Taking Rights Seriously:
Canada's Disappointing Human Rights Implementation Record

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Many of Canada's reports and appearances before regional and international human rights bodies begin by stating that it takes its international human rights obligations very seriously. However, a closer look belies a troubling reality: Canada's promises have largely not translated into the effective implementation of decisions issued by regional and international human rights bodies. This post will briefly explore: (i) Canada's engagement with international human rights mechanisms; (ii) its existing institutional framework for the domestic implementation of regional and international human rights recommendations and orders; and (iii) its implementation record regarding the cases selected for detailed study by the ESRC-funded Human Rights Law Implementation Project.

Overview of Canada's engagement with international human rights mechanisms

At the international level, Canada is a party to two-thirds of the core human rights instruments adopted within the United Nations (UN). It therefore has periodic reporting duties to most UN treaty-monitoring bodies, and receives numerous recommendations from their concluding observations. Further, Canada has also accepted the inquiry procedures regarding the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (notably, Canada has yet to submit to CAT's Optional Protocol despite repeated promises to ratify) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In relation to the latter, Canada has already received recommendations from an inquiry procedure report issued by CEDAW in 2015 in relation to missing and murdered indigenous women and girls (CEDAW/C/OP.8/CAN/1).

Canada has also accepted the individual communications procedures before three UN treaty bodies: the Human Rights Committee (CCPR), CAT, and CEDAW. Stemming from this, as of December 2017, Canada had been found to be in violation—or potential violation—of its international obligations in 24 cases decided by the CCPR, 9 decided by the CAT, and 1 decided by CEDAW. On most of these cases—the majority of which relate to flaws in the refugee determination system—the respective body has expressly called upon Canada to adopt certain measures to remedy the violations found. Many, if not most, of these cases have been taken by individual lawyers working in the area of asylum and refugee law.

At the regional level, after almost 30 years as a permanent observer, Canada attained full membership to the Organization of American States (OAS) in 1990, after it ratified the OAS Charter. Consequently, it accepted oversight by the Inter-American Commission on Human Rights (IACHR), on the basis of the OAS Charter, the American Declaration of the Rights and Duties of Man, and the IACHR's Statute and Rules of Procedure. Canada has since received numerous recommendations stemming from two IACHR country-thematic reports on its refugee determination system (2000) and on the issue of missing and murdered indigenous women (2014). Notably, very few individual petitions have been filed in the Inter-American system. Thus far, only two decisions have been issued on the merits: in the cases of *John Doe et al* (2011) and *Suresh* (2016), both related to removal proceedings from Canada.

With this panorama, it is quite evident that although Canada could certainly benefit from greater engagement with the Inter-American Human Rights System (IAHRS), it nonetheless

already has plenty of international obligations and recommendations pending effective implementation at the domestic level. But what exactly happens in Canada once these decisions and recommendations are handed down by regional and international human rights mechanisms?

The institutional framework for the domestic implementation of regional and international human rights recommendations and decisions in Canada

Surprisingly, there is little public information available on how Canada implements human rights decisions. Our research eventually led the HRLIP team to the Continuing Committee of Officials on Human Rights (CCOHR), a federal-provincial-territorial group established in 1975, led by the Federal Department of Canadian Heritage (similar to a ministry of culture), with representatives of the Departments of Global Affairs (equivalent to a ministry of foreign affairs) and Justice. The CCOHR's responsibilities include, among others:

> 1) facilitating consultations between federal, provincial and territorial governments with respect to Canada's adherence to international human rights treaties;
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> 2) encouraging information exchange among governments in Canada with respect to the interpretation and implementation of international human rights instruments; and
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> 3) facilitating Canada's interactions (reporting and appearances) with UN human rights bodies.

As such, Canadian Heritage would be responsible for coordinating the implementation of concluding observations and other general recommendations issued by international human rights bodies. Strikingly, however, no mention is made in relation to its role regarding general recommendations emanating from the IACHR. Furthermore, the CCOHR does not include policy-making or decision-making authorities. In addition, it only meets once a year in person, and monthly through teleconferences; but it does so behind closed doors, not reporting publicly as to the topics it discusses, let alone the results of those discussions. Moreover, in relation to our research, the greatest limitation of the CCOHR is that it is not involved in the actual implementation of individual human rights decisions. At most, its members are informed of the cases pending and decided, without any action taken to that regard.

