Strategic litigation against torture: Why domestic courts matter

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Abstract

Purpose: Strategic human rights litigation is often associated with filing cases before international and regional courts and treaty bodies. This article examines ways in which significant advances in protecting the rights of victims of torture and similar crimes can be achieved through domestic courts, even in countries with limited respect for the rule of law. *Methodology*: This article does not cover universal jurisdiction or transnational cases, but rather focuses on how domestic courts can be used to address torture that takes place in the same country. It is not a review of global practice; rather, it is based on observations drawn from the author's personal experience of over 25 years of strategic litigation and advocacy against torture; lessons learned from the work of partner organizations and lawyers from around the world; and the results of three research projects commissioned by the Open Society Justice Initiative (OSJI): one on the impact of strategic litigation on torture in custody in Argentina, Kenya, and Turkey (OSJI, 2017); another on how domestic courts in Latin America handle reparations for torture and similar human rights violations (Garcia Garcia, Fierro Ferráez, & Lisitsyna, 2019); and a third on strategic litigation against torture in Asia (Bokhari, 2020). *Conclusion:* While acknowledging continued challenges, the author demonstrates that domestic courts are often better placed than their international counterparts to address several aspects of human rights litigation and protection of victims' rights and in some circumstances can have broader impact.

Introduction

This article examines the extent to which strategic human rights litigation can work in domestic courts, even in countries with limited respect for the rule of law. The Open Society Justice Initiative (OSJI) defines "strategic human rights litigation" as the use of litigation to advance a process of legal, social, or other human rights change that goes beyond the immediate goals of the complainant (OSJI, 2017, p. 14). Alexander Gerasimov's case is one example of such efforts.

In March 2007, Gerasimov, a 38-year-old construction worker, went to the local police station in Kostanay, Kazakhstan, to inquire about his stepson, who had recently been arrested. The police accused elder Gerasimov of murdering an elderly woman, held him for 24 hours, and interrogated and beat him severely in an attempt to coerce a confession. The police inflicted heavy blows to his kidney area and threatened him with sexual violence. They then tortured him with a tactic called "dry submarino," in which they forced Gerasimov face down on the ground and put a plastic bag over his head. The next morning,

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Gerasimov was released without charge. Immediately following his release, Gerasimov suffered from intense headaches, nausea, and pain throughout his body. He was admitted to the hospital that evening and diagnosed with a major head injury and bruising to the right kidney. He spent 13 days in the neurological unit. In August 2007, Gerasimov was diagnosed with post-traumatic stress disorder and received in-patient treatment for nearly a month in a psychiatric hospital. In 2012, the UN Committee against Torture (UNCAT) found that Gerasimov's rights had been violated, and urged Kazakhstan to conduct a proper, impartial, and effective investigation in order to bring to justice those responsible for the complainant's treatment; to take measures to ensure that the complainant and his family would be protected from any forms of threats and intimidation; to provide the complainant with full and adequate reparation for the suffering inflicted—including compensation and rehabilitation—and to prevent similar violations in the future. In 2013, the lawyers from the Kazakhstan International Bureau for Human Rights and the Rule of Law, with advice from OSJI, used UNCAT's decision to file a civil lawsuit and argue in a Kazakhstan court that the government owed damages to Gerasimov. I did not have high expectations of success (Lisitsyna & Miller, 2021, pp. 36-38). Too much seemed to be working against Gerasimov: Kazakhstan's judiciary's lack of independence; a perfunctory criminal investigation against the police into torture allegations that had gone nowhere; and the fact that the only witnesses to Gerasimov's torture were the police themselves. At the same time, we had clear advantages that are often absent in torture cases. Gerasimov's case was straightforward: he had been held overnight, tortured, and released the next day without charge. He was consistent in his account of what happened, and his medical records corroborated his allegations.

Despite the likely impediments to success, Gerasimov decided to go forward with the case, and in November 2013 he won. He received compensation that was meaningful to him—around $13,000—if inadequate given the abuse he suffered. In its decision, the Kostanai city court stated that international treaties ratified by Kazakhstan supersede national legislation, and that decisions of UN committees are binding (Lisitsyna and Miller, 2021, pp. 37-38). The court agreed with the petitioner's arguments based on the articles 26-27 of the Vienna Convention on the Law of Treaties, which states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith," and "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Kazakhstan's law on international treaties has similar provisions. According to the national legislation, the Ministry of Foreign Affairs monitors implementation of international treaties but, in fact, it never replied to the 2012 UNCAT decision Gerasimov's case or took any action to afford reparations to Gerasimov. The courts, on the other hand, cited the UNCAT decision and granted Gerasimov compensation. This decision was sustained on appeal and then confirmed by the Kazakhstan Supreme Court, in what appears to be the first decision in the world by a national court that establishes states' mandatory obligation to implement the decisions of UN committees in individual cases. UN human rights treaties, such as the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UN CAT), do not provide clear guidance on the obligation of the state-parties to implement the decisions of related treaty bodies. This has led to ongoing debates among international law

specialists on the nature of states' obligation "to give effect" to the decisions (also known as Views) of UN committees, and states have taken widely differing approaches (Fox Principi, 2017). In light of this, it was especially important for us to obtain a judicial ruling in a domestic court that agreed with our interpretation of the obligations entailed in acceding to a UN treaty, thereby increasing legal protections for the victims of human rights violations. Kazakhstan does not have a system of legal precedent and courts are not bound to apply the same standards in future cases (Lisitsyna and Miller, 2021, at p. 38). The decision in the Gerasimov case set an inspiring example and provided a roadmap for developing arguments in similar cases in Kazakhstan, Kyrgyzstan, and Mexico (see Cherkasenko, 2014; Pervomaisky District Court Case No. GD-839/18.BZ, 2018; I(dh)eas, 2021.)

