

# Strategic Litigation Impacts



TORTURE IN CUSTODY



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**Open Society Justice Initiative**





## **Dedication**

This report is dedicated to Tahir Elçi—human rights defender and peace activist, lawyer, head of the Diyarbakir Bar, litigator before the European Court of Human Rights, and contributor to this study—who was killed on November 28, 2015 during a peace speech in Diyarbakir, and to all the human rights activists around the globe.

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The Open Society Institute Budapest Foundation constitutes a foreign financed organization under the par. I.I of the Act LXXVI of 2017.

ISBN: 978-1-940983-7-21

Published by  
Open Society Foundations  
224 West 57th Street  
New York, NY 10019, USA  
[www.opensocietyfoundations.org](http://www.opensocietyfoundations.org)

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Cover photo © Cigdem Ucuncu | NarPhotos | Redux  
Cover designed by Judit Kovács | Createch Ltd.  
Text layout by Createch Ltd.

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# About the Strategic Litigation Impacts Series

This report, which examines the impacts of strategic litigation on torture in custody in Argentina, Kenya, and Turkey, is the fourth in a planned five-volume series looking at the effectiveness of strategic litigation. Strategic litigation (also referred to as public interest litigation) is of keen interest to the Open Society Foundations (OSF), which both supports and engages in it directly, and thus has an interest in gaining an unbiased view of its promises and limitations. Strategic litigation can be a powerful engine of social change. Yet it can also be costly, time-consuming, and risky. Studying its strengths, weaknesses, unintended consequences, and the conditions under which it flourishes or flounders may yield lessons that enhance its effectiveness.

To produce the five studies in this series, OSF engaged closely with hundreds of experts, litigators, and activists around the world to learn their views on the impacts of strategic litigation in a variety of thematic and geographic areas.

The first of the five studies, *Strategic Litigation Impacts: Roma School Desegregation*, was written by Adriána Zimová and published in 2016. It looks at efforts to end discrimination against Roma schoolchildren in the Czech Republic, Greece, and Hungary. It is available online at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-roma-school-desegregation>. The second, *Strategic Litigation Impacts: Equal Access to Quality Education*, by Ann Skelton, was released in April 2017, examining the struggle for education justice in Brazil, India, and South Africa. It is available at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-equal-access-quality-education>. The third, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights*, by Jérémie Gilbert, also released in April 2017, examines the struggles of indigenous peoples to protect their traditional lands in Kenya, Malaysia, and Paraguay. It is available

online at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-indigenous-peoples-land-rights>.

The fifth and final volume in the series is a reflection by the Open Society Justice Initiative itself on the implications of the research findings, seeking to articulate insights that may help inform the future work of litigators and allied activists.

Although it is certainly hoped that these studies may lead to more efficient and effective use of strategic litigation as a complementary strategy to achieve social change, OSF is mindful that it is no panacea, and that the field would benefit from more—and possibly even more rigorous—thinking. This series of studies, then, may be thought of as one small step toward developing a better understanding of the promise and pitfalls of strategic litigation.

# Acknowledgments

This report was written by Helen Duffy, head of Human Rights in Practice and professor at the Grotius Centre of International Legal Studies at Leiden University in The Hague.

The author is greatly indebted to in-country field researchers for their work: Ayşe Bingöl Demir (Turkey), Anabella Museri (Argentina), and Anita Nyanjong (Kenya), without whom the study would not have been possible. Particular thanks are also due to the scores of interviewees—victims, lawyers, activists, judges, and many others—who provided their valuable insights.

The input and guidance of the independent advisory panel that oversaw this study was vitally important: Başak Çalı, Koç University (Turkey); Charles R. Epp, University of Kansas (USA); Juan E. Méndez, American University Washington College of Law and former UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; and Andrew Songa, National Human Rights Commission (Kenya). Thanks are also due to Open Society Justice Initiative staff members Christian De Vos, James A. Goldston, and Masha Lisitsyna, and especially Erika Dailey, for valuable peer inputs.

The Justice Initiative team that conceived of this report before the research began included Laura Bingham, Peter Chapman, Alexandra Cherkasenko, Erin Neff, Stella Obita, Chidi Anselm Odinkalu, Rupert Skilbeck, Katalin Szarvas, Réka Takács, and Marina van Riel, while OSF colleagues Emily Martinez and Borislav Petranov provided valuable guidance. Gaëlle Tribié, at the time a student at the Stanford Law School Human Rights Center, contributed background research, under the supervision of Professor Jennifer S. Martinez, before the study got underway. Caroline Toussaint, formerly the author's student at Leiden University, provided valuable assistance.

The opportunity to meet and reflect on the study's preliminary findings—at a two-day peer consultation held on December 18–19, 2015 in Istanbul, Turkey—was invaluable. Thanks to an inspiring group of participants across the three state for their insights.

The report was edited by David Berry, Erika Dailey, and Kate Epstein. The opinions expressed are those of the author.

# Methodology

This comparative, qualitative study examines the impacts of strategic litigation on torture in custody in Argentina, Kenya, and Turkey.

To the greatest extent possible, the inquiry seeks to adhere to principles of impartiality, even-handedness, intellectual integrity, and rigor. To be sure, the study's sponsor, the Open Society Foundations (OSF), advocates for, funds, and uses strategic litigation as a vehicle for realizing human rights. Its subsidiary, the Open Society Justice Initiative, both engages in strategic litigation and provides instruction in using strategic litigation. Some might then infer that this inquiry is inherently biased toward conclusions favorable to the sponsor's view of strategic litigation's value.

The study is therefore structured to mitigate such possible biases and misperceptions. It was researched and written by independent experts, rather than OSF staff; informed by hundreds of individuals unaffiliated with OSF; and overseen from its inception by a four-person advisory group whose members are also unaffiliated with and not beholden to OSF. In addition, the research process was designed to garner input from the widest possible spectrum of stakeholders and observers, including those who have been publicly skeptical or critical of using strategic litigation to combat torture. This inquiry was born of an authentic desire to understand the complexities and risks of—rather than platitudes about—the use of strategic litigation to advance the realization of human rights. A lack of impartiality would only thwart that goal.

The study draws on legal research, literature reviews, and original analysis, but principally it draws on qualitative methodologies, including scores of semi-structured in-country interviews in the three focus countries. Between June 2015 and June 2016, Anabella Museri and Helen Duffy conducted interviews in Argentina, Anita Nyanjong

conducted interviews in Kenya, and Ayşe Bingöl Demir and Helen Duffy conducted interviews in Turkey, in addition to interviews conducted remotely by the author and researchers. Please see this report’s appendix for the questions used to guide these interviews. Respondents included lawyers, judges, human rights defenders, NGO leaders, government officials past and present, survivors of torture, journalists, and scholars. Interviews were carried out in private in Spanish, Kiswahili, English, and Turkish.

Below are some essential questions and answers about this study.

► **What do we mean by “strategic litigation”?**

Strategic human rights litigation—sometimes referred to as “public interest litigation,” “impact litigation,” or “cause lawyering,”—is increasingly being used by human rights advocates and organizations around the world. The term generally refers to 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. There is, however, no precise definition of what constitutes strategic litigation and much room for discussion around the term itself.

In the context of this study, strategic 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. To properly examine strategic litigation’s distinctive characteristics, it is important to understand it as one part of a broader effort that may include some or all of these tools.

Some of the litigation discussed in this report was clearly undertaken as part of a larger strategy. But other litigation reviewed here was undertaken on short notice, in response to urgent needs, and thus may not have unfolded within a strategic framework. Ideally, strategic litigation would be one component of a broader strategy that uses an array of tools, but in practice, anti-torture litigation is often deployed on an emergency basis and only understood as “strategic” in hindsight. As Tahir Elçi, a torture survivor and seasoned human rights lawyer, noted during a peer consultation for this project in November 2015: “I do not know what you mean with ‘strategic.’ In our case, people who were tortured came to us and we took their cases.” What is more important perhaps than seeking to distinguish “strategic” from other litigation is to try to learn from the rich experience of human rights litigation, which can undoubtedly inform the development of more strategic responses in the future.

► **What do we mean by “torture”?**

Article 1.1 of the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.”

In line with international law, this study does not distinguish between torture and other forms of cruel, inhuman and degrading treatment and punishment, which are all subject to one single prohibition. At the same time, most of the situations examined in this study concern torture, rather than other forms of inhuman or degrading treatment, and the report often uses the single term “torture.”

This study focuses on instances of torture in custody that have given rise to litigation. These instances have tended to arise in specific political, military, or security contexts. The report focuses on formal custodial situations such as prisons, while recognizing that torture may take place in many other contexts.

► **What do we mean by “impacts”?**

This study seeks to illuminate in what ways, and under what circumstances, anti-torture litigation has made a difference. The study takes a wide conception of “impact” and considers it in multiple ways: on victims, survivors, and their families; on perpetrators and institutions; on law and public policy; on attitudes, discourse, and behavior; and on fundamental principles such as rule of law and democracy. Litigation may not itself have caused the change, but it may have contributed, alongside other processes and factors, to various forms of legal, social, political, and cultural change. It is this contribution of litigation, in dynamic relationship with other processes, that this study seeks to explore.

Clearly, the impact of litigation is impossible to understand out of context. It is inherently linked to political and social developments, as well as to other forms of advocacy and action taken in response to torture. As such, this examination of litigation and its impact is grounded in consideration of broader political and social shifts in Argentina, Kenya, and Turkey. It seeks to locate the litigation within the array of strategies and action taken by survivors, civil society organizations, lawyers, international allies, and others in relation to torture in each of the three states.

This study looks at three broad categories of impact: direct, material impact, such as payment of compensation to victims and punishment of perpetrators; changes in law, policy, and jurisprudence; and less quantifiable impacts, such as changes in attitudes and discourse. Of course, these categories are related, so that a change in policy may lead to a material impact, which may lead to changes in public perceptions. The study provides many illustrations of symbiosis in which, for example, political opportunities shape litigation, and litigation in turn helps to open greater political opportunities. The study suggests that litigation can have myriad levels of impact, positive and negative, direct and indirect, intended or unintended.

## Research Methods

The methodology used for the research was primarily exploratory, comparative, qualitative analysis based on semi-structured interviews with key actors in each of the three states. The author and researchers interviewed over 60 individuals, including lawyers, judges, human rights defenders, NGO leaders, current and former government officials, survivors of torture, journalists, and scholars. Interviews were carried out in private in Spanish, Kiswahili, English, and Turkish. The research also involved legal and primary source analysis of official documents, legal files, and judgments; reports and findings of regional and international human rights bodies, national enquiries, and NGOs; existing literature, media reporting, and analysis; and where available, relevant statistics on detention, torture, and litigation.

Quantitative research was impeded by the absence of reliable statistics, making it impossible to establish a quantitative correlation between litigation and impact. Instead, the report seeks to draw together available indicators of change and the experience of a range of actors whose direct experience and perceptions from the ground provide valuable insights from which lessons may be drawn.

## Selection of the Three States

Argentina, Kenya, and Turkey have been the sites of notorious torture and ill-treatment. In all three countries litigation has, in diverse ways, been a significant part of the response by victims, survivors and their families, lawyers, advocates, and civil society movements.

Argentina, Kenya, and Turkey were selected for this study based on four criteria: i) There was demonstrable interest in the study from interlocutors there; ii) they were the sites of significant attempts to use litigation to bring about change in the use of torture;

iii) key anti-torture cases were adjudicated there at least five years prior to commencement of the research, allowing sufficient time for impacts to become apparent; and iv) they are geographically and jurisdictionally diverse. Since the objective is to surface the complexities of strategic litigation rather than just highlight landmark rulings, the focus countries were also selected to maximize comparative learning.

Argentina and Turkey have civil law traditions, and Kenya's is mixed but based on English common law. Argentina ratified the UN Convention Against Torture (CAT) and other Cruel, Inhuman or Degrading Treatment or Punishment in 1986; Turkey in 1988; and Kenya in 1997. Argentina is a constitutional democracy; Kenya is a presidential republic; and Turkey is a parliamentary republic.

There is as much difference as commonality in the experience in these three states. Litigation in these states has addressed torture in diverse political contexts—including colonialism, coups, authoritarian regimes, and dictatorship—as well as diverse legal contexts.

The many different types of litigation pursued across the three countries is especially notable. The three states feature a fascinating array of litigation practices, involving criminal, civil, constitutional, administrative, disciplinary, and *habeas corpus* litigation, ranging from individual cases to collective complaints, and including national, transnational, regional, and international processes. The range includes individual civil remedies pursued before the Kenyan courts for torture during the Daniel arap Moi regime, transnational damages claims for colonial torture before UK courts, a mass of criminal accountability litigation for torture and ill-treatment committed under the Argentinian dictatorship, and the widespread resort to the European Court of Human Rights to challenge torture and ill-treatment in Turkey.

The types of litigation pursued in each state have naturally been influenced by each domestic legal system's diverse remedies, rules, procedures, and legal traditions, alongside myriad other factors, including political opportunities, international obligations, victim or civil society strategies and priorities, and the backgrounds and strengths of key actors and support networks. For example, the focus on criminal law responses (in Turkey and Argentina) is influenced by the active role of victims and their representatives in driving forward and participating in the criminal process in those states, in contrast to the state-led criminal process in common law Kenya which may contribute to relative inactivity around criminal law responses.<sup>1</sup> Conversely, in Argentina and Turkey the fact that access to compensation tends, in practice, to depend on the outcome of a criminal process may have contributed to the relative inattention to reparations in those states, in contrast to the central focus given to damages claims in Kenya.<sup>2</sup>

This diversity of experience makes it possible to explore an expansive array of litigation tools employed in different contexts, and their impacts. There are however also noteworthy similarities among the three states. They share enabling environments

within which torture and ill-treatment could take place: the declaration of states of emergency and exception, the rhetoric of war, the amorphous “enemy,” national security and counter-terrorism justifications, and the removal of safeguards in detention resonate across each state. Many of the challenges that face those seeking to address the problem through litigation and other means are also common across the three countries. Yet in all three states the legal framework recognizes the prohibition on torture and ill-treatment and through ratification of relevant international and regional treaties, provides a normative baseline for legal action

Critically for this study, in all three, the courts have been used regularly in response to torture and are considered by many within those states as having played a role in contributing to change. However, it is important to note that in all three, torture and ill-treatment persist to the present day, raising fundamental questions about the ultimate impact of strategic litigation.

# Preface: Hope and Realism

International law has developed a highly sophisticated array of norms to prevent torture and to implement its prohibition. Indeed, the centerpiece of that normative framework—beyond the absolute prohibition of its use even under states of emergency—is the obligation of the state to investigate, prosecute, and punish each incident of torture under its jurisdiction. The late Italian jurist Antonio Cassese has written that this obligation, applicable as it is even to isolated incidents that are not part of a widespread or systematic pattern, renders torture unique in the canon of human rights. In addition, the UN Convention Against Torture and its Optional Protocol establish other state obligations, both negative and affirmative, that form a sophisticated normative framework.

