparative studies have been made of *impact* in the field of ESC rights (Gauri and Brinks, 2008, Langford, 2003 and partly Langford, 2008), as well as some country studies (e.g. Heywood, 2005; Abramovich and Pautassi, 2009) and civil rights' implementation in Europe (see Çalı, 2008). Even less studied are the *reasons* for implementation or non-implementation of particular decisions, how impact is maximized and what *strategies* have been most effective in this regard.

Thus, while the contributions on democratic theory and law have made considerable progress towards the conceptual clarification and actual enforcement of ESC rights litigation, the emphasis on the *democratic legitimacy* and *production* of ESC rights rulings has tended to direct attention away from an equally important matter: the *implementation* of such rulings. As Gauri and Brinks (2008: 20) conclude, "this oversight may stem from theoretical or practical reasons –either because the last step [post-decision implementation] appears as an iteration of the first [i.e., judicialization of an ESC rights case], or because it poses daunting research difficulties … or both— but it is a crucial determinant of the extent of legalization in a given policy area". As a result, both activists and scholars have devoted relatively little time to discussing pressing practical questions that are fundamental to the realization of ESC rights. What happens after a court issues a ruling that is favorable to the cause of ESC rights? How are its orders implemented or ignored by the government and other state and non-state actors? Which are the factors that have allowed for implementation and those that have prevented it or hindered it? Ultimately, do court interventions in ESC rights cases make a difference to the cause of mitigating inequality and social injustice?

As courts in different parts of the world have become more receptive to ESC rights litigation and unimplemented or partially implemented judgments have proliferated, these questions have become central to the agendas of NGOs, social movements, judges, public officials and other social and political actors interested in promoting ESC rights. This became evident, for instance, in discussions among members of ESCR-Net's Working Group on Adjudication, on the occasion of the ESCR-Net 2009 International Strategy

Meeting on ESC rights in Nairobi (Kenya). Indeed, the Working Group selected the issue of implementation of judgments as one of its core strategic areas of work for the next few years. From the discussions at the meeting, the need of developing a transnational research and advocacy agenda on the topic in order to ensure that the right obstacles and right type of strategies are identified became apparent, particularly considering the legal and political complexities and differences across systems. Given the embryonic nature of the problem, it was also emphasized the need for sharing and learning from the developments in different jurisdictions as well as from the strategies and actions that have been advanced to address this problematic situation. In order to fulfill this mandate and shed new light on this analytical and practical blind spot, ESCR-Net, Dejusticia (Center for Law, Justice and Society, Colombia) and the Norwegian Centre on Human Rights convened a two-day workshop in Bogota, Colombia (May 2010) that brought together human rights lawyers, activists, scholars and constitutional judges from different parts of the world. The workshop, hosted by Dejusticia and funded by the Ford Foundation, combined dialogue on conceptual and empirical issues with discussion on joint strategies for promoting the implementation of ESC rights.

- ***Methodology of Symposium***

Panels revolved around a series of papers that were commissioned to practitioners and analysts from different regions. To foster cross-fertilization among regions and types of expertise, discussants were selected for each panel to comment on papers and provoke debate among participants. Papers will now be revised to incorporate the debate at the Bogota workshop and compiled by the organizers into a volume to be published (in Spanish and English) and widely disseminated among human rights circles around the world.

Participants in the event included 71 academics, activists, funders, lawyers and judges from 19 countries and all regions of the world. The event began with a keynote speech by former Colombian Constitutional Court Justice, Manuel Jose Cepeda, in which he highlighted the role of judges can play in overseeing enforcement of judgments, including factors that affect the role a judge can take in particular circumstances and possibilities for involving civil society and affected groups. The agenda then proceeded into an overview session on the goals of the event and the impetus of the project, and a series of regional presentations were given with discussions based on the papers described above, including North America, Latin America, Asia and Africa, and the Middle East and North Africa. There was also a session on enforcement issues in regional and international mechanisms as well as a session on strategies used by NGOs and lawyers to overcome obstacles to enforcement. The symposium ended with a session which brought together the threads of the discussions from the previous two days and sought ideas on long and short term strategies for this work and are fully detailed later in this report in the section titled “Moving Forward”.

Below, the key themes and points of debate that arose during the symposium will be highlighted. These themes generally focused on identifying various factors that make implementation more or less likely in a particular circumstance, possible strategies to overcome obstacles in implementation and some over-arching ideological and theoretical issues that activists as well as academics might consider in their work in this area.

II. Conceptual / Methodological Issues

“Implementation of ESCR is a process as opposed to an event.” (Odindo Opiata)

1) Implementation & Impacts

It was asserted in various ways throughout the conference that attempting to divorce an assessment of implementation from an assessment of impact may potentially undermine our larger goals. César Rodriguez introduced the idea that although direct implementation of court orders is critical, accounting for the indirect or symbolic effects that a judgment can have is also important in examining the success of the case in terms of broader goals of advancing recognition and protection of rights and submitted a model for thinking about the various impacts a decision might have. A focus on implementation alone limits the

discussion to the direct, material impacts of the judgment, i.e. did it change the measurable behavior of the targets of the litigation, which has led some to theorize that seminal judgments had little effect. Cesar pointed to scholarly analysis (Rosenberg, 1991) which claims the actual court cases of *Brown v. Board of Education* and *Roe v Wade* in the United States had little effect on the right to education and reproductive rights, respectively; that it was the social mobilization and resulting legislation which created change. However, others countered that judicial decisions create change not only when they directly alter the behavior of the subject of the litigation, but also when the public perception is altered or new civil society alliances are forged. Therefore, in some instances, although a judgment may not be implemented in the material sense, it may have favorably influenced the issue for the groups affected. Cesar presented the table below to capture this broader approach.

	Direct	**Indirect**
Material	Designing public policy as ordered by the decision	Forming coalitions of activists to influence the subject of the decision
Symbolic	Defining and perceiving the problem as a rights violation	Transforming public opinion about the problems, urgency and gravity

Source: César Rodriguez Garavito (2011)[2]

This was also the underlying idea of the presentations by Jackie Dugard and Odindo Opiata on the possibility of "winning by losing". The idea was that depending on the overall goals of the litigation strategy, it might still be useful to bring a losing case as there may be positive impacts despite a negative judgment or lack of implementation. These could be heightened media and public awareness, community empowerment or increased pressure on policy-makers. Malcolm Langford and Steve Kahanovitz also highlighted the *Joe Slovo* case, which actually lost, but where there was a high level of impact because civil society was greatly involved.

2) Focus on a winning strategy or challenging the status quo?

Bruce Porter questioned, if we never force the courts to deal with the big questions, will we ever achieve transformational change? In several different ways, presenters advanced the idea that human rights lawyers need to balance the specific needs of the clients in a case with the over-arching goals of advancing recognition and implementation of rights for all. Each case is a balancing act in terms of strategy on the claim presented and remedy sought as it relates to the likelihood of enforcement. Possibly a dual strategy of initiating "systemic" or "collective" cases aimed at transforming the current structure or creating a new structure – which are often less successful – while also continuing to initiate individual/medium/incremental cases that have a higher likelihood of winning and effective enforcement, or advancing particular elements of the right in question, might be most desirable. In general, Bruce and other participants suggested that depending on the case, implementation may be more or less the central goal of the litigation. In some contexts, winning the case or achieving implementation may be highly unlikely, however, the case may allow larger social inequalities to be challenged and bring greater awareness and public support for the situation of affected communities.