1. Advantages of pursuing strategic human rights litigation in domestic courts

A report published by OSJI found that the use of strategic human rights litigation in cases involving torture in custody can yield significant human rights gains (OSJI, 2017). The study, which analised the use of this approach in Argentina, Kenya, and Turkey over a 30-year period, focused to a large extent on cases litigated before domestic courts. This research identified many forms of domestic legal, judicial, institutional, and policy change resulting from litigation concerning torture in detention, such as: the conviction of perpetrators; changes in detention conditions in facilities where torture was practiced; payment of compensatory damages to victims and their families; the creation of broader reparation schemes; and formal recognition of and apologies to victims. There are also indications that strategic human rights litigation, combined with other forms of oversight and accountability, has had a deterrent effect on torture in detention. The study also shows that these impacts, and progress in the fight against torture in custody more broadly, have not been linear, as setbacks often follow advances. The litigation process also had significant negative effects on some survivors and anti-torture advocates, including death, further torture, and arbitrary detention.

Drawing on the 2017 OSJI report, a study on strategic litigation against torture in Asia (Bokhari, 2020), research on domestic courts awarding reparations for the victims of violations of the right to life and personal integrity in Latin America (Garcia Garcia, Fierro Ferráez, & Lisitsyna, 2019), and personal experiences, below I outline numerous insights into the practice of strategic human rights litigation in domestic courts that can aid other litigators and social movements seeking to end torture and other human rights abuses.

Domestic courts are part of the social and political fabric of every society. They pose advantages and challenges as compared to international tribunals. Well-known challenges include corruption and the lack of independence of many domestic courts; coercion of judges, lawyers and victims; and high court fees when filing cases. However, engaging with domestic courts has its advantages. They include, but are not limited to, the potential for domestic courts to be bolder in highlighting the systemic state problems that lead to rights violations; a wider range of strategic litigation choices available to victims and litigators; the ability to use evidence of torture to help defendants in criminal cases; and the ability, in some countries, to file lawsuits in the public interest, thereby seeking broader impact and minimizing risk for individual victims.

1.a. Domestic courts can be bolder in highlighting systemic problems

While international and regional courts and treaty bodies play important roles in determining the understanding and interpretation of rights, these bodies are limited by treaty terms and must be careful not to open themselves to the claim that they are impinging on national sovereignty. In some instances, domestic courts can thus be bolder in outlining their concerns regarding systemic state problems or government failures. They are more familiar with a nation's problems, and they are part of the apparatus that defines state policies. Even if courts are formally limited by the legal standards promulgated by legislatures, their role extends beyond the mere application of the law.

The Constitutional Court of Colombia, for example, found that various cases of internal displacement of people (often due to the conflict) and prison overcrowding demonstrated systematic and continual violations of human rights. Its decisions stated that such violations represented an "unconstitutional state of affairs," underlining the structural causes of such violations and requiring the government to take effective measures to remove these causes (Garcia Garcia, Fierro Ferráez, & Lisitsyna, 2019, see also Constitutional Court of Colombia, T-025/2004 and T-388/2013). The Federal Supreme Court of Brazil issued a similar decision on precautionary measures in relation to Brazilian prisons, concluding that the inhumane conditions of the country's penitentiary system likewise constituted an unconstitutional state of affairs (see Supreme Court Of Brazil, ADPF 347 Mc / Df). There are also examples of domestic courts making similar decisions based on international treaties that have not been ratified by the government. For instance, despite the fact that the Pakistani government is not a party to the International Convention for the Protection of all Persons from Enforced Disappearance, the Supreme Court of Pakistan referenced the convention in a decision criticizing the Pakistani state for engaging in enforced disappearances (Bokhari, 2020 and Supreme Court of Pakistan, Yaseen Shah case).

1.b. Victims and litigators have a broader choice of legal avenues to pursue

In international human rights litigation the range of available forums is typically quite limited. In contrast, litigators and activists in domestic courts generally have a wider array of choice when it comes to deciding which legal avenues to pursue.

Criminal, civil, and constitutional lawsuits can all be part of strategic litigation against torture. Criminal investigation is aimed at establishing the circumstances in which the crime was committed, and the identity and degree of involvement of those responsible; and obtaining the eventual punishment of the perpetrators. Victims can also pursue civil litigation in order to identify those responsible, and to seek various forms of reparation. The burden of proof in civil claims is generally lower than in criminal cases (REDRESS, 2021, p. 21). In some countries, a separate Constitutional Courts or Constitutional Chambers of the Supreme Courts will consider claims related to state violations of constitutional rights, while in others such lawsuits are brought before regular courts. In some jurisdictions (such as Kenya), an individual can seek reparations, including compensation, as part of a constitutional complaint.