The obligation to prevent torture from happening in the first place receives prominent status within this framework, and includes specific preventive measures such as periodic review of the practices of military, law enforcement, and corrections institutions; training of their personnel on the prohibition but also on legal substitutes to coercive interrogation; and periodic as well as unannounced visits to all types of detention centers. Other state obligations derived from the prohibition include the non-refoulement clause (the prohibition of delivering a person to a country or place where she or he would be at risk of torture), the exclusionary rule (mandating that states exclude from evidence in any confession or statement that has been obtained under torture), and the obligation to offer reparations and rehabilitation to victims. It is worth noting that these obligations have repeatedly been recognized as customary international law norms, meaning that they apply also to states that have not signed or ratified the UN Convention Against Torture.

This normative framework should be a powerful tool for ending torture in our lifetime, or at least to end it in democratic countries governed by the rule of law. Unfor-

tunately, states of almost all regions, levels of economic development, and ideologies find ways to circumvent these norms and to render them meaningless. Even where the government does not deliberately adopt a repressive policy or condone the use of coercive interrogation methods, torture persists because some officials engage in it as a shortcut to “crime solving,” their supervisors instead look the other way, and prosecutors and judges assign low priority to torture cases since they think that harsh interrogation is the natural way of conducting criminal investigations. Similarly, prisons are at the bottom of funding priorities—and this is true in low, middle and high income countries—though they are promptly filled beyond capacity in response to popular outcries about citizens’ insecurity. The result is high overcrowding, low pay, sloppy recruitment, and almost nonexistent training for corrections staff. The tendency to consider prisons as closed institutions aggravates the problem and becomes almost an invitation to mistreatment and worse.

There are moments of liberalization or democratization in many countries that give rise to the opportunity to alter those circumstances and break the cycle of impunity for torture and for other severe human rights violations. The three countries studied in this report have, in the recent past and in different measures, experimented with transitions from dictatorship to democracy or from authoritarianism to more liberal, rule-of-law-oriented policies. The transitions have not been complete or wholly successful in any country, and they have been marked by both progress and regression. Nevertheless, they did provide the opportunity to implement the obligations regarding the prevention of torture and its effective punishment. In addition to ushering in an era when at least some public officials (prosecutors, judges, policymakers in the executive or legislative branches) took their responsibilities seriously, the transitions also offered the independent organizations of civil society an opening to display a number of reform-oriented initiatives centered around the effective implementation of the international law framework. One important strategy, though not the only one, was strategic litigation. In the political opening, it was now safe to conduct serious monitoring among grass-roots organizations and thereby to select appropriate cases to push through the courts. There have also been efforts to bring about positive change in the way prisons and other detention centers are run, through class-action litigation where domestic procedures contemplate them, or otherwise by inserting victims and their representatives in the criminal justice processes as *parti civile* or other forms of independent judicial participation by victims of abuse.

Advances in those cases have been undeniable in the three countries under study, and many others. But the road has been hazardous and the journey full of starts and stops. Significantly, the expectation that breaking the cycle of impunity in one or a few cases would inevitably put a stop to torture has been dashed. Even with spectacular results in some cases, and with penalties for torturers reflecting the severity of the

crime, there remain incentives to conduct investigations with profuse recourse to brutality, as well as to use violence and abuse to impose order and discipline in detention centers. Perpetrators can always expect that a misunderstood *esprit de corps* will shield them with their peers' wall of silence. Prosecutors and judges will soon realize that their own success in their day-to-day duties depends so much on cooperation from law enforcement that alienating those bodies will only make their jobs more difficult. There will always be politicians that get elected by promising a hard line against crime and that hard line inevitably leads to "not tying the hands of our police." In democratic societies, freedom of expression allows room for denunciation of abuses, but it also creates an incessant drumbeat of horror stories that conditions all of us to believe that we will be safer if we give crime fighters a free rein and ignore the dirty aspects of their work.

It bears repeating that bringing torturers to justice is always justified and worth pursuing, even if we cannot be certain that the impact of the effort will be instantaneous and beneficial in all cases. Justice is its own reward, especially for the victim but also for society at large and for our sense that we live in a community that upholds human dignity. But it is also very useful to inquire into the larger societal and institutional impacts of the efforts to investigate, prosecute, and punish torture and ill-treatment. Such studies have become salient in law and the social sciences as a result of transitions from dictatorship to democracy and from conflict to peace.

To a large extent, they show that societies that come to terms with their legacies of human rights violations tend to build a more tolerant, more inclusive, and more rights-respecting dispensation. Until recently, those studies have generally concentrated on efforts to redress legacies of mass atrocities perpetrated against political enemies, real or perceived. But there is also a body of multi-disciplinary scholarship showing that torture does not work and is in fact counter-productive, and that there are safer and more humane methods of crime fighting and crime solving that also prove to be more effective than the recourse to brutality and coercion.

The present volume joins both of those strands of analysis, and contributes a comparative approach from the perspective of three nations that have undergone transitions, albeit of a different scope and character in each case. It focuses on the results of strategic litigation and its expected impact. Where perpetrators are held accountable for abuses ordered by and executed under past dictatorial regimes, the prosecutions and trials were and are still supported by large segments of the population. Of course, that is not to say that they were in any way easy or devoid of obstacles. In contrast, torture that continues to take place in democratic settings does not enjoy the same level of attention from the public, presumably because the victims are counted among the poor and marginalized of society. Nevertheless, the pervasive sense in society of a need to end impunity and to contain the excesses of power is a powerful factor that supports efforts to investigate and prosecute torture and to bring the institutions of justice inside prisons.

The recognition that democracy does not by itself end the practice of torture should not obscure the fact that only in democracy is it possible to find ways to expand the rule of law's benefits to all members of society, including those who have been detained or convicted of a crime. The studies conducted by remarkable teams of advocates and specialists in each of the three countries are rich with stories of success and of limitations. At the same time, the conclusions suggested by those empirical research efforts and judiciously and rigorously assembled by Helen Duffy and her colleagues contain very valuable lessons for reform in Argentina, Kenya, and Turkey, as well as for many other jurisdictions.

The most important lesson is one of hope. Just as it is important to be realistic about how hard it is to fight against torture and its impunity, this book highlights the contributions that those struggles make to the construction of a better world, case by case, institution by institution, and country by country. It is a wonderful journey that offers rewards as well as setbacks, and yet it is ultimately well worth the effort.

Juan E. Méndez

October 2017

# Executive Summary

Nowhere is the gap between the theory and practice of international human rights and criminal law more glaring than in relation to the prohibition of torture, cruel, inhuman, or degrading treatment or punishment in detention (hereinafter “torture”). Strategic human rights litigation is one of many tools used, increasingly, by human rights advocates to bridge this gap and give real practical effect to the absolute norms of international human rights law.

The prohibition of torture and ill-treatment is perhaps the most well-established norm in international human rights law. Freedom from torture and ill-treatment is an absolute, non-derogable, right, applicable at all times, including in situations of emergency or armed conflict. The prohibition is accompanied by an unusually elaborate body of obligations that has evolved through specific treaties, soft law standards, and a wealth of international, regional, and national jurisprudence. As a result, a detailed body of law now governs the prohibition of torture and ill-treatment, as well as governing procedural safeguards against torture, the duty to investigate allegations, the duties to criminally prosecute and punish perpetrators and to afford remedy and reparation to victims, as well as the obligation to exclude evidence alleged to have been obtained under torture. These duties are supported by mechanisms on the national and international levels that seek to offer protection and redress. Perhaps uniquely among human rights, torture *per se* amounts to a crime under international law, carrying individual as well as state responsibility.

Despite this robust and detailed legal framework, torture and ill-treatment continue unabated in states around world. For a range of reasons, including secrecy, limited access, and the threat of reprisals, it is impossible to quantify the global use of torture with any degree of certainty—but its prevalence is clear. While torture and ill-treatment

take many forms and occur in many settings, custodial situations are undoubtedly a major locus of the practice. Prisons, police stations, and other detention centers—where individuals are most vulnerable—have been a breeding ground for torture and ill-treatment, as the three states subject to this study demonstrate. In these settings, realizing the obligations to prevent and provide accountability for torture has been particularly challenging.

Litigation—conducted at national, regional, transnational, and international levels—has been a central response by anti-torture and human rights activists. Such litigation has sought, variously, to secure remedies for victims and survivors, bring perpetrators to justice, strengthen and implement the extant legal framework, and ultimately contribute to preventing torture.

This study attempts to understand the role and impact of strategic litigation in relation to torture in custody. It examines how strategic litigation, conducted in conjunction with advocacy and related efforts, has brought about, or contributed to, change. By focusing specifically on litigation in three countries—Argentina, Kenya, and Turkey—it enquires into how human rights advocates have used the courts to protect human rights. It also considers the challenges encountered, the strategies employed, and the net effects, both positive and negative, of litigation. It asks what, ultimately, we might learn from the rich diversity of experience across these three states about the potential, and limitations, of using strategic litigation to address torture and ill-treatment.

Argentina, Kenya, and Turkey offer a complex picture of attempts to prevent and respond to torture through the courts. Interviews in the three countries with a broad spectrum of respondents—from torture victims, to anti-torture advocates and lawyers, to judges and social commentators—revealed an equally diverse range of experiences and perspectives on the role and impact of human rights litigation. Progress in the fight against torture in custody has not been linear. In Argentina and Kenya, litigation contributed to a measure of accountability for individuals and repressive former regimes, but torture and ill-treatment remain pervasive today. The Turkish government made demonstrable progress during that country's bid to join the European Union in the 1990s and early 2000s, but then escalated its use again, particularly since the attempted coup of July 2016.

Each country tells a different story about how, when, and why people demanded redress in the courts. Each story provides insights into the promise and risks of using strategic litigation against torture in custody. These insights are examined in detail in the chapters that follow, but some of the main lessons are distilled below.

## Principal Findings:

1. Litigation had myriad consequences, positive and negative, across the three states and across the three types of impact considered in this study: direct, material changes; changes in jurisprudence and policy; and indirect, less quantifiable impacts, such as changes in attitudes and public perception. **Strategic litigation against torture in custody yielded direct, material changes for victims, perpetrators, and others; contributed to legal, policy, and institutional changes; and, less directly and quantifiably, influenced other forms of gradual social and political change.**
2. The impact of litigation on torture in detention was, for the most part, incremental and cumulative. Its significance has rarely been apparent from isolating and analyzing individual judgments, but can be seen by considering the impact of a series of cases in particular contexts over time. **This study highlights how mass litigation, and in particular successive cases that build on prior gains, can eventually achieve far more than any one case.** Moreover, strategic litigation has operated in dynamic relationship with other processes of change, such that the contribution of litigation is often difficult to isolate, and even more difficult to quantify.
3. Some forms of impact arose directly as an outcome of litigation, some emerged during the process of presenting and pursuing the case, and others took shape long after judgment. **There was no strict correlation between the success of the case in court and its impact; for example, the failure of litigation in all three states has served to expose injustice and deficiencies and increased pressure for change.**
4. **There is remarkable similarity across the three states concerning the environments in which torture has thrived, and the impediments to accessing justice through the courts.** States of “exception,” extended periods of incommunicado detention, the emergence of a discourse of the “enemy” and the “other,” and entrenched cultures of violence and impunity were among the recurrent factors enabling and sustaining the use of torture. Concrete impediments to litigation in each state included limited access to detainees, evidence, and reliable statistics; legal impediments such as statutes of limitations; and judiciaries that to varying degrees and at various points in time have lacked independence and/or capacity to rule fairly.
5. Research revealed the tenacity with which torture survivors, their families, lawyers, and civil society organizations have continued to seek recourse from the courts, despite many challenges. Their dogged efforts have led to an impres-

sive and **highly varied set of approaches to anti-torture litigation across the three states**, and a diverse array of litigation impacts.

6. **Strategic litigation against torture yielded substantial material impacts in Argentina, Kenya, and Turkey.** It has helped force the payment of compensatory damages to victims and their families and contributed to the establishment of reparation schemes benefitting a broader range of affected persons. It has prompted formal recognition and apologies, and led to the erection of monuments to victims. It has won convictions of perpetrators, and changes in detention conditions in facilities where torture was practiced. **While the extent to which litigation has reduced or altered the use of torture is uncertain, there are indications that strategic litigation, combined with other forms of oversight and accountability, has had a deterrent effect on torture in detention.** However, numerous respondents across the three states expressed concern that torture and ill-treatment continues, but has changed shape and may have gone further below the radar. Litigation also provoked negative material impacts on survivors and anti-torture advocates, including death, further torture, arbitrary detention, criminal charges for “propagandizing for terrorism,” and the desecration of shrines to torture victims.
7. **Research identified many forms of legal, judicial, institutional, and policy change deriving from litigation on torture in detention.** Particularly striking is the transformative impact on international and national legal frameworks. A substantial part of the detailed body of international human rights law on torture that exists today emerged from the litigation of torture in detention, including the jurisprudence discussed in this report. In national systems, change arose both through legislative and constitutional change prompted by litigation, and through the development of jurisprudence by national courts. Across the three states, and internationally, litigation has shaped legal standards governing: the nature of the prohibition on torture, safeguards in detention, the criminalization and punishment of torture, and access to justice. It has led, directly and indirectly, to the removal of legal impediments to fighting torture, such as statutes of limitations, in all three focus countries.
8. **The extent to which judicial practice has evolved through litigation is noteworthy for its potential impact on future cases.** New domestic remedies were created, third party interventions enshrined in practice, novel approaches to reparations and to evidence and proof adopted, and the litigation process itself changed to become generally more victim-friendly. Through procedural modifications, the incorporation of international standards at the national level, and the consoli-

dation of internationally focused and rights-receptive jurisprudence, strategic litigation has helped pave the way for more—and more effective—human rights litigation and protection of rights in the future.