One example of what this means emerged through the repeated idea that one can "win by losing." This idea emphasized that litigation can be secondary to a more important process of community empowerment, mobilization and public awareness-raising. If these are the larger goals, actually winning and implementing

[2] César Rodriguez Garavito, "Assessing the Impact and Promoting the Implementation of Structural Judgments: A Comparative Case Study of ESCR Rulings in Colombia", draft paper and Power point presentation prepared for workshop, (on file with ESCR-Net) May 2010.

the case is less important. Odindo Opiata provided an example of the *Toi market* case, in which market vendors sought to defeat an eviction order of traders from particular areas of the market. Although the traders lost the case, they used the case to mobilize and unify the group so successfully that it deterred the government from pushing forward with the eviction. Therefore, the fact that they lost the case was of little consequence to the overall goals of the group.

A similar example was offered by Jackie Dugard (SERI, South Africa) in relation to the *Mazibuko* water case in South Africa. Although the community finally lost their claim on access to water, the case allowed the community to unify around common objectives, build awareness of their human rights and have a voice in the public domain on the issues and government policies that were impacting them. The community in this case is now organizing their own people's courts to decide among themselves how they believe the Court should have decided in the case and the City of Johannesburg has not gone forward with installing pre-paid water meters in that community because of the high public profile of the case. Jackie characterized this strategy as "legal mobilization" which involves an integrated effort between civil society, research, activism, advocacy and litigation, grounded deeply in the affected communities and social movements. Additionally, she stressed that advancing this strategy must be a coordinated effort to ensure momentum and so that ad hoc interventions are prevented and the environment for a more permanent rights revolution is created.

It was voiced, however, that we need to be somewhat cautious of advancing this idea. Viviana Krsticevic supported the wider successes these "losing" cases presented but she also pointed out that there are failures of cases that are real and that result in the loss of life, in immense political setbacks in subjects of women's rights, migration, etc. These negative possibilities must also be incorporated in the ethics of the organizations and the criteria for choosing a case.

3) ***Lack of Indicators to Measure Implementation***

Martín Sigal discussed in his presentation that in the development of the paper written with Diego Morales and Julieta Rossi on implementation of judgments in Argentina, analyzing level of implementation of judgments in many cases was very difficult due to the lack of indicators on what exactly constitutes implementation. For example, they questioned whether there is a specific term within which cases should be reasonably implemented? Whether a judge's delay in enforcing a preliminary order constitutes non-enforcement? They found this issue of lack of indicators was even more critical in cases which involved partial implementation or when some action, although insufficient, was taken by the state. Therefore, indicators are needed to begin to make larger conclusions on levels of implementation across regions, but also to analyze the stage of implementation in specific contexts.

III. Factors Affecting Implementation of Judgments

1) Implementation of Economic, Social and Cultural Rights Cases Versus Civil and Political Rights Cases

There is a general assumption that implementation of economic and social rights might be more difficult to achieve than implementation of civil and political rights. Economic and social rights implementation may be lagging due to the complex and structural nature of the judgments. Interestingly, however, the only presentation and paper to directly address this issue argued that the nature of the rights involved does not constitute the primary obstacle to achieving implementation. Instead, the paper by Basak Çalı and Anne Koch (2010) contends that within the European Human Rights System, issues such as institutional design, legitimacy of the decision-making body, robustness of the enforcement system and the perceived costs of compliance by decision-makers will have the greatest role in determining implementation.

Along the same lines, Sigal, Morales and Rossi have observed that when analyzing the implementation of large cases involving systemic change, which they label as "*structural collective"* cases, the issue of greater difficulty in implementing judgments dealing economic, social and cultural rights as compared to those

concerning civil and political rights is dissipated. More relevant than the distinction between economic and social rights and civil and political rights, appears to be the characteristics of the case, the scope of the judgment and remedy, the number of agencies involved in solving the case, the political will to comply, and how long implementation takes. This contention was supported by Viviana Krsticevic's presentation on litigation within the Inter-American System, in that the difference she has seen in terms of levels of implementation relate more to the breadth of the remedies sought than the particular right at issue in the case.

It was also noted by Hossam Bahgat that compliance may be easier when the remedy sought is negative rather than positive (regardless of whether the right in question is an ESC or CP right) as negative decisions will not usually involve creation of new institutions or policies. Therefore, a finding from the discussions was that it is more likely that levels of implementation relate to numerous other factors, which were the focus of the other presentations throughout the two days, such as complexity of redesign and implementation of public policy and the creation of new institutions; political, economic, and social costs of implementing the decision; public support and social mobilization for the cause; type of remedy sought; size of the claimant pool; strength of the judiciary to execute its decisions and determine other powers to comply, form of government, etc., rather than the intrinsic justiciability of certain rights over others.

2) Social Movements / Affected Communities and Implementation of ESC Rights Judgments

Numerous presentations throughout the symposium touched on the issue of social movement's involvement to ensure an effective litigation strategy and implementation of a judgment. Some presenters stressed that they supported the theory of social change that places people through their organized groups at the center of the transformation of society. Therefore, social movements should be central actors in all litigation and implementation strategies. Odindo Opiata elaborated on this point by noting that litigation is merely one of the tools that his organization, Hakijamii a legal organization providing support to affected communities in Kenya, uses for the purpose of achieving social change. Numerous presentations stressed that the question is more whether to involve litigation in a particular struggle, than whether to involve social movements in litigation and implementation. Therefore, to achieve social change through any strategy, affected communities need to be at the forefront of the battle.

Despite the near universal affirmation that the involvement of social movements and community voices is needed and often essential to the litigation and implementation stages of a case, many presenters noted that it is not only social movements that can bring effective change on ESC rights. The extent of the involvement of social movements should be evaluated within the particular context and history of a given situation. Bruce Porter stated that rights-holders, civil society and government officials must engage in dialogue and that the voice of affected groups is essential particularly in social rights claims, which usually result from lack of democratic accountability and inclusiveness. Damon Hewitt suggested that litigators need the involvement of social movements to prevent "remedy-fatigue" i.e., government officials losing the political will to ensure implementation when there is little public pressure to do so.

It was pointed out that not all contexts allow for social movement organizing, particularly in more authoritarian contexts. To counter this, in Egypt they utilized the media to gain public support as there is a weak civil society. Various presentations from the Middle East and North Africa regions showed that where the case had media recognition and support it was much more successful and better implemented than in cases where the media did not publicize the issue.