When researching the impact of strategic litigation on torture in custody for the OSJI report, the team saw dramatic differences among the three countries studied when it came to the choice of legal avenues preferred by activists and litigators (OSJI, 2017). Argentinian civil society prioritized criminal accountability of perpetrators, while Kenyan litigators and activists focused on securing damages through

domestic and transnational civil lawsuits. In Turkey, the most important litigation efforts were focused on international litigation—on preserving issues for the European Court of Human Rights and bringing the Court's practice closer to home by organizing the first-ever in-country hearings for the Court.

In recent years there has been an increasing number of examples in which litigators turned to less typical avenues, such as administrative lawsuits, while still arguing cases on the basis of human rights norms. For example, lawyers from human rights NGOs in Mexico turned to Mexico's administrative court system and filed claims seeking reparations for damages under the state's financial liability regime (Responsabilidad Patrimonial del Estado), which makes government offices responsible for any damages caused to individuals. In Mexico, civil claims cannot be brought against governmental agencies. An important feature of state financial liability litigation in Mexico is that the state agency responsible for the violation bears the burden of providing compensation, which should create incentives for the agency to reform (Garcia Garcia & Melon Ballesteros, 2017). While awards in administrative cases rarely include measures other than compensation, the law in Mexico provides a possibility to seek them. Using state financial liability, the NGO Centro de Derechos Humanos Miguel Agustín Pro Juárez (Centro Prodh) filed a case in an administrative court in Mexico and secured compensation for three indigenous women who spent three years in arbitrary detention after wrongful prosecution. In February 2016, OSJI submitted an amicus curiae brief in this case, setting out the state's international human rights obligations to provide reparations where there is a violation of international human rights standards. In this case the applicants—unusually for an administrative case—requested that the state apologise to the victims. The Federal Court of Administrative Justice granted this request and ordered the federal prosecutor's office to issue a public apology to the three women, which was delivered in February 2017 at a special event at the National Museum of Anthropology in Mexico City (Centro Prodh, 2017).

In Thailand, lawyers also turned to administrative litigation to gain compensation for victims of unlawful detention and injuries inflicted by the military in the south of the country (Bokhari, 2020). The region was under martial law and administrative lawsuits appeared to be the only legal avenue available to bring the military to justice. The case involved two university students who were tortured and held incommunicado in military detention. In its November 2011 decision, the Songkhla Administrative Court stated that officials are responsible for the acts that they commit as well as those committed by people under their command. The court recognized the possibility of awarding compensation to victims, applying the 1996 Tortious Liability of Officials Act B.E. 2539 (The Ismael Tae and Amizi Manak Case, 2011). In October 2016, the Supreme Administrative Court affirmed this decision and specified that the victims were due compensation with interest due to the emotional distress and physical injuries they had suffered. The court confirmed that 305,000 baht and 200,000 baht were owed to plaintiffs Mr. Ismael Tae and Mr. Amizi Manak, respectively, and that they should also receive an additional 7.5% per annum in interest incurred since the day the case was filed.

1.c. Victims can pursue different legal avenues simultaneously

Each legal avenue has its own advantages and pitfalls. Legal avenues that could be used and might be effective differ for each case. Victims might have strong preferences with regard to

the type of accountability and reparations that they are seeking. In domestic litigation, some legal avenues can be used concurrently.

Seeking reparations through civil and administrative lawsuits or through reparations programs supplements, but does not replace, the need to hold perpetrators criminally responsible. Torture is a crime and criminal investigation is the proper societal response. But the criminal process requires the highest burden of proof in the legal system, which can be difficult to meet when it comes to individual perpetrators, who may not even be identifiable. In principle, as is possible in many legal systems, a civil claim pursued as part of criminal proceedings against the alleged perpetrators, can be an effective way for victims to seek reparations. In practice, however, criminal investigations into torture and similar crimes are often closed or "suspended" for several years, with no likelihood of proceeding to trial, let alone conviction. While states should continue improving their investigative and prosecutorial practices to respond to this challenge (OSJI, 2021), victims should also be able to seek reparations in civil or administrative courts independently of the outcome (or existence) of a criminal case against the alleged perpetrators. In addition, civil or administrative proceedings launched independently of criminal investigations help shed light on the abuses the victim suffered. At the same time, however, these proceedings might be as protracted as criminal cases, and many victims find the civil justice process ultimately unsatisfactory, often resulting in insufficient settlements. While participating in several legal processes places an additional burden on the victim, sometimes civil or administrative lawsuits can provide victims with a sense of agency. Also, civil and administrative judges are often less inured to accounts of violence and pay more attention to victims' suffering. In some cases, when police and prosecutors refuse to even undertake criminal investigations into allegations of torture, civil or administrative cases might be the only option available for victims seeking their day in court. In some countries and contexts, victims might be also able to access at least partial reparations through different administrative programs, such as the Victims Commission in Mexico (Comisión Ejecutiva de Atención a Víctimas) or the Criminal Injuries Compensation Authority in the UK.