9. While litigation's impact on policy is less straightforward, respondents generally confirmed that it has at least contributed to changes in stated policy. By drawing attention to torture in detention, and eliciting enquiries and sometimes condemnation from judiciaries and beyond, **strategic litigation has forced governments to articulate policy positions against torture and ill-treatment** and associated impunity. It has helped ensure that combatting custodial torture, which has rarely been a governmental priority, remains on national and international political agendas. A proliferation of new institutions and efforts to strengthen extant institutions have followed litigation, though in each of the states the depth of institutional reform is often less clear.
10. The research identified **diverse non-material impacts across the three states**. Among the most noteworthy of these less quantifiable effects is increasing access to information. Directly and indirectly, the litigation process has proved an invaluable source of information about government policies and practices regarding torture and other human rights violations, the identity of perpetrators, and the structure of chains of command. By on occasion forcing the disclosure of previously secret information, even unsuccessful litigation has provided tools for other forms of legal advocacy, and evidence that has been used in subsequent cases, albeit often after the political climate or legal changes facilitated more directly successful litigation. Additionally, **litigation has contributed to awareness-raising about the use of torture among members of mainstream society, the judiciary, and political actors**. It has helped debunk myths about the victims, causes, and contexts that states have used to justify the use of torture, contributing to public debate around political power and public safety.
11. Positive **non-material impacts for victims included declaratory relief and recognition from judgments, and a sense of vindication and empowerment** that has sometimes (but by no means always) derived from participating in the process of strategic litigation. More broadly, non-material effects of litigation have included energizing civil society and expanding the ranks of those engaged in the anti-torture struggle. However, the negative impacts for victims of legally challenging the state have included public vilification as “traitors and liars,” defamation of their character and motives, a sense of being ignored by lawyers and judges, and the devastating effects of seeing justice, once again, denied.

12. Whether or how profoundly attitudes have changed is uncertain, with the suggestion emerging in each state that there has been a shift, but that public sentiment still depends on who is being tortured and why. The extent to which the public is willing to reject the prejudices and misperceptions on which torture depends is open to question. Across the focus countries, interviewees suggested that, at a minimum, **litigation helped make torture less normal, government excuses less legitimate, and the impunity of perpetrators less absolute.**

Litigation and legal strategies on torture in detention were highly contextual and extremely diverse, often defying broad conclusions. However, some tentative conclusions can be drawn regarding the factors that appear to have shaped the impact of strategic litigation. These include the strong influence of changing political contexts, though the relationship between strategic litigation and political and social context is symbiotic, and there was no strict correlation between the political environment and the nature of judgments or their impact. Some judges ruled in favor of torture victims even under authoritarian governments, albeit in exceptional cases, while judicial conservatism at times remained entrenched even after major political change.

Other important factors shaping the success or failure of anti-torture litigation include the nature and range of actors involved in and supporting the litigation, the role of the media and international attention, the nature of the litigation itself, and the remedies pursued. Legal challenges have often proved most significant when a range of fora were employed, with national processes being accompanied at key moments by adjudication outside the state by foreign or supranational courts, creating a dynamic relationship between these processes.

There is also a important synergy between strategic litigation and social movements against torture. The use of the courts has been particularly effective when linked to a broader strategy for and momentum towards change, and when a range of actors has engaged in complementary advocacy for change beyond the judicial process. Civil society actors have often provided crucial support to litigation efforts, while litigation has helped galvanize human rights movements.

Rarely if ever did litigation unfold predictably, according to a clear strategic plan. It has often been responsive to immediate needs, and had particular effect where it was sufficiently flexible to maneuver around obstacles and seize opportunities that emerged in particular contexts or moments in time. Impact has at times been the result of long term investment and gradual steps towards justice, and at others quite unanticipated. The range of experience from the very diverse contexts explored here presents no simple formula for successful litigation. But it does provide a rich body of experience to inform future efforts to use strategic litigation to combat torture in detention.

# Introduction

The prohibition of torture is one of the most widely understood and comprehensively protected human rights. Today, international law prohibits the use of torture under all circumstances without exception, in all jurisdictions. The UN Convention Against Torture (CAT), which came into force on June 26, 1987, now has 162 state parties. Yet the practice persists: in 2014, Amnesty International observed that at least 141 countries still use torture.<sup>3</sup>

The struggle against torture takes many forms and is being contested on many fronts. Efforts to end torture, bring perpetrators to justice, and secure reparations for victims and their families are ongoing. The methods used range from treaty negotiations to street protests, and in forums reaching from the halls of the UN to the front porch of former US Vice President Dick Cheney.<sup>4</sup>

One of the most promising venues for the struggle against torture is the courtroom. Given the developed body of law pertaining to torture, litigation is an obvious tool to use against this heinous practice. Strategic litigation in particular seems to hold promise, offering the possibility of combining advocacy in the courtroom with activism outside it.

This study looks at litigation against torture in Argentina, Kenya, and Turkey, and seeks to examine critically the impacts of those efforts. Chapter one considers systematic torture during the last military dictatorship in Argentina, and the anti-torture litigation of various types that arose in response. That litigation occurred on multiple levels—national, transnational, and regional—over a prolonged period. These litigation efforts have been a crucial part of a painstaking and multi-faceted pursuit of truth and justice, culminating in the criminal prosecutions currently underway in Argentinian courts some 40 years later. Despite this, torture and ill-treatment occur in detention to

the present day in Argentina. The chapter therefore also explores the impact, limitations, and challenges of the inventive litigation brought in relation to contemporary practices, including collective *habeas corpus* claims, alongside attempts to challenge widespread impunity in this context.

Chapter two explores responses to the systematic use of torture during colonial rule and the Kenyatta and Moi regimes in Kenya. These responses have included vast numbers of civil claims seeking damages from the Kenyan state in domestic courts, and claims against the British government in English courts regarding torture during its colonial past. The chapter considers the impact, as well as the limitations, of this wave of individual civil litigation. More recent examples of torture litigation, in the context of post-election violence of 2007-8 and in relation to counter-terrorism, are touched on to highlight evolving approaches to litigation, as later cases are informed by the progress and setbacks of their predecessors. The impunity in Kenya for torture past and present has however yet to be dented by human rights litigation.

Chapter three considers the long Turkish experience of combating torture and ill-treatment, including through litigation domestically and supranationally. With an emphasis on peak periods of torture in the past—including following the coup of 1980s and during the fight against terrorism of the 1990s—the chapter explores the nature and impact of the litigation launched in response.<sup>5</sup> While Kenya appears to have made minimal use of regional human rights systems in addressing the torture of the past, and Argentina resorted selectively to the Inter-American regime, the Turkish litigation experience stands apart for the defining role of a supranational body, the European Court of Human Rights, in responding to the failure of the Turkish domestic system to provide protection, accountability, and remedies for victims.

Chapter four looks across the experiences of the three countries to analyze the impact of the litigation. It examines the impact in three ways, seeking lessons where possible on the factors that have enhanced or impeded litigation's effectiveness. Chapter five seeks to derive a few conclusions, highlighting factors that have contributed to the array of impacts exposed by torture litigation in these states. By sharing the experience in different states, it is hoped that the research will contribute to discussions of fruitful litigation practices among rights advocates, lawyers, human rights organizations, and others, and make a humble contribution to informing, catalyzing, and strengthening communities of strategic litigators and activists.

# Chapter 1: Argentina

## Torture in Custody in Argentina

Torture in detention of political opponents was a defining and notorious aspect of the last Argentinian dictatorship, which endured from 1976 to 1983. Myriad complex transitional justice processes have been trained on torture from that period, in pursuit of truth, justice, and non-repetition. Despite this, torture and ill-treatment has remained pervasive in Argentina in the context of custodial detention since the restoration of democracy in 1983. This chapter provides a brief sketch of torture in custody in these two very different historical and political contexts, and the evolution of political, legal, and social responses, including the important role of litigation.

### **Torture during Dictatorship**

During dictatorship, systematic torture in custody occurred in Argentina as part of a broader pattern of repression. Democratic institutions were dismantled, political opponents detained, tortured, and disappeared, and judicial guarantees negated. In at least 340 clandestine detention centers throughout the country, detainees experienced inhumane conditions of detention; deprivation of food, hygiene, and sanitation; electrocution; water-boarding; suffocation; psychological torture; and rape.<sup>6</sup> Many were ultimately killed and their bodies disposed of clandestinely, while the state withheld information about their whereabouts and fate. While precise estimates of the number of victims remain elusive and contentious, the National Commission on the Disappearance

of Persons (CONADEP) documented the disappearance of 8,960 people, while human rights organizations estimate that the figure runs to tens of thousands.<sup>7</sup>

The torture has been described as designed to obtain information, but also more broadly as an instrument of terror to eradicate opposition.<sup>8</sup> It unfolded within a political context that used the Cold War as a pretext to justify exceptional measures against an internal “enemy” of “subversivos.”<sup>9</sup> The Chilean dictatorship’s experience of internal protest and international pressure in the same period led Argentina to apply strict secrecy to its human rights abuses.<sup>10</sup> Argentina’s contemporary human rights movement was in large part born of this repression, and now-emblematic human rights NGOs such as the *Madres de la Plaza de Mayo* (Mothers of the Plaza de Mayo) and *Abuelas de la Plaza de Mayo* (Grandmothers of the Plaza de Mayo) rose in response.

This nascent civil society movement used multiple, complementary tools, referred to as “law, discourse and symbolism.”<sup>11</sup> Activists labelled the crime “forced disappearance,” and the silhouettes of the disappeared and the headscarves of the grandmothers captured national and international attention. Activists’ ability to define and depict the problem, making it comprehensible and compelling to national and international audiences, was an essential pre-requisite to subsequent actions to challenge it.

The fact that many from Argentinian civil society organizations and a number of victims were lawyers may have contributed to the inclination to use law and the courts as part of their struggle, even during dictatorship. Recourse to the courts at this stage was largely ineffective in protecting persons subject to on-going torture and arbitrary detention. Courts did, however, take their bureaucratic function seriously and recorded faithfully judicial approval of the vast numbers of corpses entering the morgue at this time. These court files became a significant part of the basis for subsequent legal action.<sup>12</sup>

Given the impotence of Argentinian courts during dictatorship, in the late 1970s civil society groups shifted to generating external pressure to impel internal solutions. They sought to enhance international visibility through monitoring and reporting by human rights organizations such as Amnesty International, which began to change the perception of Argentina abroad.<sup>13</sup> An important benchmark was the on-site visit of the Inter-American Commission on Human Rights (IACHR) in September 1979<sup>14</sup>; in one week the commission received 5,580 complaints from across Argentina, conducted interviews with members of the nascent human rights movement, and generated intense public attention. The resulting 1980 report referenced the “alarming” extent of the “systematic” use of torture.<sup>15</sup> Defensive political reactions by the junta, including “disingenuous explanations,” “self-amnesty,” and destruction of evidence led to a further “outcry of repudiation in Argentina and from many Western states.”<sup>16</sup> Of equal importance, during this period alliances were forged among lawyers and civil society organizations that would prove potent following Argentina’s transition to democracy.

The last military dictatorship gave way to democratic governance in 1983. What followed has been described as “the complete repertoire of procedures included in the transitional justice menu.”<sup>17</sup> CONADEP, which the first democratic administration created in 1983, would draw on the advocacy and monitoring work of IACHR under the battle cry “*Nunca mas*.”<sup>18</sup> While more limited in scope, powers, and modus operandi than many truth commissions, CONADEP received and exposed information and complaints concerning disappearances and torture in detention.<sup>19</sup> It lacked powers to subpoena or compel, but was able to send relevant information it uncovered to the justice system, paving the way for a potentially mutually reinforcing relationship between it and the pursuit of justice through the courts.

The state also brought criminal prosecutions against the highest-level commanders for kidnapping, torture, theft, murder, breaking and entering, and forgery of documents. In the Juntas trials of 1985, ordinary courts applied the penal code, providing an important reassertion and consolidation of the rule of law after years of chaos and lawlessness. The trials also exposed the patterns of illegal human rights abuses under the military regime. They “gave credibility to the narratives of the past” and to the testimony of the witnesses, contributing to not only the legal but also the “historical and political judgment of the dictatorial regime.” The sentencing of military leaders, including Jorge Videla and Emilio Massera, sent a powerful message regarding the possibility of high-level individual accountability, which carried enormous political-institutional significance within Argentina and beyond, and increased domestic demand for justice.

However, the adoption of amnesty laws—*Punto Final* (Full Stop) in 1986, which prevented new investigations, and *Obediencia Debida* (Due Obedience) in 1987, which amnestied all those “following orders”—retarded the momentum towards justice. Most of the hundreds of investigations that were pending at the time closed as a result. President Carlos Menem further thwarted the pursuit of justice by pardoning the convicted military leaders and the few individuals who remained under investigation.

Following adoption of the amnesty laws, victims and NGOs adjusted their strategies in four ways. First, they focused on exploiting gaps in the amnesty laws, by pursuing accountability for the abduction of babies of the tortured and disappeared, which the amnesties had not covered. This turned out to constitute a critical loophole through which justice would eventually squeeze: through these cases, civil society actors obtained information and access to disappeared children, and in some cases achieved accountability for those responsible.

Second, they pressed the criminal courts to accept the “right to truth” of relatives and of society more broadly, based on the right of the relatives to bury and mourn their dead (*derecho a duelo*), and the duty to investigate. Third, NGOs redoubled efforts at the international level, including through the IACHR, which found the amnesties and

presidential pardons violated the obligation to investigate under the Inter-American Convention on Human Rights.<sup>27</sup> NGOs also launched criminal prosecutions in France, Italy, Germany, and Spain under “universal jurisdiction” laws, although the Argentinian government refused to extradite any suspects.<sup>28</sup> Fourth, NGOs kept up their domestic campaign to name and shame suspected rights abusers, seeking to remove officials who had committed torture under the dictatorship.<sup>29</sup>

Combined national and international pressure occurred alongside political developments in Argentina that helped create conditions conducive to reopening accountability processes. The administration of President Nestor Kirchner (2003–2007) adopted a policy of “memory, truth, and justice,” including publicly commemorating torture sites and facilitating prosecutions.<sup>30</sup>

It was in this evolving political context that the case *Julio Simón et al. v Public Prosecutor* came before Argentinian courts, which ultimately found the amnesty laws unconstitutional *ab initio*,<sup>31</sup> prompting congressional annulment of those laws. This in turn paved the way for the reopening of a massive wave of 1,609 criminal cases against hundreds of persons accused of torture and other crimes under the dictatorship. To date, judgment has been rendered in 762 of those cases, resulting in 692 convictions and 70 acquittals; 847 defendants are still awaiting trial.<sup>32</sup>

The NGO community has been the driving force behind the reopened criminal processes.<sup>33</sup> In 2010, a congressional statement articulated government support, describing the criminal prosecution of “State terrorism” as an irreversible state practice.<sup>34</sup> While in recent years some questions have arisen concerning the new government’s commitment,<sup>35</sup> and the scope of trials in the future, there remains widespread recognition of the importance of the trials<sup>36</sup> as the “common patrimony” of the country.<sup>37</sup>

In Argentina today, the pursuit of justice for crimes of the past is often seen as closely connected to the country’s transition to democracy and related institutional reforms.<sup>38</sup> Without such a large scale political change, the pursuit of accountability would likely never have occurred. Individual accountability in the army and navy has been thorough, and the institutions themselves have been purged and reformed.<sup>39</sup> Other institutions that helped sustain the dictatorship—including judges, ministers, religious leaders, and businesspeople—are now, gradually, being subject to criminal process, opening up a broader panorama of truth regarding responsibility for torture.<sup>40</sup> However, even this progress has not halted torture and ill-treatment in Argentina.