The issue of "authentic" representation also arose. An extremely interesting exchange came out in relation to the unique social and political context of the MENA region given the high levels of state repression and limited community organizing. As discussed above, there seems to be a general notion that legitimacy in human rights litigation often stems from linkages to affected communities and their active engagement with the process. But some of the presenters from the MENA region challenged this concept as being universally accurate. Hossam Bahgat, for example, noted that he didn't think it was necessary to build a dramatic case

around a community story because in the case where his organization, Egyptian Initiative for Personal Rights was claiming access to affordable medicines, they wanted a discussion on policy where they were able to serve as policy experts against the government. Hossam noted that he thinks NGOs sometimes engage in artificial representation where it doesn't authentically exist. He stated that there may be an over-romanticization of representation and not really supportive of the case at issue. However, Steve Kahanovitz from the Legal Resource Center (South-Africa) countered that if there are no communities to authentically support a case, then maybe NGOs or attorneys' may not be considering the right issue to litigate.

This discussion drew out the critical issue of context, and how involvement of social movements may be more likely or more effective in contexts of democracy than in contexts of repressive regimes. Malcolm Langford, from the Norwegian Center for Human Rights, also mentioned that depending on the context, social movements might be more effective organizing around some issues than others. Some rights, due to their localism, can be hard to influence through broad-based mobilization., For example, Malcolm shared that national level water and housing movements have failed in South Africa largely due to their local nature and suggested that it may be easier to form national coalitions on education or social security which are administered nationally and can involve the middle class in creating political pressure. Therefore, the discussion suggested that the overall goals of the groups involved and the social and political context in which the case is advancing will determine the primacy of social movements in a given legal strategy, but certainly their involvement is rarely, if ever, a detriment and almost always significantly contributes to a successful decision and implementation.

3) The Chicken or the Egg

Various presentations went back and forth on the issue of whether sympathetic public perception of the issue of the litigation is required prior to effective enforcement of a judgment, or whether progressive judgments and implementation themselves facilitate a change in public perception of the issue. Justice Cepeda (former justice, Colombian Constitutional Court) stated that litigation is a micro-process in addressing rights whereas implementing rights requires social change facilitated by the creation of socially and politically legitimate institutions and systems which can effectively make rights accessible. This issue came up most directly during the presentations on India which showed a clear move between 1990 and today, toward more conservative judgments overall, yet remarkable progress on the right to food issue. It was asserted by Commissioner Harsh Mander (Supreme Court of India) that this aligned with the trend of Indian society generally becoming more free-market oriented, hence the court was issuing more conservative judgments. However, the explanation as to the anomaly on the issue of right to food is that Indian cultural/religious norms require this be a protected right, hence there was successful implementation.

Therefore, the argument, based on case data presented by Varun Gauri (World Bank, US) was that the move away from pro-poor judgments in India possibly coincided with the general move toward more conservative social/political/economic attitudes in India – therefore, social norms were dictating judgments. However, Bruce Wilson challenged this point in relation to the Costa Rican AIDS cases, which were decided in a context where AIDS was socially taboo and people with AIDS were openly discriminated against. The court ruling not only increased access to ARV drugs in the country, it had a profound effect on the social understanding and acceptance of people with HIV/AIDS. Bruce also gave the example of the *Loving* case in US, which successfully challenged anti-miscegenation laws and marked an important shift in social thinking on the issue. This discussion also relates to Cesar Rodriguez's presentation where he discusses the impacts the *Brown* and *Roe* cases had in advancing the social consciousness of the issues involved.

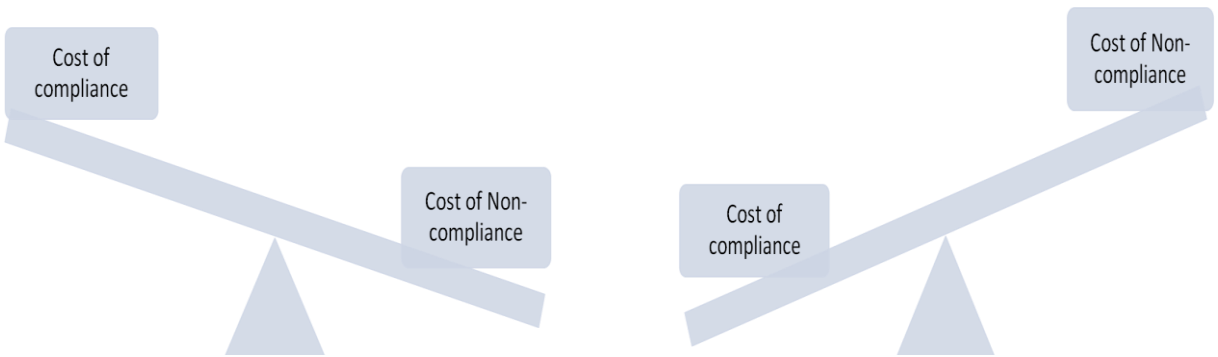
4) Costs – Real and Perceived

The real and perceived costs of implementing a judgment were also a central issue during the two days and iterations of this idea were discussed in various presentations. Real costs discussed included the economic implications of the judgment, particularly in large, collective or structural cases, and the presence of the relevant government agencies or institutional capacity needed to implement the decision. Costs can also include the political costs of supporting decisions involving highly stigmatized groups.

Anne Koch (University College of London), discussing implementation of civil and political rights in the European Court of Human Rights, emphasized that the costs associated with implementation of the decision are the motivating or inhibiting factors that inform States' decisions on whether to enforce the judgment. She also noted that these costs encompass the concept of "perceived costs", which "views decision-makers as agents embedded in domestic contexts who are both carriers of ideas and responsive to the constraints imposed by the environment." (Çalı and Koch, 2010: 9). They therefore have ideational commitments related to ESC rights which may affect their support for implementation. Koch also noted that perceived costs and incentives considered by decision-makers are not only those affecting their own ability to remain in power, but also issues of effective government, identities, beliefs and values. Daniel Brinks (University of Texas at Austin) described a similar concept as "affective costs". In describing this concept, Dan theorized that a decision-maker's or regime's support for implementation will be affected by the distance between objective of the litigation and the expressed normative commitments and values of the organization in question.

In addition to affective or perceived costs, Dan Brinks also discussed the financial and political costs which affect implementation. The real financial costs of both compliance (cost of ensuring the right) and non-compliance (fines, court sanctions) exist in every case, but in some cases the financial implications are greater than others – which may impact likelihood of implementation. Political costs are also present for both compliance and non-compliance scenarios. For example, as was presented in relation to the *Brown v Board of Education* case, cost of compliance was high given that racial segregation was largely still accepted and preferred in many areas of the United States at the time of the decision, so politicians did not have much incentive to encourage enforcement and thereby enrage their constituents. In other cases discussed, the political costs of non-compliance were high, such as the Campaign for Fiscal Equity case in New York where politically it was untenable for a politician to be seen as "anti-education" so they came out in support of the case. Dan asserted a formula for analyzing the likelihood of compliance based on the range of real and perceived costs present as:

Comply If: $C_c<C_d$, where C_c is the cost of compliance and C_d is the cost of defiance



Source: Daniel Brinks (2010) [3]

5) Size of the Claimant Pool

Rossi, Sigal and Morales developed a hypothesis which focuses on the size of the claimant pool to try and explain the disparate levels of implementation in the Argentinean context. They labeled these cases as

[3] Daniel Brinks, "Solving the problem of (non)compliance in SE rights litigation", draft paper and Power point presentation prepared for workshop, (on file with ESCR-Net) May 2010.