In some countries, for instance Kyrgyzstan, litigation for reparations faces an additional obstacle: victims may only sue for compensation and other reparations if the perpetrators have been convicted in criminal court. This requirement violates international human rights standards, and it is important to challenge and change this rule where it exists. UNCAT states that, "Notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. The Committee considers that compensation should not be unduly delayed until criminal liability has been established." (see UNCAT, General Comment 3, para 26; also UNCAT, Gerasimov v Kazakhstan, para 12.8). Decisions of the UN Human Rights Committee include similar findings (see Akmatov v Kyrgyzstan, para 10).

In Kyrgyzstan, OSJI provided advice to lawyer Sardor Abdukholilov who used the decisions of the UN Human Rights Committee to convince civil courts that victims of torture should be able to receive compensation without waiting for the criminal conviction of the perpetrators—even in cases where the plaintiff in the civil suit is not the victim identified in the relevant criminal case (e.g. the plaintiff might be a relative of a deceased victim). In October 2018, the Pervomaiski District Court of Bishkek ruled on a civil case in which the brother of Turdubek

Akmatov (who died at the hands of police in 2005) sued the government for reparations. The court disputed the claim of the police investigator, who stated that only Turdubek's late father could be the plaintiff in the civil case, as the father was recognized as the victim in the criminal case. The court instead pointed to a UN Human Rights Committee decision, stating, "In this matter, the court considers it is necessary to be guided by the UN Committee's Views, which states that persons whose rights have been violated independently of any related criminal proceedings have the right to compensation for moral damage... The court believes that the plaintiff, being the brother of the deceased, has also experienced moral suffering. However, this circumstance should affect the amount of compensation." (Pervomaisky District Court Case No. GD-839/18.BZ, 2018). In addition to paving the way for the brother of the deceased to receive compensation, this decision resolved an important procedural hurdle. As Kyrgyzstan does not have a system of legal precedent, this court decision itself does not solve the structural problem of requiring criminal conviction before reparations may be awarded. It does, however, demonstrate that it is possible to overcome it in individual cases.

It is important not to be deterred by these procedural obstacles. Often, the key elements of strategic human rights litigation that open new avenues for seeking justice are focused on procedural questions, such as the relationship between reparations proceedings and criminal conviction. Another important element is the innovative collection of evidence.

1.d. Evidence of torture can help defendants in criminal cases

Treaty bodies and regional human rights courts generally state that they do not "rehear" domestic cases to establish guilt or to adjudicate a civil claim. (The International Criminal Court and other international criminal justice tribunals serve a different function, follow different rules, and are not included in this discussion). While treaty bodies and regional human rights courts take into account evidence related to alleged human rights violations, as a general rule evidence needs to be presented to and evaluated by domestic courts. In domestic settings, litigators and activists around the world continue to develop new skills in collecting evidence, including relying on new technological tools and sophisticated medico-legal examinations, and improving interview techniques in line with international standards. While often ignored in practice, article 15 of the UN CAT prohibits the use of evidence obtained as a result of torture (Fair Trials and REDRESS, 2018). Credible evidence of torture can throw into question evidence presented by the prosecution in cases where victims of torture are themselves standing trial for alleged criminal actions.

Within the last few decades, the UN has adopted two manuals—known as the Minnesota Protocol (1991; revised 2016) and the Istanbul Protocol (1999, revised 2004, currently being updated)—that respectively offer guidance on investigations of summary or arbitrary executions and of torture and cruel, inhuman and degrading treatment. Before the Protocols, in many jurisdictions state forensic experts—often employed by the same institutions as alleged torturers and other abusers—were the only available source of medical and forensic evidence. Litigators can challenge state forensic reports and introduce independent expert evidence. Even if domestic law does not specifically provide for the introduction of such evidence, in most instances there is no prohibition on trying. Independent reports might not always have the same probative value as official forensic reports, but

they are still useful and can have an impact on the decision of the court. In addition, human rights activists have engaged in training of forensic experts in order to improve the quality of official reports.

A recent example of the successful use of the Istanbul Protocol was in the so-called "Red Room" case in Rio de Janeiro. In 2018, the Brazilian military tortured several young Black men following a large military operation in one of the city's favelas. The young men stood trial on drug-related charges. Their initial medical examination was perfunctory, and the Public Defender's office of Rio de Janeiro requested that the judge order an additional medical examination given their allegations of torture. OSJI provided advice on strategic litigation approaches to the Public Defender's office in this case. The International Bar Association's Human Rights Institute (IBAHRI) collaborated with the Rio de Janeiro Forensic Institute, which is part of the civil police, to conduct the examination in line with the Istanbul Protocol. IBAHRI invited Pau Peres-Sales and Marina Parras, two medical experts from Spain specializing in medical and psychiatric forensic work, to join its team and accompany Brazilian forensic doctors. This was the first time an official examination in line with the Istanbul Protocol had taken place in Brazil. Peres-Sales and Parras trained local doctors on the medical elements of the Istanbul Protocol, IBAHRI's Veronica Hinestroza and two consultants conducted training sessions on its legal aspects. Seven Istanbul Protocol evaluations were conducted and signed by Peres-Sales and Parras and one Brazilian doctor on behalf of the national Forensic Institute. The men's defense team introduced the reports in court. Referring to these reports, the judge suggested that the credibility of the military's statements was tainted by "the hateful practice of torture," and acquitted the defendants. Such acquittals are extremely rare in Brazil. (Lisitsyna, 2020). In February 2022, an appeals court affirmed the acquittals. In a related case concerning three other young men, the defense could not undertake a thorough medical examination like the one discussed above. But the Public Defender's office requested the opinion of a forensic doctor from Colombia, who reviewed one of the official medical reports, which he found to be inconsistent with the Istanbul Protocol. Despite the absence of a specific procedure to submit independent medical reports, the judge accepted the report and cited it in the decision, which also led to an acquittal. (OSJI, 2022)