## **Torture since the Restoration of Democracy**

The advent of democracy in Argentina in 1983 led to the dismantling of the dictatorship’s system of repression, of which torture was an integral part. Despite this, torture

and ill-treatment remain pervasive in Argentina today in prisons, mental institutions, police custody, and other situations of deprivation of liberty.

Torture and ill-treatment is qualitatively and quantitatively different today than it was during dictatorship. The scale, contexts, purpose, perpetrators, and victim groups differ substantially.<sup>41</sup> Nonetheless, interviewees described a degree of continuity of practice<sup>42</sup> and perpetrators<sup>43</sup> that reflects the lack of institutional reform in the police and prison service since the end of the dictatorship.<sup>44</sup> Torture and ill-treatment in prisons, mental institutions, and police stations across the country is extensive, according to human rights organizations, provincial and national mechanisms against torture, the National Public Defender's Office (*Defensoría General de la Nación*, DGN),<sup>45</sup> and UN and Organization of American States (OAS) mechanisms.<sup>46</sup>

Argentina's lack of reliable statistics on detention in general, and on torture in particular, is among the challenges to understanding and addressing the problem, despite CAT recommendations to create a national register of torture cases.<sup>47</sup> Inadequate statistics, under-reporting and ineffective monitoring make it very difficult to measure trends in this context. However, reports of torture and ill-treatment in the federal prison system have increased in recent years. Reports to the Ombudsman for Persons Deprived of Liberty in federal prisons (*Procuración Penitenciaria de la Nación*, PPN) doubled twice between 2009 and 2014, with 814 reports in 2014, though the PPN acknowledged this may reflect increased reporting as well as the prevalence of the practice.<sup>48</sup>

The PPN describes violence in prisons as forming the “essential logic” of the prison system, as guards inflict it on detainees<sup>49</sup> and detainees inflict it on one another.<sup>50</sup> Interviewees and civil society reports alike describe torture and ill-treatment in prison as an instrument of power, control, or discipline.<sup>51</sup>

Human rights organizations, judicial officials, detainees' family members, and detainees themselves cite as key contributing factors the lack of institutional reform, overcrowding, and pervasive impunity. Prisons often operate as militarized structures within which lawless networks, corruption, and cover-up thrive. In a country known for its ground-breaking and wide-reaching anti-impunity work, the dearth of prosecutions and convictions for torture in detention is striking. The formal impunity around torture during dictatorship has ceded to a *de facto* impunity based on reluctance to pursue and punish these crimes.

The problem of torture in detention, and associated impunity, occupies a weak space on the political agenda in democratic Argentina.<sup>52</sup> As fears of rising criminality have gripped Argentina in recent decades, governments have responded by increasing incarceration, paying little heed to the issue of detainee rights. Reports suggest a clear correlation between increased fear of insecurity, demands for more severe punishments, and increased overpopulation and the ill-treatment of detainees.<sup>53</sup>

In the initial period following the restoration of democracy, the issue of prisons did not occupy a central place on the NGO agenda any more than it did on that of the state. However, in the past 20 years there has been a discernible shift, with domestic NGOs and activists engaging in monitoring, advocacy, and litigation.<sup>54</sup> Yet that pressure—even combined with strong government policies around memory, truth, and justice—has not translated into government action against torture and ill-treatment today. In this context, the need for, and role of, litigation against state authorities has taken on increased significance in exposing the problem and the state’s failures.<sup>55</sup>

The role of international mechanisms<sup>56</sup> such as the Inter-American Court of Human Rights (IACtHR), the UN, and OAS has also become increasingly important. The case of *Bulacio v Argentina* concerning torture and ill-treatment by the police reached the IACtHR and other cases on prison conditions followed.<sup>57</sup> Site visits by special rapporteurs from the UN and OAS have drawn media and political attention to the issue.<sup>58</sup> This growing international attention has had some effect in shifting state positions, for example in acknowledging the problem of prison overcrowding.<sup>59</sup> While media interest in torture has been lacking, and some coverage has been unsympathetic,<sup>60</sup> some particularly brutal cases of torture, especially where photographic or video evidence exists, have gained public attention.<sup>61</sup>

The formation of informal networks of families of prisoners has also played a critical role in giving voice to those affected by torture and ill-treatment in detention today. Alliances among these groups and with larger NGOs have been instrumental to the success of recent accountability efforts.<sup>62</sup>

The efforts of international institutions and networks of domestic NGOs have helped to increase monitoring and reporting of torture and ill-treatment in prison, including by state institutions.<sup>63</sup> This has enhanced understanding of the problem, increased public attention to it, and fed litigation efforts.<sup>64</sup> Monitoring (by state and non-state actors) and litigation are closely intertwined: litigation has helped remove obstacles to effective monitoring,<sup>65</sup> while increased monitoring and access to detainees have contributed to the success of some litigation. Although still partial and insufficient, just as building up files during dictatorship proved central to subsequent litigation, information now being gathered may contribute to fuller accountability in the future.

As the next section makes clear, the combination of increased monitoring and litigation has made inroads into impunity for torture in custody, though accountability remains exceptional.

# Litigating Torture in Custody in Argentina

Litigation of torture and ill-treatment in custody in Argentina has been varied and versatile, utilizing diverse methods, tools, and forums domestically, while also using remedies available at the international level to push domestic solutions.

## **Litigating Torture Committed during Dictatorship**

During the dictatorship, there was considerable litigation, which had significant impact despite the lack of judicial independence and the general failure to secure the remedies sought.<sup>66</sup> This litigation principally took the form of *habeas corpus* claims that sought to suppress torture and clandestine detention and press for investigation of disappearances.<sup>67</sup> Although broadly considered to have been unsuccessful in their immediate litigation objectives, those efforts elicited information which was subsequently used both in litigation and to expose judicial failure before critical public and international attention.

It was only after Argentina's transition to democracy that litigation moved from the margins to assume a central role in fighting torture in custody. For litigation begun right after the transition, information—most urgently about the whereabouts and fate of missing persons—was a key goal. As this information emerged, it fed increasing demands for accountability. In particular, the Juntas trials in 1985 helped re-establish the importance and independence of the judiciary, opened up democratic space, and exposed the systematic nature of the repression, feeding demands for more investigations and accountability beyond the Juntas trials.<sup>68</sup> These demands for more investigations and prosecutions were thwarted by the amnesty laws of the 1980s. Strategic litigation took flight in response to the amnesty laws, seeking first to work around them and, ultimately, seeking to tear down barriers to accountability and secure criminal sanctions for perpetrators.

The progress of strategic litigation seeking accountability for torture committed during the dictatorship can be seen by examining specific cases, which can be grouped according to their timing and goals. The first two clusters of cases reveal ways in which victims and civil society groups adjusted to the amnesty laws and, for a time, worked within the narrower juridical space by focusing on the right to truth, reparation, and universal jurisdiction. The third cluster illustrates how, once the groundwork had been laid and the time and conditions were ripe, the amnesty laws could be challenged directly. The fourth set of cases shows how the process culminated in myriad reopened criminal cases that were the fruit of earlier litigation. This chronology demonstrates

the incremental nature of litigation and how its effects have accreted over time, leading eventually to litigation against torture committed more recently, under democracy.

### ***The Right to Truth: Mignone, Lapacó, and Urteaga Cases***

*“The impossibility of pursuing the authors of these crimes in criminal proceedings did not mean simply the closure of any kind of judicial intervention. On the contrary...it was the need to know (in both of its aspects, the personal right of the relatives and the collective right of the whole community) that was presented to the courts, pleading the ‘Right to the Truth.’”*<sup>69</sup>

During the 1990s, victims and human rights organizations began to assert a right of relatives and of society to know the truth about human rights violations during dictatorship. Their argument built on nascent references to such a right in the Inter-American human rights system. Some of Argentina’s right to truth cases were brought by victims and family members while others were brought by NGOs, but all were led by respected and politically connected figures and selected to show the systematic practice of torture and enforced disappearance.

Emilio Mignone brought the first such case concerning the disappearance of his daughter, Monica, in May 1976. As a Human Rights Watch report noted, “the courts that had powers to obtain information from official sources, as well as to summon military and police personnel to testify [but] they first had to be convinced that the Full Stop and Due Obedience laws did not rule out further judicial investigation.”<sup>70</sup> In 1995, the Federal Chamber of Buenos Aires acknowledge that the relatives had a “right to know the truth” about the fate of the victims, and ordered the armed forces to present relevant files to the court. The armed forces ignored the order. The Center for Justice and International Law and Human Rights Watch presented a joint *amicus curiae* brief, which the court accepted despite there being no procedure or practice in place in the Argentinian legal system for such briefs. Ultimately, the investigation stopped because of the armed forces’ continued refusal to comply with the court’s order, exposing the continuing rule of law deficit in which security forces were beyond the reach of the courts.<sup>71</sup> But the case had reopened the judicial process, the Federal Chamber had acknowledged a “right to know the truth,” and *amicus* briefs had been accepted for the first time, all of which paved the way for future cases.

The Center for Legal and Social Studies (CELS), founded by Mignone and others in 1979 in response to rights abuses under dictatorship, brought a suit on behalf of Carmen Aguiar de Lapacó, co-founder of the *Madres de la Plaza de Mayo*, concerning her daughter Alejandra Lapacó. The same chamber again recognized the right to the truth, but this time went a step further by articulating a state obligation to reconstruct the past. It affirmed that the amnesty laws precluded the opportunity to prosecute and

punish, but could not imply the culmination of the legal process. The armed forces again claimed they did not have the information and the chamber stopped the process.<sup>72</sup> Lapacó appealed to Argentina's Supreme Court, which ruled, in August 1998, that it would be pointless to reopen the inquiry. Lapacó responded by filing a petition with the IACtHR in November 1998.<sup>73</sup>

The commission declared the petition admissible in May 1999, and eventually brokered a friendly settlement of the case in which the state agreed to "accept and guarantee the right to truth which consists of the exhaustion of all means to obtain clarification of what happened to disappeared persons." The state had accepted the obligation to continue judicial investigations regarding the fate of the disappeared and the obligation of all arms of the state to cooperate, and Argentina began shifting official policy to meet this obligation.

In the meantime, Facundo Urteaga presented a *habeas data* action to help locate his missing brother. In October 1998, Argentina's Supreme Court recognized victims' right to pursue information through *habeas data* actions. Significantly, the court accepted the right to information about a relative's death as inherently linked to recognizing the right to identity, which is closely related to the right to human dignity. This reframing breathed new life into litigation, developing the jurisprudence on the right to know and its link with the protection of family members from torture and ill-treatment.

In 1998, the Federal Appeal Courts clarified that state pardons of individuals accused of torture did not foreclose "the right to truth and information about the victims," and that "investigation should continue to allow relatives to know the circumstances of their disappearances and the location of their remains."<sup>74</sup> Processes to uncover the truth began to take place all over Argentina, with important direct and indirect impact.<sup>75</sup> These cases produced a clear recognition of the right to the truth, and served to reaffirm the courts' role in addressing the wrongs of the dictatorship era, despite the amnesty laws.<sup>76</sup>

Despite the military's refusal to acknowledge these judgments, significant facts nonetheless came to light through the litigation, setting the stage for increased accountability.<sup>77</sup> The cases provided a framework for the production of evidence and information. That information, once uncovered, called out for, and would be of critical value in, subsequent criminal proceedings. Testimonies given during the truth trials would later be used as evidence in the reopened criminal trials and in challenges to the constitutionality of the amnesty laws.<sup>78</sup> Thus, some scholars have suggested that the subsequent criminal cases were born in the truth trials of the 1990s.<sup>79</sup> Victims have also averred that these trials energized the search for justice, with one stating, "I think they awakened, in desperate people in their bitter homes, a basis for hope..."<sup>80</sup>

## ***Economic Reparations: Nationally and Internationally***

Economic reparation does not emerge strongly in the Argentina litigation narrative and has been relatively neglected in analysis. Obtaining compensation does not appear to have been a key priority for NGOs (who at times showed some resistance to embracing compensation as a key part of reparation) or apparently for victims. Litigation has however pursued damages alongside, or in the stead of, criminal accountability, with significant consequences.

When former prisoners submitted claims for damages post dictatorship, they were rejected by the courts on the basis that civil actions were subject to a two-year statute of limitations. This prompted a group of applicants in 1989 to present a petition to the IACtHR arguing that their right to due process had been violated. President Carlos Menem, a former political prisoner who had won a civil case for damages against the state—and who at the time was under fire for his controversial pardoning of military officers convicted by the Juntas trials—agreed to compensate. Subsequent negotiations led to victims receiving a symbolically significant sum equivalent to the maximum daily wage given to the highest-level personnel of the national government for every day of their detention. When laws were passed to enable this compensation, they embraced a broader category of beneficiaries, and more comprehensive economic reparations have evolved over time.

## ***Universal Jurisdiction Cases***

While those responsible for torture and ill-treatment in dictatorship were protected from criminal accountability in Argentina by the amnesty laws, judicial proceedings successfully advanced elsewhere based on the principle of passive personality (or victim nationality) and universal jurisdiction. At the beginning of the 1990s, French courts convicted Alfredo Astiz, a commander in the Argentinian Navy, of kidnapping two French nuns and sentenced him to life imprisonment.<sup>81</sup> Germany and Italy followed suit in 1999 with investigations of Guillermo Suárez Mason, the major general in charge of the so-called war against subversion. The Italian judiciary sentenced Suárez Mason and fellow officer Santiago Omar Riveros for kidnapping, torture, and murder of Italian citizens in 2001. But these trials were held *in absentia*<sup>82</sup> and the Argentinian government refused to extradite or prosecute in accordance with the international principle *aut dedere aut judicare*.