Rather, in relation to individual cases, it is Canada's Department of Justice (whose representatives participate in the CCOHR) that is charged with litigation, follow-up and implementation responsibilities. The DOJ acts as a liaison between Global Affairs (who communicates with the relevant international body) and the provincial-territorial and/or subject-matter departments relevant to the specific case. An inter-departmental consultation process is then held, in which officials analyse the treaty body's reasoning, the facts relied on in the decision, the recommendations formulated, and domestic law and jurisprudence in order to determine whether Canada agrees with the decision and, if so, whether or how to comply. As a general rule, the government does not, at any point of the process, engage in direct contact with the petitioners or their representatives. Notably, absent from this process is any discussion within the CCOHR about general recommendations that might overlap with reparations ordered in individual cases.

A closer look at Canada's implementation record regarding the HRLIP's selected cases

Just as there is not an adequate mechanism or process in place to domestically implement international decisions issued in individual cases, Canada's actual implementation record is also poor. For the purposes of its study, the HRLIP identified and tracked selected decisions issued in 9 individual cases (8 issued by UN treaty bodies and one by the IACHR), taking into account factors such as their connection to armed conflict or to violations in peace time, the length of time that has passed since the decision was issued, the identity or characteristics of the victims, the structural nature of the violations found and the reparation measures ordered, among others. From these and other related cases, our findings surfaced four types of reactions or attitudes that Canada has shown in relation to implementation of individual decisions issued by regional and international human rights treaty bodies.

Disregard of interim measures

As noted, most of the individual human rights cases decided in relation to Canada refer to imminent removal from the country, alleging flaws in the refugee determination system and the potential violation of the *non-refoulement* principle. In this regard, a first concern related to Canada's implementation record is that of interim measures. In at least three cases before the CAT (Comm. No. 258/2004, *Mostafa Dadar*: decision / follow-up; Comm. No. 297/2006, *Bachan Singh Sogi*: decision / follow-up; Comm. No. 505/2012, *P.S.B. and T.K.*: decision) and two cases before the CCPR (Comm. No. 1051/2002, *Mansour Ahani*: decision; Comm. No. 2091/2011, *A.H.G.*: decision), Canada deported people who were subjects of protection under interim measures requested by the respective bodies. In *A.H.G.*, arguing that the request had been received too late to stop the deportation; in *Ahani*, given that a domestic court had held that interim measures were not binding; and, in the other three cases, it appears that because the Canadian government simply did not agree with the interim request, it refused to comply with it. Deporting persons protected by interim measures automatically nullifies any eventual decision on the merits of their removal claims and on their compatibility with Canada's international human rights obligations.

Implementation through domestic legal advocacy

In other cases where people have not been deported before a final decision has been taken by the relevant human rights body, some have managed to obtain permanent residency in Canada (among others, Comm. No. 1763/2008, *Ernest Sigman Pillai et al*: decision / follow-up; Comm. No. 1881/2009, *Masih Shakeel*: decision; both decided by the CCPR). However, these victories came about not because Canada complied with the international decision *per se*, but because the petitioners were able to pursue new domestic applications for residency and supplied the decision of the international human rights body as evidence of the risk they would face if they were to be sent back to their countries of origin.

As such, these situations—some of which have since been deemed as "satisfactorily implemented" by the treaty bodies—have not occurred as a consequence of government actions specifically aimed at implementing those international decisions. In fact, at least in the case of Masih Shakeel, the Canadian government had expressly disagreed with the Committee's decision (CCPR/C/112/R.3). Thus, the favourable outcome for these petitioners came principally because they were able to afford new applications that were assessed differently on the merits. In short, the treaty body's decisions were contributory, but were not necessarily determinative, to the petitioners' ultimate victory.