"individual," "medium" or "structural". They found that where there were individual cases which only involve one claimant seeking a specific, individualized remedy, there was a very high level of implementation. When looking at "medium collective" cases which involve a change in public policy, but for a relatively small, identifiable pool of applicants which entailed fewer public funds, the order may be to adopt a certain conduct, which in spite of affecting a number of individuals, is easily identifiable, limited in time, measurable, and involves fewer State actors, there was an adequate to high level of implementation. In "structural" cases which involve a larger number of persons and public resources, affecting a farther-reaching public policy, involving a larger number of state actors and the judgment includes obligations that are more complex to meet, there was a low level of implementation. They propose several reasons for this gap in implementation between medium and structural cases. In "medium" cases, the infrastructure allows the judge to determine a specific remedy through existing agencies. Also, there is often less resistance from the defendant (state) in implementing these remedies as they are able to see direct political gains (increased popularity with public) because there are identifiable beneficiaries. In "structural" cases the court is ill-prepared structurally and experientially to implement these types of judgments. Also, there is a lack of accountability of the judge to ensure implementation as there is no specific victim. Finally, there is greater resistance from the defendant (usually the state) to comply with a structural order because of the greater economic implications and due to the lack of identifiable beneficiaries, they see few political gains from implementation. Luisa Cabal shared that this trend continues at the international level and that with regards to implementation of friendly settlements in the Inter-American System or international treaty bodies' recommendations, there is also a difference between individual and general remedies, with individual being better enforced.

A related issue emerged during the presentation on Brazil, which showed reticence on the part of those courts to accept and make decisions on larger, structural cases. Octavio Ferraz explained the situation of Brazil, which is a civil law country, where currently 100,000 cases have been filed related to access to healthcare and currently 35,000 people in Sao Paolo are receiving health benefits directly from a court order. Of these cases, over 90% are individuals going to courts for specific benefits, rather than collective suits asking for structural change. Although Octavio stated that he has limited evidence of the reason for this, he suggested due to there being no formal barriers to collective suits, the most likely factor for this, based on interviews, is the sentiment among lawyers that the court will be resistant to these claims and therefore, a lower likelihood of enforcement.

The Colombian Constitutional Court's decision in T-760 presents an interesting contrast to the Brazilian situation. On its own initiative, the court in this case decided to aggregate a large number of individual claims on access to health insurance and make a structural decision on the issue. The court required both individual (immediate and specific) and structural remedies (creation of a new policy) and designed the structural remedy in a way that both contemplated economic sustainability and also community participation. Former Constitutional Court Justice Cepeda shared that this result arose due to a debate within the judiciary. The argument was that protection of access to health insurance on an individual basis was distorting the priorities of the health system because the people who needed access to the health insurance the most didn't know they could go to the court to get protection.

6) Institutional Capacity

Another factor which was repeatedly discussed had to do with current Institutional capacity of governments or agencies responsible for overseeing the implementation process. Victor Abramovich highlighted that an obstacle in implementation of decisions rendered through the Inter-American Human Rights System is the lack of adequate mechanisms for coordination among and between governmental agencies at the national level, when more than one is required to implement a decision. Collective cases or complex litigation cases in matters of equality and social rights generally require the involvement of more than one agency in the implementation of the remedies. This becomes even worse when legal reform is required and the

government must coordinate between branches. Also, coordination in federal systems between national and provincial governments creates additional obstacles for implementation.

7) Backlash and Highly Stigmatized Groups

Another important factor that may affect likelihood of implementation in a particular case relates to the group whose rights are at issue. When dealing with highly stigmatized groups for example, there are often low levels of compliance because the group has very few allies. An example provided by Sawsan Zaher, from Adalah (Israel), relating to the Arab minority in Israel was that politicians would frequently undermine the enforcement of successful judgments affirming the rights of this group by passing new legislation which made the ruling moot. Another tactic she has frequently encountered is that the court will avoid issuing firm decisions and encourage arbitration or mediation. This has resulted in a lack or deficit of jurisprudential development on the issues that most affect this group. Andi Dobrushi and Theo Alexandridis's paper on cases involving Roma peoples presented similar issues of political costs. The Roma are generally isolated and don't often form social movements, with the exception of in Romania. Because this group is so socially stigmatized, particularly in Eastern Europe, it becomes extremely costly, politically, for government officials to move forward in implementing a favorable decision for this group. Also, it was brought up that soft remedies are not usually useful for this group as they have few allies and little public or political support to ensure the decision is implemented.

Finally, backlash will also be a major factor in cases involving highly stigmatized groups and therefore there is a need to contemplate in the implementation strategy how to minimize its impact. Bruce Porter from the Social Rights Advocacy Center (Canada) made the point that although the potential for backlash is something to remain aware of, particularly with stigmatized groups, sometimes it might not matter. He gave the example of suffragettes fighting for the right to vote; they did not question whether theirs was a popular issue and whether they were likely to win, but that it was the right thing to do and that eventually society would accept that to be the case. Luisa Cabal, Centre for Reproductive Rights (US), noted that in her experience with reproductive rights litigation in Latin America, backlash can be dealt with by undertaking a risk assessment of the balance between not mobilizing and possible backlash to help weigh options, although she stated that sometimes you must risk some type of backlash to be able to promote public awareness around an issue.

8) Legal System Design

Another key factor that was raised when looking at trends in enforcement of judgments was the characteristics of the legal system in which the case was being resolved. The issue of common law systems versus civil law systems was briefly touched upon in relation to Egypt and Brazil, which are civil law countries, where individual decisions have little to no effect on future decisions and makes the need for collective cases more critical to bring about broad-based change and advancement of human rights. In terms of common law countries, it was remarked several times that issues of the size of the claimant pool may be less critical under the legal theory of *stare decisis*. In theory, the judgment should apply to all persons similarly situated to the claimant in the case.

The European Court of Human Rights (ECtHR) uses what Çalı and Koch call a "deliberative compliance model". This entails significant dialogue between the Court and the State party in fashioning the compliance requirements (Çalı and Koch, 2010) and it may also be seen as a soft remedies approach. Specifically, once the Court reaches a decision in case, it transmits the file to the Committee of Ministers of the Council of Europe, which confers with the State concerned and the department responsible for the execution of judgments to decide how the judgment should be executed and how to prevent similar violations of the Convention in the future. This will result in general measures, especially amendments to legislation, and individual measures where necessary (Article 46(2) ECHR). Çalı and Koch listed a number of advantages this system entails: it allows for a context-specific approach to implementing remedies; the principle of subsidiarity creates greater ownership within a State to ensure implementation; and the involvement of peer

review introduces an element of compliance pressure from States that see themselves as leaders on human rights issues. However, they also mentioned several drawbacks to this model, including the risk that the deliberation process may dilute the court judgments and frequent delays in implementation. Depending on the domestic context, compliance may either impose significant institutional burdens, or support governments in transitional States in stabilizing democratic institutions, or in the European context in making EU membership more likely.