By contrast, naval officer Adolfo Scilingo appeared voluntarily to testify following the indictment by the *Audiencia Nacional* (National Court) of Spain of 98 Argentinian military officers.<sup>83</sup> Scilingo acknowledged having participated personally in the disappearances and provided details of the nature and extent of the state policy of repression.<sup>84</sup> The court sentenced him to 640 years in prison, and the evidence he provided was used later in criminal processes in Argentina.<sup>85</sup>

Together with other universal jurisdiction processes, these cases had multiple ripple effects. They sent a resounding message that the amnesty laws were not the end of the line, and impunity for egregious crimes could not be guaranteed. As one observer noted, “International cases generated pressure on the national government to judge crimes against humanity, by the threat that if not, other countries could do it.”<sup>86</sup>

Despite the government’s refusal to extradite, these cases—in particular, the issuance of arrest warrants by foreign judges—sent shock waves through Argentina’s judiciary.<sup>87</sup> They brought forth obvious questions for public debate, and raised the hopes of victims and civil society; as one survivor put it, “Why had somebody been tried outside of Argentina, when everything had happened in Argentina? The cases gave us a lot of hope...that there would be an impact in Argentina.”<sup>88</sup> The universal jurisdiction cases contributed, incidentally, to a growing sense of international solidarity, and the development of international networks that would assist and strengthen domestic processes in due course.

### ***Unconstitutionality of Amnesty Laws***

In 1998, the NGO *Abuelas de la Plaza de Mayo* filed a case against police officers Julio Héctor Simón and Juan Antonio Del Cerro for abducting a baby during the dictatorship.<sup>89</sup> The case sought to recover the identity of the child and reunite her with relatives and to ensure criminal accountability for the child’s abduction. Advocates hoped the case would demonstrate the absurdity of laws that permitted the state to charge the police for abducting the child but not for the kidnapping, torture, and murder of her parents.

The case’s timing was fortuitous: the truth trials and other developments in Argentina and beyond, including Argentina’s signing of the Rome Statute founding the International Criminal Court, created an environment in which the repeal of the amnesty laws was possible. At the end of 2000, CELS filed a legal action concerning the disappearance and torture of the baby’s parents. Arguing that the child could not have been abducted without the previous enforced disappearance of her parents, it used the case as a vehicle to request the repeal of the Full Stop Law and Due Obedience Law. In 2001, the federal court investigating the case declared the amnesty laws unconstitutional and indicted Simón for crimes against humanity. The Federal Court of Appeals upheld the decision, basing its decision on international obligations. This 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. Simón was sentenced to 25 years’ imprisonment and absolute disqualification from public service for life.

The Simón case brought increased profile and legitimacy to Argentina’s NGOs, whose innovative and persistent search for legal openings, and refusal to accept the impossibility of justice, had paid off.<sup>90</sup> The judgment also unlocked the criminal justice process in Argentina, leading to a wave of reopened trials for crimes against humanity.

## **Reopened Trials**

Judgments have been rendered in 762 cases, and 847 defendants are awaiting trial for crimes against humanity committed under the dictatorship.<sup>91</sup> It would be premature to seek to evaluate the overall impact of these ongoing processes and this report does not pretend to do so. But it is clear that these trials have enabled the exposure and prosecution of a growing number of those responsible for enabling and executing torture and broader repression during dictatorship. The growing reach of these criminal cases has highlighted the range of those responsible, beyond the armed forces, for this dark period in Argentinian history and contributed to a broader historical narrative embracing a fuller understanding of responsibility.

The reopened cases have also enabled a more comprehensive look at the nature of the violations, including revealing rape and sexual assault as a systematic practice in detention during dictatorship.<sup>92</sup> The lynchpin in this case was the conviction in 2010 of Gregorio Rafael Molina of rape. The original trial judge found a lack of corroborating evidence to prosecute the defendant, but a September 2006 ruling held that the victim's testimony could, in these circumstances, be sufficient. The case changed judges' perception of and willingness to convict sexual crimes during dictatorship. It opened up the courts for the first time to international jurisprudence from international criminal tribunals<sup>93</sup> and led to the filing of additional cases.<sup>94</sup> This new layer of criminal trials has also brought a greater focus on victims' experiences.<sup>95</sup> Victims of sexual violence in particular have described the importance of the trials in helping them to reframe and process what happened to them.<sup>96</sup>

The use of litigation to pursue justice for torture committed during Argentina's dictatorship can be seen as a virtuous cycle in which relatively small gains, such as the disclosure of information, won on behalf of individual litigants, help seed larger changes, which attract more—and more organized—litigating parties, leading to the massive number of criminal trials underway today. Unfortunately, however, torture in Argentina was not limited to the dictatorship, and litigation continues to be central to the struggle against torture committed more recently, as explored in the next section.

## **Litigating Torture Committed during Democracy**

In Argentina, criminal accountability has emerged as a priority goal of litigation in relation to custodial torture and ill-treatment today. Unlike the wave of cases focused on abuses during dictatorship, convictions for torture and ill-treatment in democracy are rare. While recent years have seen a stark increase in numbers of cases pursued and supported by NGOs, as well as by nascent state-backed institutions, these cases remain exceptional and discrete.<sup>97</sup> Although these cases appear to be unconnected to

one another, they nonetheless illustrate how the courts are being used in Argentina to pursue accountability for torture in custody.

### ***Patricio Barros Cisneros: Torture and Death in Plain View***

Like the other individual criminal cases around torture under democracy, the case of Patricio Barros Cisneros is exceptional, not paradigmatic, in many ways. On January 28, 2012, Barros Cisneros, a 26 year-old prisoner in Buenos Aires, was beaten to death by at least seven guards after arguing over the location where he could meet his girlfriend, who was visiting. The brutality of the incident, as well the fact that it occurred in full view of visitors and other detainees, made the case emblematic. The prison service offered a spurious claim that Barros Cisneros had committed suicide by banging his own head against the prison bars, and coerced other detainee witnesses into signing it. But the autopsy and the testimony of visitors, including the victim's girlfriend, were irrefutable.

Of the eight prison guards prosecuted, five were found guilty and sentenced to life imprisonment for torture, one was acquitted, one fled, and one committed suicide. The judgment also ordered an investigation into the falsification of evidence, and the Ministry of Justice ultimately removed the head of the prison and five guards.

Several factors specific to this case, including the presence of witnesses, meant that, unusually, the cover-up and coercion could not stop the case from going forward. Also significant was the early engagement of outside entities, including CELS, the Public Defender's Office, and the Provincial Commission for Memory (*Comisión Provincial por la Memoria*, CPM), as well as public pressure by the victim's family. International human rights bodies also engaged in the case, linking it to broader patterns of prison violence in the country.<sup>98</sup>

The torture convictions were highly significant, given the general dearth of such convictions. However unusual the case, these convictions sent a clear message that the prison service's ability to conduct cover-ups and evade accountability could not be guaranteed. The convictions also had significant jurisprudential value. The court's finding that it was not necessary to show "special intent" to torture, or intention to kill, as necessary elements of the crime had significance for future cases.

The case brought media attention to torture in prisons, illustrating the importance of the litigation attracting media attention.<sup>99</sup> The case exposed key aspects of the underlying phenomena of brutality in the Buenos Aires Penitentiary Service, impunity, abhorrent conditions of detention,<sup>100</sup> and use of falsified evidence to shift blame to the victim or other detainees.

The case's impact can be seen in the behavior of prison guards, who are said to engage in "more cautious practices" following the convictions in this case.<sup>101</sup> When another case of torture in the same prison came to light in 2014, prison guards provided

information, breaking their traditional code of silence. The impact on the victim's family members is less clear. They describe "three very difficult years of fighting the judiciary, who will not see what happens in the prisons."<sup>102</sup> But they also expressed a degree of satisfaction and some hope for the case's future impact: "The judicial process was very important for us, but it doesn't repair us. It might help others.... Perhaps, after the convictions, guards will think twice before killing someone."<sup>103</sup>

### ***Brian Nuñez: Torture by the Federal Penitentiary Service***

Twenty year-old Brian Nuñez survived two hours of severe beating by agents of the Federal Penitentiary Service (SPF) with fists, boots, batons, a cane, a lighter, and cigarettes, on June 16, 2011.<sup>104</sup> In the first torture conviction of SPF personnel, the court sentenced four guards to eight and nine years imprisonment in 2015. Many unusual factors contributed to making this litigation outcome possible. First was actions of the victim himself, who filed the initial complaint while still in prison, despite potential retribution.<sup>105</sup> A network of family members of prisoners, the Association of Relatives of Detainees in Federal Prisons—one of several such groups to emerge recently in Argentina—was instrumental in bringing the case to light. The head of the SPF at the time immediately ordered an inquiry and denounced abuse by guards, isolating those responsible.

Coordinated action, a strong prosecutor, and "a good judge, with a lot of experience working on cases of crimes against humanity" during dictatorship were all considered significant contributors to the conviction of those responsible.<sup>106</sup> Although the convictions were hailed as a rare victory for accountability, the victim was subject to several acts of retaliation from prison guards while proceedings were ongoing.<sup>107</sup> This triggered a series of official reactions, which may affect future cases. First, at various stages the court transferred Nuñez to house arrest or ordered him isolated and monitored (with positive and negative impact on him). The court also reduced his sentence "as a palliative measure [in response] to the enormous legal and constitutional damage" the torture had caused.<sup>108</sup> Like the *Barros Cisneros* case, the case garnered considerable media coverage<sup>109</sup> and has contributed to weakening the culture of impunity, even as the threats to Nuñez during the proceedings showed that impunity persists.

### ***Luciano Arruga: Torture and "Disappearance in Democracy"***

Police detained and tortured 16 year-old Luciano Arruga in Buenos Aires province in 2008. After his release, he was reportedly subject to on-going threats and intimidation, and four months later he disappeared. His body was found in October 2014: he had been buried anonymously in Chacarita cemetery in Buenos Aires. The investigation of Luciano's disappearance, prompted by legal actions brought by the Association for

Human Rights (APDH) and CELS on his family's behalf, is still pending. But in May 2015 a Buenos Aires policeman was sentenced to 10 years for torturing Arruga. The court focused on the child's incommunicado detention as a key contributing factor in its assessment that he had been a victim of torture.<sup>110</sup> The case garnered significant public attention, in part because it was seen as a bridge between torture and ill-treatment in detention in Argentina's past and in its present.<sup>111</sup> It also captured media attention focused on the issue of "*desapariciones en democracia*".<sup>112</sup>

As with almost all of the Argentinian cases, success was made possible by civil society support and by the determination of the victim's family and friends who were actively involved as witnesses in the case, and have since become activists against prison violence. A psychologist who accompanied Luciano's mother throughout the process described the process as having had a noticeable impact on her life, improving her sense of empowerment and self-esteem.<sup>113</sup> The victim's sister noted the case's potential future impact, stating: "This [conviction] does not change the situation for young people in the [impoverished] neighborhoods...but it provides small precedents that will help us at some point write 'Never again.'"<sup>114</sup>

### ***The Verbitsky Case: Collective Habeas Corpus*** <sup>115</sup>

In November 2001, a large group of NGOs, coordinated by CELS,<sup>116</sup> lodged a "collective *habeas corpus* petition"<sup>117</sup> arguing that prison conditions in Buenos Aires amounted to a widespread violation of prisoners' rights. The Criminal Court of Cassation rejected the claim, but it was appealed to the Federal Supreme Court of Justice.<sup>118</sup> This brought significant media attention to the issue of prison conditions, and drew the involvement of various international organizations, which intervened as *amici curiae*, lending weight to the case.<sup>119</sup>

On May 3, 2005, the Federal Supreme Court handed down a wide-reaching and ground-breaking judgment.<sup>120</sup> It found that the prison system should conform to the United Nations Standard Minimum Rules for the Treatment of Prisoners and that prison conditions fell short of constitutional and international human rights standards. The judgment linked detention conditions with the obligations of the state in respect of torture.<sup>121</sup> The case also catalyzed debate on the role of the judiciary, and procedural issues on access to justice in collective cases concerning structural human rights problems (including accepting the right to lodge collective *habeas corpus* actions),<sup>122</sup> which created new avenues to be explored in subsequent litigation.

A long process of implementation of the expansive decision ensued. Buenos Aires reformed its criminal procedure code, changing the rule that certain crimes were not subject to the possibility of release.<sup>123</sup> Incarceration rates declined from 211 per 100,000 in 2005 to 185 in 2008.<sup>124</sup> The number of detainees in police stations fell from

6,000 in 2005 to 800 in 2012 and the detention of children in police stations was promptly banned.<sup>125</sup>

Equally important were institutional strengthening measures that stemmed from the decision, such as the creation of the Sub-secretariat for Human Rights (*Subsecretaría de Derechos Humanos*) to keep track of the implementation of the ruling, and the organization of judicial officials' visits to prison units. More information on detention conditions became available, providing significant tools for future reform efforts. Prisoners in Buenos Aires are now aware of the decision and have appealed to it in defense of their rights, and two pieces of litigation introduced in 2014 that prevent the reinstatement of police station detention reflect its influence.<sup>126</sup>

Yet progress has been far from constant. Recently, the number of detainees in police stations, overcrowding, and overall numbers of inmates in the province have all increased.<sup>127</sup> Some suggest that the case may have provided a legal veneer that suggests the issue has been resolved, when in fact the problem persists.<sup>128</sup>

### **Penitenciarias de Mendoza Case: Precautionary Measures<sup>129</sup>**

Since 2000, lawyers working on human rights issues in Mendoza province have also filed numerous collective *habeas corpus* claims regarding the notorious conditions of detention in that region. The judicial responses have been prompter and more favorable than in Buenos Aires, as local judges acknowledged the problems and ordered reform measures, but the provincial government has essentially refused to comply.<sup>130</sup> Lawyers therefore filed a complaint before the IACtHR in July 2004 alleging inhumane conditions of detention and overcrowding.<sup>131</sup> Citing the “risks of irreparable harm to the life or physical integrity,” the commission treated the claim as a request for provisional measures,<sup>132</sup> and called on Argentina to protect the physical integrity of detainees, including separating pretrial detainees from convicted prisoners. A friendly settlement reached between the petitioners and the Argentinian state in 2008 entailed a series of governmental commitments to reform. While some are still pending, the Inter-American Court lifted provisional measures in December 2010.<sup>133</sup>

The impact of the case, like that of the Verbitsky case, is both recognized as extremely significant and criticized as insufficient. It contributed to widespread recognition by the judiciary,<sup>134</sup> the executive branch,<sup>135</sup> and the legislature<sup>136</sup> of the critical nature of the problem and the need for reform. The provincial government's action plan included changes regarding prison personnel, prisoners' accommodation, improved detention conditions, and the creation of mechanisms to investigate deaths in custody, among other measures. Unfortunately, there is no official information on which measures resulted in concrete changes in prison conditions. One research effort found broad changes as a result of the case,<sup>137</sup> including a reduction in the number of violent

deaths in prison,<sup>138</sup> construction of new prisons, improvements in health and hygiene conditions, increased educational and work programs for detainees, more staff training, and the production of official information on conditions of detention. But other research has found indications that ongoing ill-treatment persists.<sup>139</sup>

### ***Precautionary Measures of Inter-American Commission on Human Rights***

Collective action has also been used to address the structural nature of violence in Argentina's prisons. In a 2012 case, several NGOs sought precautionary measures from the IACtHR on behalf of persons detained in units of the Buenos Aires Province Penitentiary notorious for patterns of violence.<sup>140</sup> On April 13, 2012, the IACtHR requested that Argentina adopt the necessary measures to guarantee the life and personal integrity of detainees.<sup>141</sup> The government created a roundtable to monitor these measures,<sup>142</sup> providing a framework for representatives of the national and provincial government, legislature, and judiciary<sup>143</sup> to discuss policies to improve detention conditions. As in previous cases, an initial decline in the number of inmates (from 1,200 inmates at the San Martín Complex to 900) took place during the first years of the precautionary measures, but the numbers have gone up again since 2014.