Federalism and non-compliance

Other issues are present in cases not related to removal of persons from Canada. For example, *Arieh Hollis Waldman* (Comm. No. 694/1996) was a case concerning the province of Ontario where public funding is provided for private Catholic schools, but not for other religious denominations. In this case, the Human Rights Committee established that Canada was "under the obligation to provide an effective remedy that will eliminate this discrimination." In response, Canada limited itself to saying that matters of education fall under exclusive jurisdiction of the provinces and that the government of Ontario had communicated that it had no plans to extend funding to other private religious schools and that it intended to adhere fully to its constitutional obligation to fund Roman Catholic schools.

This case highlights two important dynamics that impact implementation of international decisions in federal systems. First, instances wherein a state uses its domestic federal structure as a justification for the failure—or refusal—to implement an international decision. And second, the complexities that arise in implementation when recommendations or orders transcend the interests of the specific petitioner, and touch upon matters of local/state/provincial policy. The underlying issues in *Waldman* are highly controversial at the local level, but it must be emphasized that CCPR did not specify *how* Canada had to go about eliminating this discrimination; rather, it left that to the state's discretion.

Moreover, international law does not permit countries to simply allege federalism or other state-structure arguments as an obstacle for compliance with the human rights obligations to which it has committed itself. In cases like *Waldman*, then, it becomes particularly relevant for countries to have effective domestic structures that can facilitate implementation, particularly a mechanism or political body that is capable of bringing together all the relevant actors—from civil society and all levels of government—in order to engage in a dialogue that can help identify adequate alternatives to effectively bring the country into compliance with its obligations. Such structures hardly guarantee implementation, but they can better equip the machinery of state to act in that regard.

Inadequate implementation

In 1981, in one of its more significant decisions against Canada, the Human Rights Committee decided that Sandra Lovelace, a Maliseet Indian who lost her Indian status because she married a non-Indian man, had suffered a human rights violation having "been denied the legal right to reside on the Tobique Reserve, [which] disclose[d] a breach by Canada of article 27 of the Covenant" (Comm. No. 24/1977, para. 19). However, in contrast to subsequent decisions, the Committee did not formulate an express remedy or recommendation that Canada should implement to comply with the decision. Nevertheless, Canada understood that in order to comply it had to reform the Indian Act to remove the sex discrimination, because Indian men who married non-Indian women did not lose their Indian status. The government did so in 1985, but this reform did not fully eliminate sex discrimination as there were now different categories of Indian status that distinguished between how men and women transmitted that status to their offspring.

Since then, nearly 40 years after the *Lovelace* case was decided, these remaining issues of discrimination have been taken up by multiple UN treaty-monitoring bodies in the context of the periodic reporting process, as well as by the IACHR in its thematic report and hearings on missing and murdered indigenous women and girls. The inadequate implementation of the

Lovelace decision and the lack of implementation of the recommendations stemming from non-contentious mechanisms has led to further domestic and international litigation (*McIvor*). Thus, the *Lovelace* case and the subsequent developments in its underlying issues, illustrate not only the overlap between the regional and international human rights systems, but also the interaction between their different contentious and non-contentious mechanisms. If Canada had adequately and effectively implemented all the recommendations that were handed down by regional and international bodies—through their non-contentious mechanisms—after the *Lovelace* decision, perhaps the *McIvor* litigation would not have been necessary.

Conclusion

While these cases do not represent Canada's entire implementation record, they illustrate serious concerns that need to be addressed. If Canada really does take its international human rights obligations as seriously as it claims, it should:

- Accept full and regular assessment of its domestic human rights record by regional and international human rights mechanisms;
- Engage sincerely and constructively with interim measures and recommendations in individual communications and petitions, as well as with general recommendations stemming from other international human rights mechanisms;
- Refrain from resorting to state-structure arguments as a way to evade compliance;
- Establish a formal process for transparent, effective and accountable implementation of its international human rights obligations, both in the context of general recommendations, as well as those stemming from individual communications and petitions.

In taking these steps, the Canadian government—at all levels—should ensure that any implementation processes are developed in extensive consultation with provincial and territorial governments, the persons or groups in question, and civil society.

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