The structure of the Inter-American System of Human Rights was also central to the discussion of enforcement of decisions form the Inter-American Commission and Court of Human Rights within various legal systems. Victor Abramovich, former Inter-American Human Rights Commissioner, discussed the fact that there are no mechanisms within the Inter-American System to follow up and monitor decisions and the rules of procedure themselves have not been studied as to their ability to handle structural litigation. Also, many countries have no domestic mechanisms for the enforcement of international decisions. He mentioned that for example, the lack of national level mechanisms for implementation has been a key hurdle in the Yakye Axa case[4] as there is no one to seek accountability from at the state level. In addition, the structure of the Inter-American System does not provide enough procedural room to discuss the reach of the solutions in concrete cases. In addition, there is a lack of interest to further a juridical discussion within the IAHRS and within the academic community concerning the design of mechanisms of enforcement of international decisions. In Victor's opinion, this is related to a focus on the investigation of the facts and too little development of the types of solutions of structural transformation that the system could establish, especially with these types of cases.

The IASHR does allow, however, for the possibility of direct negotiations between the victim and the state and for friendly settlements. Luisa Cabal, Centre for Reproductive Rights (US), shared that in her experience, using these options has been the most effective strategy in actually getting redress for victims and enforcing general decisions. Although this may take many years it may be the more effective route in the end to actually achieving compliance. She explained that direct negotiations allow governments to own the results of the negotiation they have invested resources and time in obtaining; they generally work in good faith toward its implementation. At the national level, Martin Sigal discussed that the legal/institutional framework in Argentina lacks procedural rules for the implementation of complex positive obligations, particularly in structural cases, and therefore the likelihood of implementation tends to be reliant on a judge willing to take an active role in ensuring compliance.

9) Involvement of Allies in the Implementation Strategy

Varun Gauri argued that courts are generally weak and therefore dependent on political and social allies. Courts are very susceptible to the social and political context and that allies can be an important factor in over-coming this susceptibility. The allies may change depending on hard or soft remedies. In seeking soft remedies the court needs civil society, media, and political support. For hard remedies, court need to be allied with itself, i.e., lower courts need to feel their decisions won't be immediately overturned by higher courts). Varun mentioned that the right to food case in India, which emerged in the late 80's, initially went nowhere, but in 2001, better allies emerged in civil society and Indian society at large. Varun's initial hypothesis is that these strong allies allowed that case to move forward and he intends to explore this further as he develops his paper following the symposium. The necessity of allies (although not for courts) was also supported in a number of other presentations less explicitly, such as in the Yakye Axa case in the Inter-American System, where indigenous groups sought the support of agricultural workers and peasants, which have stronger social movements than they do.

Bruce Porter mentioned that in Canada they have had important alliances between courts and human rights commissions where the commission had been given the task to promote human rights and take up particular

[4] The Yakye Axa community, a Paraguayan indigenous community belonging to the Lengua Enxet Sur people, won their case in the Inter-American Court against Paraguay for failing to acknowledge their right to property of ancestral land. For more information see: http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=405985&country=13605.

systemic issues. He noted that some of the roles civil society asks courts to fill, in some contexts would be seen to be beyond the judicial role. Therefore, although many groups have given up on human rights commissions, it might be worth looking at some success stories and asking courts to build these alliances to help relieve some of the burden and create the institutional alliances necessary. Bruce went on to question whether we are putting enough of the burden on the government to provide the resources to ensure engagement of civil society in implementation – that the question is not only do we have the allies, but if we don't how can we have them created?

10) Soft versus Hard Remedies

Bruce Porter, Social Rights Advocacy Center (Canada), argued that if we design the claim to fit the most likely mode of enforcement we may not be truly responding to the needs of the clients – that even if effectively enforced, it might not have moved the bar higher in terms of rights guarantees. He described "soft remedies" as those designed in collaboration and in meaningful consultation with stakeholders, which includes the components of a complaints procedure, a meaningful accountability mechanism, timetables and benchmarks for the elimination of the rights violation, and a central role for civil society. Bruce suggested that in assessing the effectiveness of enforcement mechanism for social rights we must first ask ourselves what it is we are trying to achieve with social rights claims and assess enforcement options against the goals and purposes of the rights claiming in question. He suggested that opposite is most often the case – that the claims are designed around the remedies and enforcement mechanisms most familiar to courts rather than around the problems being addressed and the goals our constituencies seek to achieve. Therefore, there may be effective enforcement, but the fundamental rights violation may remain unchallenged.

In initiating a "transformative social rights claim" Bruce contended in the Canadian context, that soft remedies can be more effective than specific orders at bringing the voices of the affected into the enforcement process, as consultation can be required. He also made the point that courts should be used to provide guidance and on-going rights-based decision-making rather than just for specific enforcement. An example of this can be found in the *Eldridge* case where the court's role was to determine the framework of the entitlement system which complied with human rights obligations rather than deciding which entitlement should be provided in each context. Therefore, the role of the court was not to serve as administrators of entitlements, but rather as interpreters of fundamental human rights. Courts in Canada or Brazil, or others cautious about separation of powers issues, might also be more receptive to this approach.

However, in Damon Hewitt's presentation on implementation of *Brown v. Board of Education* in the United States, he remarked that soft remedies run the risk that government officials will develop a "remedy-fatigue" in which they lose the political will to deliver on their promises, i.e., in *Brown* where the court ordered that schools be integrated with "all deliberate speed". In the context of cases such as this, where there was open defiance to the decision and the case was very politically charged, an unpopular decision may be difficult for judges and politicians to have will to implement. Hewitt further asserted that soft remedies rely on government to design a plan to implement rights and therefore utilize a more consultative / participatory model. Although this model has potential to foster significant voice from the community and civil society, it seems to require a fairly robust organized effort (a social movement). Also, as a participatory process is iterative, it will require ongoing negotiation, thus it may be difficult to sustain.

Anne Koch, University College London, briefly discussed the soft remedies under the EctHR, most notably the declaration of violations as a remedy in itself and pointing out to systematic problems in a domestic jurisdiction (the so called pilot judgments). Despite the lack of specificity of remedies, however, Çalı and Koch (2010) find a reasonably high level of compliance in the European context because of additional factors discussed above, such as the Court's high level of legitimacy and authority on human rights issues. In addition, the soft remedies grants the state a reasonable amount of time to set up a generally domestic effective remedy to be monitored by the Committee of Ministers. It is also important that in the case of pilot judgments the Court retains jurisdiction to revisit the case if the state fails to put in place effective domestic remedies.

The concept of "dialogic remedies" was also discussed in relation to the Olivia Rd case in South Africa where the Constitutional Court issued an interim order which order the parties to meaningfully engage with civil society as the facilitators. However, Jackie Dugard was cautious about this approach saying that it was largely successful in this case because of the strong social movements involved which facilitated a good settlement and secured alternative accommodation for 700 people, which is the first time this has happened in Johannesburg. But she believes there are real problems with this approach because it relies heavily on civil society as the court never defined the content of the right to housing, so there were no parameters to the negotiations, which could have resulted in a race to the bottom.