The comprehensive medico-legal examinations in the Red Room case not only served as evidence that the defendants were tortured; they were also crucial for the men's acquittal. If not for the reports, the state's evidence—though "tainted by torture"—would have appeared legitimate. Such individual cases serve as important examples of how entrenched practices–perfunctory medical evaluations, the "presumption of truth" of the testimony of police and military officials, the use of evidence that might have been obtained through coercion–can be successfully challenged in domestic courts. At the same time, while individual cases can provide inspiration and pave the way for other human rights litigators to follow, the scale of the challenge often requires actions that target systemic problems.

1.e. Cases can be filed in the public interest to seek broader impact

In most cases, victims and their representatives turn to litigation to seek protection, reparations, and accountability for specific human rights violations. But in some jurisdictions, lawsuits can be filed in the public interest and, if successful, can have broader

impact. Lawsuits filed in the public interest are often, but not always, influenced or connected to individual cases. There are also examples of strategic litigation seeking broader impact through collective petitions, such as collective habeas corpus, on behalf of certain groups.

For instance, in November 1998, the Bangladesh Legal Aid and Services Trust (BLAST), along with two other organizations and five individuals, filed a writ petition in Bangladesh's High Court in the form of public interest litigation. The suit challenged sections of the Criminal Procedural Code (CrPC) and other legislation that allowed police to abuse their powers of arrest and magistrates to abuse their powers of remand by placing individuals in pre-trial detention. BLAST and others decided to bring this lawsuit following significant public outcry after the police arrested, without a warrant, a 20-year-old student who was found dead five hours later. Though the lawsuit was not brought on behalf of the student's family, it was in direct response to his death, which sparked broader national attention to the problem of the abuse of police powers in Bangladesh. In its 2003 decision on this writ petition, the High Court found respective sections of the CrPC to be inconsistent with fundamental constitutional rights. (Blast and others vs. Bangladesh). The Court also issued a comprehensive set of recommendations regarding necessary amendments to the CrPC, as well as Bangladesh's Police Act, Penal Code, and Evidence Act. It also issued a set of fifteen guidelines with regards to exercise of powers of arrest and remand. The case was considered on appeal by the Appellate Division of the Supreme Court in May 2016, which endorsed, with some modifications, the guidelines formulated by the High Court. These guidelines were directed at law enforcement agencies and magistrates. The Supreme Court's Appellate Division reiterated the binding nature of the guidelines and clarified that it had the authority to issue them, pending the enactment of law (Bokhari, 2020).

In Argentina, litigators have successfully used collective habeas corpus petitions to protect people in detention. In November 2001, the NGO Centro de Estudios Legales y Sociales (CELS), supported by a large group of individuals and other NGOs, lodged a collective habeas corpus petition arguing that prison conditions in Buenos Aires amounted to the widespread violation of the rights of incarcerated individuals. In 2005, the Federal Supreme Court issued a wide-reaching and ground-breaking judgment. It found that the prison system should comply with the UN Standard Minimum Rules for the Treatment of Prisoners—and that prison conditions fell short of national and international human rights standards. The judgment linked detention conditions to the state's obligations to prevent torture and found that the state was violating the human rights of people in prison. The case also catalyzed debate on the procedural means of securing access to justice in collective cases concerning structural human rights problems. By accepting the right to lodge collective habeas corpus actions in this case, the judiciary effectively created new avenues for developing subsequent litigation (OSJI, 2017, pp. 45-46).

In 2020, when the COVID-19 pandemic hit, Association XUMEK, an NGO in the Argentine province of Mendoza, filed a collective habeas corpus petition requesting the release of at-risk individuals being held in detention. This resulted in a court order requiring the government to review all cases of at-risk individuals who could be moved from detention and placed under house arrest. The court also urged authorities to supply people in detention with personal protective equipment and

hygiene items and authorized their temporary use of mobile telephones while family visits were suspended. The judicial decision allowed many people to serve their sentences at home. (OMCT, 2022, p. 9).

1.f Cases filed in the public interest can minimize risk for victims

Another reason why anti-torture litigators turn to lawsuits in the public interest is to protect victims from retaliation.

Security concerns are a central part of the planning of any legal action on torture or other human rights violations. One way to minimize risk is to file a petition in public interest without naming any individual victims. In Mexico, at the beginning of the COVID-19 pandemic, the NGO Centro Prodh filed a constitutional complaint in the public interest that called for the protection of people in detention from the spread of COVID-19 (Centro Prodh v Governor of Morelos et al). OSJI served as advisor to counsel and helped Centro Prodh develop and build evidence for this case. As the lawsuit was filed in the public interest, Centro Prodh acted as a plaintiff and did not name any victims, which mitigated the risk to individuals in detention, who might have otherwise been subject to retaliation by the prison administration and other state agencies.