Although the number of detainees has fluctuated, other changes appear to be more lasting. Several protocols including rules on searching visitors, use of force by prison guards, and the investigation of cases of torture have been adopted.<sup>144</sup> The attorney general committed to investigate all deaths in confinement, official information was produced on death rates, and an audit of the prison healthcare system was conducted. It is a matter of debate whether these changes will endure, but the prolonged duration of the precautionary measures certainly created a space for reform.

## **Conclusion**

For decades now, Argentinian civil society has successfully deployed strategic litigation as a human rights tool, among others, to address torture in custody.

The journey towards truth and justice for crimes committed under dictatorship has been a long and arduous one, and is ongoing. The process has been far from linear, and has suffered setbacks and dead ends. But the experience shows how a range of strategies and actors can come together to produce an impressive cumulative effect over time. Litigation involved various national, foreign, and international courts, addressing diverse issues including the right to truth, the duty to investigate, economic reparation, and criminal and state responsibility. In different ways, these initiatives ensured that the pursuit of truth and justice remained at all times part of Argentina's political

environment. The results thus far have included a remarkable process of individual accountability, a gradual uncovering of a fuller truth, and increased opportunities for victim engagement. In turn, these changes have contributed to international norms on accountability, and arguably helped consolidate democracy and the rule of law in Argentina.

However, there is a stark contrast between the success of litigation against torture in custody under dictatorship, and the more halting progress against torture in prisons today. The criminal cases discussed are unusual good news in the context of widespread and ongoing prison brutality and impunity. Although rare, the results in these cases have been significant. These include holding individuals to account, exposing institutional failure and cover-ups within the higher echelons of the prison service, compelling further investigation and administrative action to weed out those violating human rights in the service, and increasing media and public attention to the issue. The opinion of interviewees was that litigation has contributed to the sense that torture is no longer normal, that impunity is not absolute, and that detainees' rights must be respected.

Innovative litigation challenging prison conditions has effectively created a new remedy in Argentinian law and procedure, and ensured that the issue has a more prominent place on the country's political and human rights agenda. It has forced or incentivized a reluctant executive and legislature to recognize the issue and engage with it.<sup>145</sup> It has helped reframe discussion on overcrowding and abuse as a fundamental rights issue. Class action *habeas corpus* suits have drawn the judiciary into prison policy, while international litigation engaged the federal government and the judiciary so that these issues could not be dismissed as provincial politics. Frameworks and platforms for dialogue have been formed as part of settlements or implementation and an important range of interlocutors engaged, notably including detainees and family members.

Gains are fragile, however, and have not always been sustained after litigation stopped. Some initially promising gains in reducing overcrowding and violence appear to be eroding. But public and media attention to the issue, driven in large part by litigation, gives hope for more sustained progress, even as much more remains to be done.

The focus on criminal law has meant that the targets of litigation were primarily individuals, not state institutions. Shortcomings in institutional reform may be a by-product of this focus. The state itself needs to be held accountable for its failure to investigate, prosecute, and break the rampant impunity surrounding torture and ill-treatment in detention today. The shift to collective action to challenge underlying structural problems of prison conditions and violence may offer a potent means to address torture in custody, but enormous challenges remain.

# Chapter 2: Kenya

## Torture in Custody in Kenya

Torture in custody has been practiced in Kenya since at least the colonial era, persisting in varied degrees and forms, and under different forms of government. Torture has been deployed for many different ends, including suppressing political dissent, controlling the public, and discriminating systemically against targeted groups.<sup>146</sup> Political activists, student leaders, academics, and human rights advocates throughout Kenya's history have been subjected to torture in custody, often while being labelled "enemies of the state."

This chapter looks at the evolution of torture throughout Kenya's recent history, then considers the political, legal, and social responses to it, with a particular focus on litigation.

### **The Colonial Period**

British colonizers, in Kenya as elsewhere,<sup>147</sup> employed hooding, sleep deprivation, bombarding with noise, beatings, sexual humiliation, and violent interrogations to maintain the status quo and suppress challenges to imperial power.<sup>148</sup> The peak use of torture may have been in the late 1940s and early 1950s, against the Mau Mau resistance. Beginning in 1952, the British declared a "state of emergency" and forced many Kenyans into concentration camps where torture was routine. As litigation 50 years later would eventually allege, some 150,000 Kenyans died as a direct result of the British torture strategy between 1952 and 1960.<sup>149</sup>

## The Kenyatta Regime

Following independence, the Kenya African National Union (KANU) political party gained power, first through President Jomo Kenyatta (1963–1978) and then President Daniel arap Moi (1978–2002). Regrettably, the practice of torture and unlawful detention did not end with independence, and both regimes used it.<sup>150</sup> Changes to the country's new constitution—although presented as necessary to protect the nascent independent state—became instruments to protect the interests of the ruling party,<sup>151</sup> eroding the tenets of constitutionalism through piecemeal amendments that removed checks and balances on the executive<sup>152</sup> and created a *de jure* one-party state.<sup>153</sup> The president gained unfettered power over the appointment and termination of public servants, including officials in the police and judiciary.<sup>154</sup>

## The Moi Regime

The Moi regime, which came into office in 1978, followed in the footsteps of the previous administration by further eroding constitutional protections and institutions.<sup>155</sup> In fact, its use of arbitrary detentions, political trials, and police brutality reached an even greater scale, reminiscent of the colonial era. Following a 1982 coup attempt, the state engaged in widespread torture and arbitrary detention without trial, as part of a broad crackdown on democracy advocates, human rights activists, government critics,<sup>156</sup> and members of marginalized communities.<sup>157</sup>

Detention cells in the basement of the infamous Nyayo House government building in Nairobi became a focal point for—and a symbol of—state sanctioned torture.<sup>158</sup> The basement of the building, whose construction began one year after Moi took office, included heavily reinforced, lightless cells specifically designed for torture. The tiny cell doors were fitted with rubber seals to prevent water leakage so that prisoners could be held ankle-deep in water and in complete darkness. A control room pumped cold, hot, or dusty air into the cells, and controlled light intensity. Detainees were held in incommunicado solitary confinement for weeks and even months with little food or drinking water.<sup>159</sup> In addition to gruesome conditions of detention, survivors describe brutal interrogations,<sup>160</sup> often to extract “confessions.”<sup>161</sup> Common techniques included stripping prisoners naked, severe beatings, burning with lit cigarettes, pricking underneath fingernails with pins, and sexual violence. Hundreds of political prisoners were tortured in the Nyayo House cells and an unknown number died.

This torture was supported by the philosophy and rhetoric of the Moi regime, which presented human rights as alien Eurocentric concepts inconsistent with African values and culture.<sup>162</sup> Pro-democracy and human rights advocates in Kenya were depicted as unpatriotic, disloyal, and influenced by “foreign masters.”<sup>163</sup>

Detention without trial intensified in the wake of the failed coup in 1982 and coup suspects were denied access to lawyers. As throughout much of the history of Kenya, the judiciary behaved as an agent of the ruling administration, often for financial and political reward.<sup>164</sup> It was not only ineffective in the protection of fundamental rights, but often considered complicit in human rights violations.<sup>165</sup> The politicized use of criminal law was coupled with the denial of fair trial rights; the accused, when presented before courts martial, were only given the opportunity to respond to the charges in the affirmative, under threats of further torture and hanging.<sup>166</sup>

In the late 1980s and early '90s, Kenya experienced a resurgence of the multi-party democracy movement. A series of constitutional amendments began to strengthen the country's legal framework. Security of tenure for judges, the attorney general, and other public officers was restored, provisions declaring Kenya a one-party state and providing for unending use of emergency powers were repealed, and presidential term limits were imposed. Despite these developments, serious deficiencies remained, such as the ease with which rights could be limited or suspended, and the lack of sufficient enforcement mechanisms.

Elections in 2002 would bring an end to the Moi regime. In anticipation, in 2001 people exiled following the failed coup attempt began to return to Kenya, some forming groups for torture survivors and their families. These groups would eventually play a key role in litigation of torture in Kenya, but their initial emphasis was on rehabilitation rather than compensation or litigation. The success of these groups in mobilizing and providing support to survivors motivated them to assert their rights more aggressively. The groups began to document victims and gather evidence, while conducting outreach to additional victims—all of which would also prove critical to subsequent litigation. Former exiles joined with nascent national networks, attracting strong support from both international and local NGOs during this time.<sup>167</sup>

## **Post-Authoritarian Regimes**

The National Rainbow Coalition (NARC) assumed power in 2002, removing the Kenya African National Union after 39 years in power. NARC had run on a platform of constitutional reform. One of its first public acts was to open the Nyayo House torture chambers to the public,<sup>168</sup> and it expressed support in principle for the idea of a truth and reconciliation commission. NARC lifted the ban on the Mau Mau, imposed by the colonial government in 1952. Political dissidents continued to return from exile, some of whom took roles in the new regime.<sup>169</sup> Yet at the same time, Moi himself and other notorious torturers from his regime were granted amnesty.<sup>170</sup> It was in this fluctuating political, legal, and institutional landscape that the Nyayo House litigation emerged.

Judicial, legal, and constitutional reform unfolding since 2003 strengthened the rule of law and opened greater possibilities for torture litigation in Kenya. The Truth, Justice and Reconciliation Commission (TJRC) was established in 2007, providing legal standards on which subsequent torture litigation would rely. The promulgation of the Constitution of Kenya in August 2010 brought new constitutional safeguards, including a robust Bill of Rights, coupled with institutional and legislative reforms. It gave constitutional rank to ratified conventions,<sup>171</sup> clarified the non-derogable status of freedom from torture and the right to *habeas corpus*,<sup>172</sup> invited the courts to develop the law to give effect to constitutional rights,<sup>173</sup> expanded *locus standi*, and made the procedural rules of court more flexible.<sup>174</sup> Independence of the judiciary was a key pillar of the reform process.<sup>175</sup> These constitutional and institutional developments were coupled with legislative reform, including the criminalization of torture (albeit only when committed by the police, which remains a serious legal weakness),<sup>176</sup> increased oversight of the police,<sup>177</sup> and victim protection and participation.<sup>178</sup> Gaps in the legal framework nonetheless remain. For example, there is still no crime of torture as such in Kenyan law.<sup>179</sup> Judicial reform, while significant, remains incomplete.<sup>180</sup> The need for broader institutional reform, in particular of the police, has been frequently highlighted by human rights NGOs.<sup>181</sup>

Despite the political and legal transformation, state sanctioned torture in custody remains a serious problem today, with those detained under the guise of counter-terrorism or in the context of a crackdown on public protest being at particular risk.<sup>182</sup> The state reportedly routinely renders victims from Kenya to other states with more lenient torture laws.<sup>183</sup> As in Argentina, underlying problems such as overcrowding and abysmal prison conditions which “form a breeding ground for torture and ill-treatment,”<sup>184</sup> and sexual violence during detention, have been the subject of international condemnation.<sup>185</sup>

The lack of statistics and monitoring makes it impossible to provide an accurate assessment of the current scope of torture and ill-treatment in Kenya. Experts interviewed for this report argued that torture today cannot be compared to the more severe, systematic Moi brutality, but noted that it persists in more targeted form. One report from 2014 states that “while cases of political torture seem to have reduced in Kenya, torture while in police custody is still rampant, and mostly due to impunity.”<sup>186</sup> Some interviewees argued that torture has not declined so much as “gone underground” or migrated to “safe places” where oversight could not reach.<sup>187</sup> One interviewee suggested that “torture has not abated; it just took a new, scary form: extra judicial killings are now widely practiced.”<sup>188</sup>

The government’s approach to allegations of torture has been described as “denial, passivity, and indifference.”<sup>189</sup> On occasion, where evidence was irrefutable, the state has responded to torture allegations by citing the need for security, in a manner reminiscent of justifications under previous regimes.<sup>190</sup> An entrenched culture of impunity remains in place, which many believe to be closely linked to torture and state violence.<sup>191</sup>

To date, no one has been tried in a criminal proceeding for the Nyayo House torture. Further, as East Africa has emerged as a center of transnational terrorism and Western-backed counterterrorism efforts since 2001, gross human rights violations, especially the use of torture to extract information, have proliferated. The country has never had a free and independent media, which leaves its citizens vulnerable. While the challenges are therefore huge, lawyers, judges, victims, and NGO representatives alike credited litigation with having positively influenced the landscape in various ways, making torture and ill-treatment less accepted,<sup>192</sup> and impunity for public officials less absolute.<sup>193</sup>

## Litigating Torture in Custody in Kenya

Just as the legal and political landscape in Kenya has evolved, so too have the forms of litigation pursued against torture in custody and their impact. As in Argentina and Turkey, the litigation in Kenya has generally been shaped by a combination of legal possibilities, political realities, and available resources and support.

### **Torture Claims during the 1980s and 1990s**

A cluster of litigation related to torture in Kenya first emerged before the transition of 2002. This litigation took a largely defensive posture, to fight criminal cases brought *against* torture victims. These cases challenged the victims' confessions and in some cases challenged the lawfulness of their detention, trials, or sentences. In so doing, they paved the way for subsequent claims.

The earliest forum in which torture allegations surfaced was therefore criminal trials, and to some extent *habeas corpus* proceedings<sup>194</sup> and bail applications,<sup>195</sup> lodged on behalf of victims who were being prosecuted based on "confessions" extracted through torture and ill-treatment.<sup>196</sup> Unsurprisingly perhaps, many victims in this scenario did not raise claims of torture, as there was no real prospect of satisfaction or protection from the judiciary. As one interviewee described, "the only audience were those responsible for [my] torture: the prosecutor and police, and then the judges."<sup>197</sup> Threats of reprisals and a lack of legal advice made complaints relatively rare.<sup>198</sup> Individuals did, however, occasionally speak out, and on rare occasions the courts questioned their "confessions," gave reduced sentences, or set aside convictions on the basis of the "particular circumstances" of detention and interrogation. Yet the taboo around acknowledging torture meant that the true nature of the allegations was generally avoided.