In the discussion of the Colombian cases related to health and forced displacement both specific orders and participatory remedies were issued by the court. In the displaced persons case, soft remedies used by the court generated public participation and generated a detailed monitoring process and therefore resulted in Cesar Rodriguez's opinion as deeper, more efficient judgments. Therefore, this approach may be very context specific. Soft remedies may be more successful in a country or legal system with high level of compliance with court judgments and respect for the judiciary, a well-developed democracy, where there is accountability of judges and low levels of corruption, but it this may not function as effectively in other contexts.

11) Legitimacy and Strength of the Judiciary and the Role of Judges

The legitimacy or strength of the judiciary was relevant both in terms of implementation of regional and international decisions, but also for effective enforcement of national or provincial level decisions. Several presentations, such as Darci Frigo discussing Brazil, pointed to a trend of national level refusal to implement supra-national decisions because they infringe on national sovereignty or because decision-makers feel the national system is superior.

A difference was also highlighted in relation to the European Commission on Social Rights and the European Court of Human Rights – there is a much higher level of compliance with judgments from the latter, possibly related to disparities in perceived legitimacy. Although the European Commission's decision on child labor was very successful, decisions on Roma housing cases have mostly not been implemented. There is now a strategy to take these cases to the ECtHR because of higher level of compliance. In relation to decisions from the treaty monitoring bodies, Luisa Cabal shared that enforcement has been difficult because the UN system seems even farther removed and therefore, the state questions the legitimacy of these bodies and it feels it is less accountable to them. Viviana Kristicevic, CEJIL (US), highlighted that questions around the legitimacy of the regional institution at the national level and the breadth of the remedial orders issued have had impacts on the extent of implementation of decisions issued by the Inter-American Commission and Court. Generally it was also discussed that currently there is not very much regional pressure to comply with these decisions, however, in relation to the coup d'etat in Honduras, Brazil played a positive role in ensuring compliance with precautionary measure issues by the Commission, which might serve as a positive model.

The degree of judicial power in a particular case also appeared to have an impact on cases at the national level. For example, Malcolm Langford shared that courts in South Africa do not have the same legitimacy as courts in Colombia and Costa Rica, so judges have to triangulate between the Executive, the public and their own independence in each case; sometimes they have to shift a bit to maintain their legitimacy. However, in Costa Rica where the judiciary enjoys a high level of legitimacy, the Constitutional Court has taken repeatedly strong positions on ensuring treatment for persons infected with HIV, which has pushed the social perception of the issue forward in that country.

The role and attitudes of judges was also a repeated point. A wide range of issues were highlighted as to what affects a judge's position in a case. First, the issue of judicial independence was raised as being key and this was connected to the governing regime in that specific context. Also, the concern for maintaining judicial integrity affected several related factors including: maintaining the perception of clear separation of

powers; likelihood of support of superior courts so they are not overturned on appeal; and a reluctance to issue broad orders where difficult to ensure specific performance, or where they think public funds may not be sufficient. Justice Kogan, justice of the Supreme Court of the Province of Buenos Aires (Argentina) stated that if a decision requires a house for every person who doesn't have one within a few years, it won't be implemented by the state. Judges are more likely to make a decision ordering provision of housing in various individual cases, in the hope it will help increase awareness that the right to housing exists and increase people demanding their rights through political means as well.

12) Right at Issue

It was raised that the particular economic or social right at issue in the case may also affect the likelihood of both a positive decision and it enforcement. For example, former Justice Cepeda, from the Colombian Constitutional Court, stated that he felt that healthcare issues were easier for the court to be effectively involved in than housing which requires much longer period of investment of resources and public policy. Malcolm Langford also echoed this point later in the event in relation to the disparity in implementation of early and later decisions by the European Commission on Social Rights, stating that child labor or decisions involving similar issues are easier to implement than housing because of its wide-ranging implications for public policy and the fact that it must be implemented at the local level involving numerous new political and bureaucratic hurdles.

13) System of Government

Particularly in relation to presentations from the Middle East and North Africa region, the issue of enforcement of judgments within authoritarian regimes arose. Because of the nature of this context, the strategy of using a rule of law argument for the effective enforcement of judgments is currently being advanced by groups in an attempt to see if jurisprudence can be built supporting this idea. Examples were shared from Lebanon, Israel and Egypt in which the petitioners argued that lack of enforcement was evidence of a failure to respect the rule of law and that this had been a relatively successful tactic within a larger context which offered fewer allies, civil society support, etc. Anne Koch asserted that arguments might also be persuasive in democratic contexts, because democracies pride themselves in their commitment to the rule of law and in being "good cosmopolitan citizens".

14) Exogenous factors

Several factors which are external to the social/political/legal context of each legal system were also discussed as having impacts on implementation of court decisions. For example, the current financial crisis has created an environment in which states are cutting social services with less scrutiny because of the global financial situation, but this may or may not reflect the actual availability of resources or the related issue of resource prioritization. Religious and cultural institutions were also mentioned as having relevant influence on certain issues such as the Catholic Church on issues of sexual reproductive health and or the widespread cultural acceptance of discrimination against Roma peoples or LGBTQ communities. The presence of private actors was raised in relation to the Colombian health insurance system and Argentina HIV case – in both cases the private health providers said that a specific treatment was not part of the contract but this argument was not accepted by either court. In Colombia a public stop-gap fund was created to cover these costs, and in Argentina the Ministry of Health issued a new regulation ordering them to provide the treatment.

IV. Strategies for Increasing Compliance

1) Building the enforcement strategy into the litigation

The necessity of building and integrating an enforcement strategy into the litigation strategy itself was reiterated several times as being essential in all contexts and in all cases. It of course needs to respond to the context you are working in as well as the needs of the claimant community. Viviana Krsticevic mentioned

that in the Inter-American System, CEJIL identifies the particular structures through which they will seek implementation and this will help inform the remedy they seek. They have also sought to build monitoring and coordination systems during the litigation to promote implementation following the decision.

2) Contemplate the current institutional capacity to shape an effective, implementable remedy based on current infrastructure

Center for Reproductive Rights designed a strategy to prepare ministry in charge of health policies and regulation (Ministerio de Protección Social) which would be in charge of implementing the court decision partial decriminalization of abortion in Colombia. They had workshops on international standards and comparative regulations with key people in the ministry so the staff would feel relatively prepared on how to implement the ruling once it was in place. They have also been doing this in regards to a case on maternal mortality against Brazil, pending in the CEDAW Committee; this strategy has included public forums on the issue, recommendations for civil society action, etc.

3) Grouping Cases

Viviana Krsticevic suggested that grouping cases which involve different aspects of one larger rights claim could be a useful way to get a more collective result within the understanding that individual cases usually have more luck. Ashfaq Khalfan suggested advancing a more popular case which can support your underlying legal argument and then follow up with a less popular case where you might be able to can rely on the previous decision.

4) Asking the judge to retain jurisdiction to monitor implementation can be key.