However, this choice required a trade-off. The case would have been stronger with a plaintiff who could have provided a detailed description of their treatment and lack of protective measures. Centro Prodh was ultimately allowed to serve as a public interest plaintiff, but the court could have denied this request. Moreover, in this case, there is no recourse beyond domestic courts, whereas an individual plaintiff or a group of plaintiffs could have filed a complaint to the Inter-American Commission on Human Rights or to a UN treaty body. In this case, the first-instance court dismissed the complaint a year after filing, arguing that the government demonstrated in its written submission that it was taking necessary measures. The appeal court has not yet taken up the case.

Public interest litigation and collective complaints can be powerful tools for seeking change. However, these lawsuits are also easier to dismiss for procedural reasons and their implementation is patchy. Nonetheless, each case—whether individual or collective, whether it was won or lost in court, settled, or withdrawn—can become a building block on which litigators and activists can construct the next case, advocacy, and campaigns.

2. Strategic human rights litigation is more than a single high-profile case

The impact of strategic litigation is rarely apparent from the outcome in a single case, but rather can be observed and assessed by considering several cases over time, especially when combined with advocacy and other tools (OSJI, 2017).

2.a. Strategic litigation often involves multiple cases over time

Many important and impactful judicial decisions were made possible because several "smaller" cases came before them and removed procedural obstacles or led to substantive decisions on similar, but less controversial, matters. Sometimes, a case similar to the ones dismissed in the past comes at the right political moment. Whether a country does or does not have a system of legal precedent also informs how much one case builds on others, although even in countries with legal precedent—such as the United States—important decisions might be overturned. One of the most progressive judges on the US Supreme Court and an icon of gender equality and women's rights, Ruth Bader-

Ginsburg, was famously "not very fond of" *Roe v. Wade*, the landmark Supreme Court decision that in 1973 established a constitutional right to abortion. She noted that the ruling tried to do too much, too fast, leaving it open to fierce attacks. "Doctrinal limbs too swiftly shaped," she said, "may prove unstable" (Gupta, 2020). Due to a number of reasons—such as legal restrictions or the will of the victims involved— building on a series of "small wins" over time can often be the most effective strategic litigation strategy (OSJI, 2017).

OSJI's 2017 report describes one dramatic example of a successful litigation strategy based on "small wins." In 1998, the Argentine NGO Abuelas de la Plaza de Mayo filed a case against police officers Simón and Del Cerro for abducting a baby during the period of Argentina's military dictatorship of the late-1970s and early 1980s. NGOs hoped the case would demonstrate the absurdity of Argentina's amnesty laws—enacted in the mid-1980s to appease former officials of the dictatorship—which permitted the state to charge the police for abducting the child but not for the kidnapping, torture, and murder of her parents. At the end of 2000, CELS filed a legal action concerning the disappearance and torture of the baby's parents. In 2001, the federal court investigating the case declared the amnesty laws unconstitutional and indicted Simón for crimes against humanity, a decision confirmed by higher courts. Simón was sentenced to 25 years' imprisonment and absolute disqualification from public service for life, and the decision paved the way for Argentina's Congress to declare null the amnesty laws, and for the Supreme Court to subsequently confirm the nullification of the amnesty laws (OSJI, 2017, pp. 41-42).

Strategic human rights litigation often means several cases build over time. Just as importantly, these cases need to be part of a broader movement seeking change in laws and in practice.

2.b. Strategic litigation combines court cases with advocacy and other tools

Litigation is just one of many possible catalysts of social change. Others—including mass mobilization, public protests, advocacy, and legal aid—are commonly used in concert with, and sometimes as a prerequisite for, strategic litigation (OSJI, 2017, p. 14). All examples of cases discussed in this article were accompanied by advocacy campaigns.

Strategic human rights litigation helped end the use of rubber bullets in Catalonia. Like many others, activist Ester Quintana lost an eye when she was hit by a rubber bullet when participating in a protest. She sued the state and adopted a vigorous legal strategy. The plaintiffs argued that use of rubber bullets constituted torture. Quintana underwent a comprehensive medico-legal examination by medical professionals associated with NGO SIR(a), which specializes in medical and psychiatric forensic work for strategic litigation. The examination consisted of multiple assessments, including medical, surgical and psychiatric, over a year and a half, and found that there was little justification for the use of rubber bullets, which had been deployed as the protest was ending. As significantly, it detailed the many negative physical and psychological effects of Quintana's eye loss, including nine surgeries. Quintana's experience became one of the key stories in a small but active civil society campaign against police use of rubber bullets. Amnesty International and other international NGOs expressed support for the campaign, and small political parties on the left addressed the issue in Parliament, leading to an independent investigation. The court in its preliminary decision found that Quintana was a victim of torture,

even if the identity of the perpetrator was not known (Perez-Sales, 2019). The government chose to settle the case by paying significant financial reparations to Quintana (€261,000), who agreed not to pursue the case any further (Bueno, 2015). While the litigation was still ongoing, Catalonia banned the use of rubber bullets (Baqué, 2014).