One such case was that of Joseph Kamonye Manjee,<sup>199</sup> a university lecturer arrested in 1986, held naked and incommunicado in a water-logged cell, without food

or drink, for 14 days before admitting to possession of a “seditious publication” during interrogation. The Court of Appeal threw out the guilty plea, citing the illegal length of the detention and the “particular circumstances” that rendered Manjee “not a free agent” at the time of his confession.<sup>200</sup> Similarly, the Court of Appeal ordered the release of David Mbewa Ndede,<sup>201</sup> who had endured torture during his 30-day incommunicado detention, citing injuries sustained in detention in “an unusual circumstance.”<sup>202</sup> These cases nibbled at the impunity that surrounded police practices and placed an onus on the prosecutor to account for the abuse. Subsequent criminal defendants relied on the *Ndede* case to quash other decisions.<sup>203</sup>

In some cases, litigation during this period paved the way for civil action. Ndede brought a civil suit<sup>204</sup> and was awarded general and special damages for his unlawful detention and subsequent malicious prosecution in 1994,<sup>205</sup> though the court again avoided calling torture by its name. Other cases followed and were allowed to proceed based on the *Ndede* precedent, albeit often with delays and obstructions.

### **Nyayo House Torture Cases**

The atrocious Moi era torture in detention gave rise to a large number of civil cases, perhaps the most significant being those referred to as “the Nyayo House cases.” Despite some level of survivor networking, the Nyayo House cases could not be described as coordinated, strategic litigation but as a series of individual civil cases, facilitated by collaboration among civil society, donor organizations, and victims’ groups. The cases were filed against the government, seeking awards of damages and a declaration from the court. This vast body of litigation has unfolded in multiple waves, the first of which came in 2003, when 33 cases were filed. This litigation had interesting, unpredictable repercussions from the outset, including serving as a bargaining chip in negotiations between the minister for justice and victims’ groups regarding the establishment of Kenya’s Truth, Justice and Reconciliation Commission.<sup>206</sup>

The cases were beset by myriad challenges. Gitau Mwara, who represented the victims in most of these cases, describes facing evidentiary problems, including access to witnesses and inadequate documentation, government actors who refused to testify, the “gate-keeping attitude” of the attorney general,<sup>207</sup> and the fact that even after 2003, many judges feared being viewed as “anti-government.” Other impediments included mysteriously missing files and judges who openly refused to take torture cases.<sup>208</sup>

A significant shift arrived with the appointment of a new chief justice in 2005, himself formerly a victim of torture.<sup>209</sup> The creation of a dedicated Constitutional and Judicial Review Division within the High Court, with two full time staff dedicated to cases against the state, was also significant. Further rules were developed in 2006 to expedite existing

cases<sup>210</sup> and consolidate and accelerate the pending Nyayo House cases. These developments would enhance the prospects for more effective torture litigation in the future.

A second tranche of Nyayo House cases was brought between 2006 and 2008, in which several hundred additional litigants filed complaints. Civil society support, and better links between victims and NGOs and between NGOs and the United Nations Trust Fund for Victims of Torture, provided critical support for this new wave of litigation. Reliable statistics on the number of cases lodged and decided is surprisingly elusive, but Mwara says he has lodged more than 500 cases, while other lawyers have lodged even more.<sup>211</sup> As the number of cases increased, so did the scope of beneficiaries and the direct impact of the cases. Family members of deceased victims—as well as living victims—have been able to lodge cases and win settlements.

As regards the normative or declaratory power of these judgments, the picture is mixed. Some rulings sent a strong message on the impermissibility of torture and the rights of victims. Others reveal a restrictive and unduly conservative approach, with lamentable reluctance to reopen cases litigated during dictatorship (when cases were thrown out by courts lacking independence) or insistence that victims should have raised torture arguments then, when plainly there were impediments to doing so.<sup>212</sup> But overall, the Nyayo House cases contributed to what one lawyer described as a “super highway of human rights litigation.”<sup>213</sup> This includes a firm understanding of human rights as the purview of the courts, removal of obstacles such as statutes of limitation,<sup>214</sup> and implementation of procedures to facilitate litigation in the future.

Damages issued in response to the Nyayo House torture cases were, in both a symbolic and a very practical sense, transformative for victims who were “stigmatized, ostracized, and [for whom] even small awards made a big difference.”<sup>215</sup> However, the compensation issue has been controversial in numerous ways. First, implementation has been extremely weak. Second, awards have been criticized as insufficient.<sup>216</sup> The amount of each award reflects the economic situation of the victim, leading to vast differences in payment, adversely affecting those most in need, and undermining the sense of justice for the poor. Compensation has also generated backlash towards some of the victims, purportedly for seeking to benefit at taxpayer expense. Negative rhetoric emerged from the government<sup>217</sup> and from some sectors of society<sup>218</sup> who felt recipients were diminishing victims’ suffering by reducing it to a quantum of monetary compensation.<sup>219</sup>

Finally, the reparations claims in these cases focused on quite narrow conceptions of financial damages, which, as one judge suggested, may have revealed a “lack of creativity” by lawyers regarding reparations claimed.<sup>220</sup> Similarly, the judgments themselves do not reflect comprehensive notions of reparation under international law. For example, the judgments commonly overlooked the medical and psycho-social support that survivors needed,<sup>221</sup> and failed to address the need for official apology, commemoration, or guarantees of non-repetition. Yet despite its shortcomings, the processes opened up debate

on the obligation of reparation for crimes such as torture, and on proposals for a broader reparation scheme, in a way that positively influenced future law and remedies.<sup>222</sup>

Many victims interviewed for this report cited the importance of non-monetary elements of the judgments, including establishing the impermissibility of torture, and a reckoning of sorts with the past. An admittedly loose and disparate set of legal actions led to increased awareness of torture, which in turn helped to build an anti-torture constituency and drive media attention to the issue. The state's implication that only individuals who posed a threat to society were victims of torture had long been used to suppress public outrage over torture, but the Nyayo House litigation helped undermine that argument. As one interviewee put it, litigation transformed the public's view of torture from a purely moral issue into a matter of rights and law.<sup>223</sup>

The Nyayo House cases led to a change in how Kenyans view torture committed under the Moi regime. Another set of cases, explored in the next section, helped to expose torture committed during the colonial period.

## **The Mau Mau Litigation**

*“Our aim was only to liberate Kenya and to regain our dignity.”<sup>224</sup>*

In October 2009, five elderly Kenyans initiated a historic civil claim before UK courts concerning torture by the British Colonial Administration in Kenya during the Mau Mau uprising between 1952 and 1961. The claimants sought damages for personal injury, including torture, sustained by those considered members or sympathizers of the banned Mau Mau movement at the hand of British agents (of both the UK government through the Colonial Office and the Kenya colonial government through the governor general).<sup>225</sup> The initial claim brought forth a wave of interest from thousands of persons mistreated as part of the repression of the Mau Mau, and the case was ultimately brought on behalf of 5,228 victims (although this constituted only a fraction of those who sought to bring claims).<sup>226</sup>

The case was before the courts only relatively briefly. After the UK government's preliminary objections were rejected in favor of the claimants<sup>227</sup> and the court ruled that the matter could proceed to trial, the UK government promptly decided to settle, and did not therefore contest the claims directly. But even the court's decision that the matter could proceed to trial was significant. It recognized the evidence that 5,228 Kenyans had suffered torture at the hands of the British during the colonial period.<sup>228</sup>

Approaching UK courts brought undoubted strategic advantages for the claimants. The choice of forum, and the representation of claimants by lawyers from Leigh Day & Co, provoked some controversy in Kenya,<sup>229</sup> but also immediately generated

national and international attention before, during, and after the case itself. The Mau Mau claims brought forth a wave of international support, leading to strategic partnerships for engagement in the litigation itself (with several amicus interveners)<sup>230</sup> and surrounding advocacy. Kenyan and international NGOs, historians,<sup>231</sup> international human rights activists, politicians, and the UN Special Rapporteur on Torture lent support to the Mau Mau.<sup>232</sup> NGOs, human rights activists,<sup>233</sup> and the independent group of world leaders known as the Elders, sent public letters to the UK prime minister, protesting that “the British Government’s repeated reliance on legal technicality in response to allegations of torture of the worst kind will undermine Britain’s reputation and authority as a champion for human rights. Our concern is that this, in turn, will have a damaging effect on the fight against impunity across Africa.”<sup>234</sup> The Kenyan government also issued statements in support of the claimants.<sup>235</sup>

On June 6, 2013, UK Foreign Secretary William Hague made an announcement to parliament on the settlement of the Mau Mau claims: “I would like to make clear now, and for the first time, on behalf of Her Majesty’s government, that we understand the pain and grievance felt by those who were involved in the events of the emergency in Kenya. The British government recognizes that Kenyans were subject to torture and other forms of ill-treatment at the hands of the colonial administration. The British government sincerely regrets that these abuses took place and that they marred Kenya’s progress towards independence.” His statement represented plain recognition of victims and their torture and ill-treatment.

The settlement agreement included payment to the 5,228 claimants, as well as payment of costs, to the total value of £19.9 million. This was one of the largest publicly announced settlements of a civil claim in British history. The UK government also committed to support the construction of a memorial in Nairobi to the victims of torture and ill-treatment,<sup>236</sup> which was unveiled by the British High Commissioner to Kenya in September 2015.<sup>237</sup>

Since the unveiling of the monument, the Kenyan government has also taken steps to address the welfare of Mau Mau uprising veterans, including registering them for social security and health benefits and recognizing their service through national awards.<sup>238</sup> The national and international media coverage of the Mau Mau case sparked debate on atrocities committed during the colonial era in Africa and beyond.<sup>239</sup> The entire process contributed to the debate on transitional justice, accountability, and reparation for colonial crimes more broadly.

This case, and the attention it generated internationally, was made possible by, among other factors, a long process of careful documentation and evidence gathering, both in Kenya and the UK. The TJRC in Kenya was a contributor to this process, by recognizing the torture of the Mau Mau in its report on historical injustices in Kenya, thus rendering British denial less plausible. As recognized in the applicants’ statement

at the conclusion of the case, strategic relationships and international partnerships were important factors in the case. Sustained attention from international media outlets helped to drive international pressure on the UK government. Surprisingly, media coverage in Kenya was not as sustained, and tended to focus more on unprecedented level of compensation than on the underlying torture and its implications today.

Alongside the Nyayo House cases, the Mau Mau claim contributed to a growing sense in Kenya of the absolute nature of the prohibition of torture, and graphically illustrated the very long arm of the law that enables justice to be achieved despite the passage of time.

### **Recent Cases Concerning Torture in Kenya**

Despite the success of the Nyayo House and Mau Mau litigation, more recent cases illustrate how difficult it is to challenge the government in Kenya in response to torture in the present. Although recent cases are not the focus of this report due to their as yet uncertain impact, they can shed light on lessons learned from the Nyayo House and Mau Mau litigation, and hence help to measure the impact of that earlier litigation, which has informed and strengthened subsequent practice.

The post-election violence that swept Kenya in 2008 brought forth litigation, including a constitutional claim filed February 20, 2013 seeking effective investigations and reparations for the state's failure to protect its citizens. The litigation sought to establish that the government of Kenya violated the constitution and international treaties to which Kenya is a party, focusing on the state's positive obligation to protect its citizens.<sup>240</sup> The litigation included claims related to sexual violence, which the Mau Mau and Nyayo House torture cases had addressed, but which earlier torture litigation had neglected. Notably, victims took a holistic approach to reparations in line with international standards, embracing appropriate compensation, but also including psycho-social, medical, and legal assistance to the victims and broader guarantees of non-repetition.

In a significant shift from earlier litigation, the petition also asks the court to find that the post-election sexual violence rises to the level of crimes against humanity and that, as a result of that finding, the government is obliged to investigate these international crimes and prosecute them where the evidence permits. This line of argument embraces the fight against impunity as an element of reparation.<sup>241</sup> The case also opened up Kenya's legal system to international and comparative standards on a range of issues critical to the effective protection from torture and ill-treatment.<sup>242</sup> These cases have highlighted the need for ongoing reform and awareness raising, notably with regard to sexual and gender-based violence. The post-election violence cases have met with government opposition and intimidation, endangering victims and lawyers, and testing judicial independence and the rule of law.

Despite the success of the Nyayo House and Mau Mau litigation and their obvious influence on litigation related to the post-election violence, torture in custody continues in Kenya. Some legislative reforms, such as the repeal of aspects of the Evidence Act governing confessions,<sup>243</sup> are thought to have reduced overt abuse by police.<sup>244</sup> But several people interviewed for this report argued that torture has not ceased, but instead migrated to other, more clandestine, locations.<sup>245</sup>

Moreover, interviewees felt that while the litigation influenced attitudes regarding torture during the colonial period and the Kenyatta and Moi regimes, many Kenyans today support torture in police operations against certain groups.<sup>246</sup>

Finally, the mass of judicial findings regarding torture has not led to a single criminal prosecution in Kenya. Impunity for torture in Kenya is ubiquitous and deeply entrenched. For example, there is no coordinated civil society strategy against torture today.<sup>247</sup> Some interviewees described the path of torture litigation as progress toward accountability and the rule of law, but others remained deeply skeptical.

## Conclusion

The strategic litigation experience in Kenya reveals the dynamic and cumulative effect of litigation conducted alongside other social-change processes. The Nyayo House and Mau Mau cases have both exposed the truth about torture in Kenya and enhanced popular understanding of it. They have led to recognition by governments, official apologies, financial compensation, and a degree of commemoration for the wrongs of the past.

The cases have helped nudge the broader truth and reconciliation process forward, while litigation has in turn used the fruits of that process to move towards justice for victims. Victims and state representatives alike have described the cases as a starting point for processes of healing and restoration. Through arguments in court, and more commonly debates and monuments to memory beyond the courtroom, these stories form part of the unfolding historical narrative of the country.

Constitutional, legislative, and judicial developments have enabled litigation, which in turn feeds more calls for reform. The Nyayo House litigation led to the passage of specific legislation, the Victims Protection Act, which takes a more holistic approach toward reparation. In turn, this litigation has influenced judicial practice and procedures, thus influencing subsequent litigation and improving its prospects for impact.

Torture in custody and the impunity surrounding it remain widespread in Kenya. But the history of strategic litigation against torture in the country suggests that impunity may not last forever.