The IASHR has recognized that lack of compliance with their orders is becoming a major problem and undermining their legitimacy. Therefore, they have begun to implement some new strategies to address this, which groups involved in litigation in other fora might consider. The IASHR has now instituted follow-up hearings before the Commission or the Court. After those hearings, the Court adopts compliance resolutions that serve as interlocutory orders, and in the case of complex collective remedies, are essential to gradually providing more precision to and adjust the general orders established in judgments of cases or in the initial provisional measures. They have also implemented confidential working meetings; these are informal meetings, and although they are not as effective in pressuring states as the hearings, they favor open and straightforward negotiation and dialogue, in particular about problems related to implementation and coordination, which governments are not willing to discuss in public fora.

5) Involvement of Allies

Victor Abramovich suggested the Inter-American Commission or Court could ask for the involvement and participation of local actors, such as autonomous government agencies (for example the *Defensorias del Pueblo*, Ombudsman), and universities and research centers at the stages of execution so that they would provide statistical data, censuses, technical and impartial studies about the situation under analysis. This information would permit the Inter -American bodies to assess the reasonableness of the programs and policies put forth by governments as strategies for compliance with court orders.

6) Development of Creative Argumentation

In the face of lack of enforcement on a right to education case in Israel, and because their ultimate goal was developing a constitutional argument in the field of non-enforcement, Adalah decided not to use the contempt provision to seek enforcement, but instead submitted another petition which claimed that the non-implementation itself was a violation of the petitioners constitutional rights to education and non-discrimination. They also argued lack of good faith. This case is still pending. Also, in a dispute over funding allocations between Arab and Jewish town, again, they didn't use contempt clause because they didn't only want expenses. They again used a lack of good faith argument and submitted that if the government does not want to implement the decision, they must prove they (1) acted in good faith, (2) there was a positive purpose, (3) they have taken reasonable efforts to implement, and (4) non-enforcement was not in its

control. They also linked these arguments to the breach of the rule of law. The result was that although the court did not rule on these arguments, they did state that the government was taking the law into their own hands, which they are not to do in a country which abides by the rule of law. In Egypt, they have also successfully used the argument that lack of compliance is a violation of the rule of law and legitimacy of the government

7) Creative NGO Strategy, using tax and budget information

In Egypt, NGOs are inserting themselves directly into the litigation process, in some cases as plaintiff's themselves. Also, in a case involving setting a minimum wage, the NGO's/lawyers involved developed a framework themselves for how the state might implement the decision to combat claims by the Egyptian government that NGOs demand change but contribute nothing to helping these changes occur. Additionally, in this case they felt it was important to show there was not a lack of resources to implement the judgement, but there was lack of political will and mis-prioritization of resources. They produced a book on taxation justice which showed that workers and subsistence farmers contribute 28% to taxes and corporation only contribute 13% to taxes. They examined the tax records of 45 major companies and they found they had not been audited since 2004. They also examined the government fund to support exports and found it had received more support than the support received by the poor sectors of society, which they used to establish a bias against Egyptian workers.

8) Work in collaboration with social movements, but also between national and international NGOs

The need to work in conjunction with social movements prior to and following the decision in a case was well established throughout the discussion, but also, involvement of international NGOs in national level cases can help bring new energy and legitimacy to difficult case, such as Amnesty International's involvement in the Yakye Axa case.

9) Other NGO Strategies:

Ashfaq Khalfan suggested a tentative list of strategies for civil society to consider:

- Assist affected groups to know their rights and to develop capacity to advocate for them;
- Campaign on enforcement of judgments as a broader rule of law issue;
- Emphasize that failure to implement any judgment impacts all people, even privileged groups in the long term;
- Argue that non-implementation of any right affects non-implementation of all rights;
- Ensure cost of non-compliance is high;
- Use follow up mechanisms;
- Internationalize the issue where strategic to do so;
- Ensure that some of the cases brought forward will build the credibility of the organization with the court and in public opinion and avoid litigating only on the cases that would put the court at significant variance with popular opinion
- Emphasize the need to the court for unambiguous and concrete orders; and
- Campaign before litigation.

V. Summary of Presentations

The last session of the event offered a space for participants to reflect on the key themes that had been debated during the event, distilled into a analytical framework of a "cost of compliance" model proposed by Daniel Brinks. This created a conceptual bridge into a collective discussion of strategic projects for short and long term work to address the obstacles and opportunities discussed during the previous two days.

Dan summarized the presentations through a cost framework - the idea of cost inequality – cost of compliance v. cost of non-compliance, including perceived costs in the equation included above. He

described those factors which should be considered costs as including political costs (public disapproval); financial costs; "affective costs" (the distance between objective of the litigation and the expressed normative commitments and values of the organization in question). He then shared a model which described how many of the cases and examples discussed during the symposium would fit into this framework. Included in each cell are cases that exemplify high costs in that category.

	Compliance	**Non-Compliance**
Financial Costs	Every case, but to a different extent	Fines, sanctions, but also social cost of violating ESC rights
Political Costs	Brown v. Board of Education	"Medium cases"; Campaign for Fiscal Equity cases in New York
"Affective" Costs	TAC; Westville; Verbitsky; Roma housing cases	Rights to food (specific issue; Democracy & Human Rights (compliance orientation)

Source: Daniel Brinks (2010) [5]

Brown was a case that involved high political costs for politicians who complied with the decision; in contrast, the cases described as "medium cases" by Rossi, Sigal and Morales had very low political costs of compliance (indeed, they may have generated political benefits), while the size of the affected population made it likely that they would mobilize effectively in support of compliance, thus raising the cost of non-compliance. In terms of affective costs, we can highlight similar examples. The TAC and Roma housing cases purport to force the government to do things against which it has explicitly and forcefully taken a position. The ECtHR, on the other hand, is often in a position of ordering democratic governments to do things they have publicly stated they support.

Dan then presented examples of the many variables discussed at the conference that affect these costs, and therefore greatly affect implementation, such as: complexity of the order, financial costs, and number of beneficiaries. Reflecting on general assumptions, Dan noted that although we might think the more beneficiaries there are, the greater the political cost of non-compliance, the presentations showed that when the benefits are greatly diffused across society, it hard to mobilize enough people who are directly affected to create pressure. Lack of resources of litigants also creates a problem the larger the applicant pool becomes. The civil and political context of the case also matters as the more authoritarian the regime the lower the cost for non-compliance may be as they rely less on social approval.

Dan also mentioned that in theory, in common law countries, precedent matters. If judges and litigants are taking the concept seriously, every case should have an impact beyond the immediate parties, thus raising the expected cost of compliance. So in a common law country, it might make sense to start with a "medium collective" case as it may be easier to get a positive result for the reasons Martin Sigal discussed in his presentation, but the decision will have wide-ranging, possibly "structural", impacts. Dan then discussed the idea of positive affect, which are cases that have a high affect value up to a point until the symbolic value of the case runs out, or when there is a regime change which more closely aligns the values of the government with that of the litigants. There were also cases which exhibited what Dan described as negative affect and these were often cases which involved unpopular groups –here it seemed that it doesn't matter what is done as the issue related more to value judgments rather than rational choice models. In negative affect

[5] Daniel Brinks, "Solving the problem of (non)compliance in SE rights litigation", Power point presentation prepared for workshop, (on file with ESCR-Net) May 2010.

cases, politicians are often able to gain political capital by defying the court order, such as the Verbitsky case in Argentina or the Westville case in South Africa.