Challenges of strategic human rights litigation in domestic courts

There are many challenges involved in strategic litigation against torture, whether the case is brought to a domestic or international forum. These include risk of retaliation against victims, their lawyers, and other representatives, including threats, physical violence, pressure on families, and defamation lawsuits; and the challenge of implementing judgments. Below I briefly discuss some of the difficulties involved in relying on domestic litigation for human rights cases.

Lack of independent judges

While members of international courts and other bodies can be subject to political influence, the pressures at the domestic level generally are greater: domestic judges are more susceptible to corruption given that their salaries and careers are wholly dependent on domestic authorities, they often are poorly paid, and their security risks are higher. Sometimes it is impossible to win however well one argues the case, as the decision would have political and personal consequences for the judge, who might already be ambivalent about the protection of human rights. At the end of the day, domestic judges are part of the state system. In some cases, judges are disciplined by shocking acts of violence against those who step out of line. For instance, in 2011, Judge Patricia Acioli was shot to death outside her home in Rio de Janeiro after receiving numerous death threats. Acioli was known as an uncompromising judge who sentenced approximately 60 police officers involved in death squads and militia groups. The Brazilian Association of Judges reported that the number of judicial workers requesting government protection increased 400 percent after Acioli's killing (Human Rights Watch, 2012). The message to other judges was clear.

In many jurisdictions, there is often little hope for a fair trial in cases with high political stakes for the government. These cases are not decided in the courtroom. For instance, Azimjan Askarov, a human rights defender who in 2010 was accused by the government, without any evidence, of being a key instigator of ethnic violence in the southern Kyrgyzstan. Askarov was tortured and sentenced to life imprisonment in an unfair trial. While decisions of the UN Human Rights Committee were crucial in persuading the Kyrgyzstan courts to order reparations for other victims, families of those who died in police custody, the courts ignored the Committee's 2016 decision calling for Askarov's immediate release. Askarov died in prison in 2020, allegedly after contracting COVID-19 (Lisitsyna & Miller, 2021, at p.40).

Procedural and bureaucratic obstacles

There can also be multiple procedural obstacles to pursuing human rights cases in domestic court systems—such as statutes of limitations, or, as discussed above, the requirement that criminal conviction must precede reparations. In Nepal, for example, the 1996 Torture Compensation Act provided victims with 35 days in which to file their request for compensation. Following years of advocacy and litigation, in 2020 the Criminal Procedure Code was amended, raising the statute of limitations for torture cases to six months, which is still grossly inadequate (Advocacy Forum-Nepal, 2020). In many jurisdictions

police and military officials benefit from overarching statutory immunity and the legal presumption that they are telling the truth, which effectively denies victims the right to seek redress. Some countries adopted blanket amnesties for prior violations committed during a conflict or specific historical period.

Some procedural obstacles have been successfully removed in different countries through strategic litigation and advocacy. For example, the Constitutional Chamber of El Salvador's Supreme Court ruled in July 2016 that the country's 1993 amnesty law is unconstitutional and must be stricken (Roht-Arriaza, 2016). A number of NGO representatives and victims of rights violations brought a complaint alleging that the amnesty law, covering the crimes of both sides in a civil war that claimed over 75,000 lives, was illegal and violated El Salvador's international commitments and constitution. The Court first dismissed the procedural illegality argument but held that the legislature had to balance the need for reconciliation with the need for justice for the victims.

In some jurisdictions, such as Mexico, a judge can only mandate that the agency directly responsible provide compensation to victims of human rights violations, and that agency must also be a respondent in litigation—all of which makes it difficult to seek reparations that involve multiple agencies, especially when some, such as health authorities, might not have played any role in violations but have a role to play in repairing the harm. This is not a problem in international human rights tribunals, where the decision is issued against a state as a whole. At the same time, not all countries have such limitations. For example, courts in Colombia can include different agencies in their reparation orders.

Bureaucratic red tape at domestic level can entangle human rights cases for years and pursuing justice for victims is often a protracted process. This is often due to small violations of technical requirements —a blank signature, the lack of a stamp that is impossible to obtain, a missing confidential document held by a government agency—that can cause major setbacks. International bodies, by contrast, can be more forgiving when claimants are unable to comply with their procedural rules as a result of state recalcitrance or incompetence.

Costly legal fees

Domestic litigation can entail costly filing fees, especially for cases involving compensation, and lawyers' fees can be prohibitive. In some jurisdictions, the practice known as "no win, no fee" can encourage lawyers to reach settlements that ensure their own costs are covered, even if the plaintiffs might have received higher compensation if their case had gone to court. Many successful cases have been litigated pro bono by lawyers associated with human rights NGOs, but NGOs only have the capacity to represent a small fraction of victims.

Lack of trained medical professionals

Medical professionals are vital for litigating torture cases as they are the ones who can identify whether the victims' account is consistent with their psychological and physical injuries, which are often invisible. They also can describe the consequences of abuse for the victim. However, many jurisdictions still lack medical professionals trained in the Istanbul and Minnesota Protocols, and, as discussed above, government forensic services are often not independent or reliable. Medical evaluations of victims can be superficial and retraumatizing for victims. They are often performed in the presence of police and other security services, and medical professionals might follow the directions of those

state agents, misrepresent their medical findings, and issue a medical report that bolsters the case against the victim. Some independent medical and other experts, while willing to conduct evaluations and issue reports, are unwilling to make time to testify in court. In the case of foreign experts, unless testimonies are possible through video conferencing or other remote means, the need to appear in a court in a different country might just not be feasible. Expert testimony is rarely necessary in international human rights litigation but is expected in many domestic judicial systems.

Lessons learned

Twenty years ago, when working in Kyrgyzstan, I viewed filing domestic complaints against torture as a way to "exhaust domestic remedies" before bringing a case before an international human rights body. Reflecting on the work of strategic human rights litigation over the last decades, however, I now see domestic courts as crucial venues for the protection of human rights.

Below are several general takeaways from the expansion of domestic human rights litigation against torture:

Losing is part of litigation

One cannot always win. Losing a case might offer strategic value and contribute to future positive change. However, in torture cases, the victims' own objectives for litigation and the potential effect on their well-being must be weighed seriously before engaging into strategic litigation where there is a high likelihood of a negative outcome in the courtroom.

Strategic litigation often must be accompanied by advocacy for broader reforms

For example, if all forensic experts in a jurisdiction work under the auspices of the police or other law-enforcement agencies, long-term efforts for change might involve documenting human rights violations that are facilitated by the lack of independent doctors and overall challenges of conducting effective medical examinations in such systems and developing policy proposals for reform combined with the domestic and international advocacy for such reforms. In the short-, and medium term, the training of independent doctors, the solicitation of expert reports from doctors abroad, engagements with health authorities to adopt appropriate protocols for medical examinations, and other complementary non-litigation efforts might be necessary.

Courts should be treated seriously, even if they do not appear independent

Presenting serious evidence, amicus briefs, and expert opinions can be meaningful, even in cases with a low likelihood of success or before courts that lack independence. Sometimes litigators and activists assume that there is no hope in the domestic system, but then they see that the government does not necessarily deploy the full arsenal of repressive tools against each case, and wins are possible. Often, strategic human rights cases need a boost—a political opening, a thorough and courageous judge—but they should always be as strongly argued as possible on their merits. There are, at the same time, cases where the hope for fair result is even lower than usual, for example in cases where a negative outcome is all but guaranteed due to the politically charged nature of the case.

Strategic litigation often involves trade-offs

Litigation involves constant trade-offs. There are limited resources. Victims and lawyers might disagree on what approach to take to seek accountability, or on what strategy is most likely to succeed. Some legal avenues might just be too dangerous in some cases—

for instance, seeking individual criminal accountability can lead to retaliation against the victims or their representatives. Sometimes, the best option is to bring a case in the public interest without naming individual victims. For some victims, holding perpetrators accountable is the most important objective. Others find reparations more meaningful because they serve as an acknowledgement of state responsibility. Some want to forget and move on with their lives. Victims' opinions and commitment might evolve and change during the often protracted litigation process, and the litigation needs to be adjusted. If adherence to all international human rights standards could be guaranteed, these trade-offs would not be relevant but, unfortunately, the reality forces both victims and litigators to be strategic and make imperfect choices.

Successful strategic human rights litigation depends on building a strong evidence base

In international human rights law and jurisprudence on torture, the burden of proof often rests with the state, which must provide a plausible explanation for the harm inflicted on the victim. In most domestic cases, however, the burden of proof often rests on the victim seeking accountability and reparations for human rights violations. It thus is important to build a strong evidence base to help ensure a positive decision. This often means relying on new technology and experts from a range of disciplines. For example, medico-legal reports, including those conducted by independent health professionals, have become a key form of evidence in anti-torture litigation. In some cases, advances in technology and the growing experience of practitioners have allowed medico-legal evaluations to be conducted remotely. Security cameras and mobile phone videos have also been critical in seeking accountability for police violence, for example in the United States. The COVID-19 pandemic, meanwhile, highlighted once again the need to engage scientists, such as epidemiologists, or physicians when calling for humane conditions for those in detention.

The application of international law by domestic courts in one country shows what is possible elsewhere, even in vastly different legal systems

The decision in Kazakhstan on the Gerasimov case, which addressed Kazakhstan's obligations under international treaties, inspired litigators in Kyrgyzstan and Mexico and led to similar legal victories. For example, in Kyrgyzstan, courts issued several decisions similar to the decision in *Gerasimov* that emphasized the state's obligation to implement the rulings of the UN Human Rights Committee. And in Mexico, the Supreme Court issued a decision mandating the state to follow Urgent Action requests issued by the UN Committee on Enforced Disappearances (Garcia Garcia and Gutierrez, 2021; Lisitsyna and Miller, 2021).

Conclusion

In recent years, there have been an increasing number of examples of important human rights breakthroughs in domestic courts addressing torture and similar human rights violations. While judges around the world still often ignore forced confessions, side with alleged torturers, or are simply reluctant to challenge the system in which they operate, we have also seen how successful cases can contribute to social change. Moreover, the impact of strategic litigation is not always measured by success in court—the failure of litigation can serve to expose injustice and galvanize movements for change. Litigating in domestic courts, when used strategically, has distinct advantages. When it is deployed as part of a broader project of civil society organizations and social movements to advance

human rights, strategic litigation can help victims obtain a measure of justice and lead to policies that curtail abuses.

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