Another dimension of the costs of compliance are complexity of the order and state structure needed to comply. The more the structure of the State needs to build, the less compliance you will get. However, there was some evidence that this can be overcome by strong political will or when the case builds on past advances. Strategies that can be used by litigants to change the cost of compliance calculation included:

(1) Build implementation strategy into litigation strategy and relate that to the capacity of the state and resources you have to ensure they happen;

(2) Be responsive to the context you are working in by framing the case to the political context, frame the goal of the litigation within current state structures, take an incremental strategy when dealing with a case with high negative affect, and allow for negotiation within the litigation when dealing with hostile judges;

(3) Use different strategies to limit costs without limiting beneficiaries

- Financial cost:
    - Use deliberation to keep remedies realistic, draw on existing structures (Anne Koch)
    - Select and target existing state infrastructure (*Sparks case*)
    - Use regulation as much as direct provision (Cepeda)
    - Develop efficient technical solutions through hearing process
- Political cost:
    - Frame the case in a way that appeals broadly to the public (e.g., abortion vs. maternal mortality)
    - Require public reason-giving by the authority in question
- Affective cost:
    - Choose your leading cases with care
    - Make compelling videos / media tools to raise awareness of your case

(4) Raise the cost of non-compliance through litigation process

- Information is key to both affective and political costs
    - Request reports, expert investigations, data gathering
    - Generate indicators
    - Request public hearings at all stages
- Use the litigation as a mobilization tool
    - Use every stage of the litigation as a mobilizing event (Kenya)
    - Use the case to highlight inconsistencies
- Ask the court to develop claimant capacity:
    - Set up committees with public support
    - Incorporate claimants into oversight committees
    - Use public funds to amplify their voices, through ethnography and public hearings

(5) Change the context to raise the cost of non-compliance

- Create alliances:
    - Varun Gauri – India, wide network of support needed to facilitate implementation
    - Victor Abramovich - working with domestic actors who can “domesticate” international judgments
    - Point out how interests coincide: homelessness – mental health, substance abuse, affordable housing, poverty, indigenous groups
    - Find bureaucrats who are frustrated because they can’t do their job, technocrats who think current policy is wrong
- Use public education campaigns to change the affect value of a group or claim
- Work on developing institutional capacity and mechanisms (CEJIL and CELS)

VI. Moving Forward

Following Dan's summary of the presentations and discussion, the participants engaged in a participatory dialogue on short and long term next steps for this work. The following general categories were presented, with specific suggestions related to each category detailed below:

1. ***Reflective Praxis – Ongoing workshops***
    - **a.** It was noted that the unique and multi-disciplinary, cross-regional exchange that took place during the Bogota workshop was essential as it allowed people to break out of their disciplinary or regional ways of thinking to explore new ideas and new partnerships, therefore, follow up international meeting such as this one are also necessary.
    - **b.** There was also a suggestion to hold a series of seminars to discuss particular problems with cases and how to overcome them.
    - c. It was also voiced that we need to follow up what impact we are having with a follow up workshop in a year or two with detailed updates on the cases discussed and we need to make results of this workshop widely accessible.

2. ***Follow up regional /thematic workshops***
    - a. Follow up regional and thematic seminars were widely suggested to take these international ideas and make them more focused to particular contexts.

3. ***Joint monitoring***
    - a. It was suggested that the group might collaborate to develop a pilot project called "judgment Watch" to monitor enforcement of judgments.
    - b. There was a call for more work to done on monitoring gaps in public policy.
    - c. There was a call for a mapping project on what groups are doing and where cases are right now, as it is important to pay attention to the difference between enforcement and impact – it is important for NGOs to be involved in this discussion to ensure the realities of affected groups are integrated into the conclusions of academics writing on this subject and there is a lot of debate on impact right now.
    - d. It was suggested that we consider submitting a joint amicus curiae brief in a case which is currently in the implementation phase to bring international attention to bear on the case.

4. ***Documentation / Research***
    - **a.** There was a call for groups to share methods they had for creating quantitative data on enforcement and impact and that more detailed empirical research is needed in specific contexts.
    - **b.** It was suggested that an informational mission to Paraguay be organized to try and get more data on the Yakye Axa case and bring international media pressure to help revive interest in implementation of the judgment.
    - c. Another suggestion was to develop a questionnaire groups could fill out regarding implementation/impact of their cases, which is catalogued and accessible.

5. ***Institutional Reform / Judicial Exchange***
    - **a.** Participants suggested that a workshop on institutional reform / judicial exchange would be very useful although Institutional reform might need to be thought through on a 10/20 year perspective. There has been a lot of thought in the constitutional reform about inclusion and justiciability of ESC rights, but there hasn't been much thought of mechanisms for enforcement.
    - **b.** It was expressed that there is a need to build solidarity between judges, they should be invited to have a discussion among themselves on how to improve implementation.
    - c. Groups also thought that having judges in the symposium was important and that they should be included in more events such as this.

6. ***Other Suggestions***
    - a. The exchange between activists and academics on this issue was appreciated and participants called for more collaboration of this sort.
    - b. Another possible follow up project suggested was that the meeting report could lead to a 1st draft of a declaration to push acquire political dynamics to support implementation
    - c. A participant requested that the group pay attention to what people want and what success means to them. That there is a need to re-evaluate whether all judgments are important to enforce – we are still at an early phase of getting adjudicative bodies to hear these claims. We may not want to rely on outcome assessments whether they have succeeded or failed. There are some rights claims that need to be made over and over again even if they fail because it is the right thing to do. We need to be vigilant that our fundamental methodology adheres to the larger goals that we share.
    - d. The meeting organizers announced that new chapters from the MENA region would be in the book which will be an output from this event
    - e. A participant from Egypt requested a statement of international solidarity on enforcement of the minimum wage case recently won in Egypt from the groups in attendance to bring international awareness and pressure for implementation.
    - f. The issue of critical nature of translation was raised as well as necessity of involving social movements in the discussion.

Therefore, from this discussion the coordinating group has identified a couple of short term follow up activities from those suggested that based on staff and resource capacity could be effectively coordinated. Those include: a statement of international solidarity on behalf of implementation of the minimum wage case in Egypt, a small fact-finding mission to Paraguay to gather new facts and raise international awareness and pressure on this case, and possibly submit an *amicus curiae* brief to the Inter-American Court on lack of implementation of the Yakye Axa decision.

To define our longer term strategy, and the types of projects which support that strategy, we will be in consultation with the participants of the Bogota event as well as with other members of the ESCR-Net Adjudication working group and other relevant organizations focused on implementation issues. This consultation will take place from June-August 2010, with the final result being a funding proposal for the strategy and project/s identified.

This event was made possible with the generous support of

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The organizers would also like to thank the **University of Los Andes Law School** for its contribution to this event.