# Chapter 3: Turkey

## Torture in Custody in Turkey

Torture in custody has been a regrettable feature of the political history of Turkey since the inception of the Republic in 1923, or indeed before that if one takes into account the legacy of its predecessor, the Ottoman Empire.<sup>248</sup> The nature and prevalence of torture and ill-treatment in Turkey is such that it cannot be confined to particular moments in history, regions of the country, or causes. Torture in detention has flourished in particular during times of political crisis, such as military coups or periods when the armed conflict in the southeast and related “counter-terrorism” measures have been particularly intense. In these contexts, “enemies of the state” have been portrayed as undeserving of basic rights<sup>249</sup> and torture has been perceived by the public as “inevitable.”<sup>250</sup>

### **Torture following the 1980 Military Coup**

While torture and ill-treatment may have been prevalent throughout Turkish history and throughout the country, there can be little doubt that it dramatically increased during the period of martial law following the coup of September 12, 1980, and in the context of the state of emergency and anti-terrorism policy in southeast Turkey. This led to various responses, including the litigation analyzed later in this chapter.

Figures cited by a several different organizations put the number of people arrested following the 1980 coup at 650,000, and refer to incommunicado detention and torture as standard practice.<sup>251</sup> According to one victim, “Torture was there all the time. There was a pre-acceptance that if you are arrested you would be beaten, tortured...

people taken to the police stations alive left in coffins.”<sup>252</sup> Records show 445 deaths in detention between 1980 and 1995, of which 171 were reportedly a result of torture.<sup>253</sup> Detainees were tortured at police/military headquarters, military prisons,<sup>254</sup> and in factories, municipal buildings, schools, and sport centers.<sup>255</sup> Victims report suspension by the arms, electric shock, beatings on the soles of feet, sexual violence including rape with truncheons and bottles, blindfolding, forced nudity, suffocation, water torture, threats, and psychological torture.<sup>256</sup> A statement by the European Commission on Human Rights in its admissibility decision in the *France, Norway, Denmark, Sweden, Netherlands v Turkey* case recognized that torture was a state practice conducted with clear official tolerance in this period.<sup>257</sup>

Under martial law, a glaring lack of safeguards, including judicial oversight, meant suspects could be held in incommunicado detention for up to 90 days, subject to extension. Accordingly, victims report that their torture followed a pattern that indicates the significance of such safeguards: being tortured heavily for the first weeks of detention in custody, less intensely in the following weeks to avoid lasting marks, and left alone during the week prior to being brought before the judge for recovery from visible signs of torture.<sup>258</sup> Doctors treated victims during the last days of their detention.<sup>259</sup> While torture was hidden, it was occasionally implicitly acknowledged by the security forces. One particular request for judicial approval to extend custody stated that “the suspect was physically prepared to handle any kind of interrogation, so no certain information could be taken from him up to now; therefore, the custody term must be extended for two more days.”<sup>260</sup>

A number of torture victims who were eventually subjected to criminal process—usually before Martial Law Courts—raised their torture during trial, but it fell on deaf judicial ears. This was as far as many complaints went at this stage, in part due to reprisals against complainants<sup>261</sup> and against non-compliant judges,<sup>262</sup> as well as legal barriers that precluded judicial review or investigation of military authorities.<sup>263</sup> Limited available statistics show virtually no accountability for torture at this time. One report showing only two convictions from hundreds of complaints of torture was, ironically, promoted to the media and publicized under the headline “Most torture allegations ended up groundless” in a mainstream newspaper.<sup>264</sup> In the relatively rare cases that did proceed, the manipulation of legal standards by judges—such as raising the definitional thresholds for torture—led to torture allegations being thrown out.<sup>265</sup> Rare convictions, invariably of low-level perpetrators, generally resulted in extremely lenient or suspended sentences.

Allegations of torture at that time were met with simple denial by the state.<sup>266</sup> A typical political discourse was that victims were being used by the West against Turkey,<sup>267</sup> that alleged torture victims were injuring themselves,<sup>268</sup> or that deaths in custody were in fact suicides.<sup>269</sup> Turkey had no independent media; a rare example of

torture being briefly mentioned in the news led to the editor of the paper being called in and threatened by authorities.<sup>270</sup>

With judicial, political, and public avenues to expose and confront torture in custody blocked, the importance of recourse to the international level became clear during the 1980s. Before individual petitions to the European Court of Human Rights (ECtHR) became possible in 1987, a number of European states agreed to the unusual step of taking one of the first inter-state case to the ECtHR on torture in 1982.<sup>271</sup> One of the immediate effects of this process, and the “friendly” settlement proceedings that ensued, was a range of commitments by Turkey to ratify other international treaties and accept international mechanisms, including individual petitions to the ECtHR. This paved the way for what would become an abundant and influential body of ECtHR case law in the decade to follow.

### **Torture and the “Fight against Terrorism” in the 1990s**

Military rule ended in 1983, although the president for the next six years was the military chief of staff who had led the coup, showing the enduring influence of the military. Intensification of the conflict between Turkish security forces and the Kurdistan Workers’ Party (*Partiya Karkerên Kurdistanê*, PKK) was accompanied by widespread torture, ill-treatment, and disappearances of those deemed members of, or sympathetic to, the PKK in the late 1980s and early 1990s. Repression and torture of the Kurdish population is one of the factors blamed for fueling the conflict, and torture in detention specifically is considered an important factor in the empowerment of the PKK and in enhancing recruitment by banned organizations.<sup>272</sup> The intensification, systematic nature, and severity of torture during the 1990s is broadly acknowledged.<sup>273</sup>

As with the period after the military coup, legal states of exception again provided the enabling environment for repression and torture, this time in the name of the “fight against terrorism.” Turkey declared a state of emergency in a number of Kurdish-populated cities in 1987.<sup>274</sup> The state of emergency remained until 2002, and Turkey indicated to the Council of Europe its intention to derogate from numerous articles of the European Convention on Human Rights (ECHR).<sup>275</sup> The ECtHR declared on a number of occasions that particular measures could not be justified by reference to the emergency.<sup>276</sup> Whether as a result of the court’s decision, international criticism, or most likely both, the state withdrew its derogation in relation to all articles other than Article 5 (on liberty) on May 5, 1992.<sup>277</sup>

Specific anti-terrorism laws were drafted in the context of the exceptional legal frameworks, backed up by exceptional courts (the “state security courts” with competence over terrorism related offenses, were established in 1973 and operated until

their abolition in 2014),<sup>278</sup> which did the bidding of a “specialist” counter-terrorism branch of the executive (TİTEM). Procedural safeguards against torture were read as subject to exceptions,<sup>279</sup> and incommunicado detention in zones covered by the state of emergency were permitted for up to 30 days. Doctors examining victims were allowed to note only the existence of physical injuries, not to explain or comment in a way that could be used as evidence.<sup>280</sup>

Despite the challenges, diverse responses to torture emerged more visibly during the 1990s. Civil society groups were created or strengthened, but because this movement was fueled by egregious violations of the rights of the Kurdish population, many human rights groups and advocates came to be associated with controversial political causes and banned organizations. This provided the pretext for state interference with civil society that continues to impede human rights work in Turkey to the present day.<sup>281</sup> Given this interference with Turkish civil society groups, international civil society organizations such as Amnesty International had a crucial role to play. The NGO the Kurdish Human Rights Project was established in London with the specific mandate of enabling ECtHR litigation.<sup>282</sup>

Other international mechanisms and processes grew in relevance during this time. The European Committee on the Prevention of Torture (CPT) gained access and began making detailed reports and recommendations in 1992, though its low profile and the confidentiality of its reports until 2007 damped its influence. Somewhat later, other international voices joined the chorus of condemnation, among them the UN Special Rapporteur on Torture who found widespread and systematic torture at least up to and including the first half of the 1990s.<sup>283</sup>

Turkey ratified the ECHR in 1987, enabling individual petitions from that point on, and despite multiple obstacles, cases began to make their way to Strasbourg by the early 1990s. These cases drew on, and in turn bolstered, the reports of civil society, and of international mechanisms such as the consistent CPT reports.<sup>284</sup> During this decade, the ECtHR handed down numerous individual judgments, condemning and putting beyond feasible doubt the egregious nature of violations, including torture occurring in detention at the hand of the Turkish state. Turkey became the state with most judgments against it.

## EU Accession and Responses to Torture

In 1999, Turkey became an official candidate country for EU accession. A coalition government,<sup>285</sup> headed by Bülent Ecevit of the Democratic Left Party, took office. The government’s political and legislative response to torture evolved in relation to the Copenhagen Criteria for EU membership, which required close and regular review of Turkish legal reform and respect for human rights.<sup>286</sup> Compliance with the judgments

of the ECtHR was a specific membership criterion. In this context, blanket denials gave way to a stated policy of opposition to torture.<sup>287</sup> Reports indicate greater questioning of government by parliamentarians, and more information being provided with some gradual, if limited, opening of political space around torture in detention after 1999.<sup>288</sup>

The legal definition of torture was expanded in 1999 to bring it more closely in line with the CAT definition.<sup>289</sup> Allowable periods of incommunicado detention were shortened, the duty to inform a relative or other person upon detention was introduced in 2002,<sup>290</sup> and restrictions on access to a lawyer under anti-terror laws were lifted. The right of all detainees to be brought before a judge within four days was set in 2003,<sup>291</sup> while the right to independent medical reports followed in 2005.<sup>292</sup> In 2004, Turkey's renewed application for EU accession took effect, giving human rights law priority over domestic law in the constitution.<sup>293</sup>

Civil society organizations, activism, and reporting grew post 1999, which in turn fed the work of international and regional organizations. The media also gained some measure of independence during this period.<sup>294</sup> However, the misuse of anti-terrorism measures to justify criminal action against human rights lawyers and organizations represented a continued encroachment on freedom of association.

Reports from entities such as the Human Rights Foundation of Turkey,<sup>295</sup> the US State Department, Human Rights Watch,<sup>296</sup> and the Association for the Prevention of Torture<sup>297</sup> suggest that torture in general—and in particular deaths in custody—declined in the late 1990s and early 2000s.<sup>298</sup> Interviews for this study, of judges and lawyers dealing directly with detainees for example, generally confirmed this assessment.<sup>299</sup>

The reasons given for the decline differ. A former chief of police cited improvements in criminal investigative techniques, reducing the perceived need for torture.<sup>300</sup> Others cite domestic legislative reform limiting incommunicado and pretrial detention, linked in turn to Turkish engagement with international and regional treaty mechanisms, especially the ECHR.<sup>301</sup> As a former ECtHR judge noted, “for a country to be condemned for torture practices by judicial institutions was something very heavy to carry.”<sup>302</sup> Some interviewees referred to the attention brought by a few high profile investigations and prosecutions,<sup>303</sup> while others pointed to a broader, more gradual change in the overall environment during this time.<sup>304</sup>

Others expressed doubt that torture has diminished in Turkey. Interviewees noted that the state has shifted to less discernable forms of torture such as sleep and food deprivation, prolonged standing, exposure to loud music or noise, and psychological torture.<sup>305</sup> As in Kenya, interviewees described an increase in the excessive use of force by the security forces, and torture outside of formal detention settings. This suggests torture has changed in form and context but not disappeared.<sup>306</sup>

Closely linked is the problem of impunity for torture. Legal reform has lifted many legal obstacles to holding torturers accountable, including narrow definitions of

torture, the need for government permission to bring a torture prosecution, and the statute of limitations.<sup>307</sup> However, *de facto* impunity remained, even during the period of greatest engagement with human rights standards. Official statistics show that of 4,191 new torture and ill-treatment cases tried between 2003 and 2012, only one-sixth of the accused were found guilty and sentenced.<sup>308</sup> This contrasts starkly with conviction rates for crimes other than torture, in particular terrorism related offenses.<sup>309</sup>

## **Menace of Return**

Research suggests an upsurge in the incidence of torture and ill-treatment since 2010.<sup>310</sup> The failed coup of 2016 occurred while this report was in preparation; but even prior to it interviewees described government policies as becoming more authoritarian in recent years,<sup>311</sup> linked to a fracturing of political support,<sup>312</sup> more active opposition,<sup>313</sup> serious acts of terrorism on Turkish soil,<sup>314</sup> and an escalation of the conflict in the southeast.<sup>315</sup> The menace of a return to the widespread rights violations of previous eras was not far from the surface of official statements and action.<sup>316</sup> Waning interest in EU membership and increased emphasis on alternative international partnerships threaten to hobble legal mechanisms that have been used to hold torturers accountable.<sup>317</sup> Extensive allegations of torture of the thousands of suspects detained after the 2016 coup attempt suggest the fragility of improvements made during the prior two decades.<sup>318</sup>

Impunity is pervasive, and institutions remain weak: the Human Rights Institution of Turkey, established in 2012,<sup>319</sup> had not conducted any site visits as of April 2016,<sup>320</sup> while the Ombudsman Institution established to receive individual complaints in 2013 does not meet standards of independence<sup>321</sup> and appears to have had little impact.<sup>322</sup> Notably, Turkey also created a new “domestic remedy” before the Constitutional Court in 2012. This came as a direct result of the growing number of applications before the ECtHR, and some interviewees viewed it as intended to stem the flow of cases to Strasbourg.<sup>323</sup>

## **Litigating Torture in Custody in Turkey**

Human rights litigation in Turkey has more commonly occurred in reaction to the very urgent needs of persons in detention, rather than being used as an instrument of a carefully planned long-term legal strategy. As an experienced Turkish litigator noted, “I do not know what you mean with ‘strategic.’ In our case, people who were tortured came to us and we took their cases.”<sup>324</sup> As a response to the immediate needs of victims, litigation has taken many forms, including criminal justice and ECtHR proceedings.

Civil litigation claims for damages for torture have occasionally prevailed in Turkey, but have more commonly been hampered in various ways.<sup>325</sup> In practice, proceedings are difficult to progress absent a criminal conviction (creating a vicious impunity circle when such criminal investigation and prosecutions are ineffective),<sup>326</sup> and often marked by excessive delays and pitifully meagre awards.<sup>327</sup> Legal obstacles preclude civil claims against civil servants acting in an official capacity, leaving open only the possibility of administrative action against relevant ministries.<sup>328</sup> Even when such proceedings are successful, the government simply pays a minimal award and then closes the case, thereby minimizing attention to the litigation.<sup>329</sup>

With civil litigation claims often hitting a dead end, criminal litigation and litigation before the European Court have become more prominent in addressing torture in custody in Turkey.

## **Criminal Litigation**

Torture has long been a criminal offense in Turkey, and litigating to overcome the legal and practical obstacles to accountability has been one of the major areas of focus of litigation, in which victims and civil society have played an active role. A selection of criminal cases, identified by interviewees and civil society as significant, exposes the challenges and the sort of exceptional circumstances that enabled at least some cases to bear fruit and to have an impact, against the odds. These cases do not purport to be representative of the many attempts to secure criminal justice in Turkey, most of which have floundered en route and many of which may have had little impact.

### ***Litigating Torture following the 1980 Coup***

According to one expert, “Litigating was not something many would think of or do” during the repression that followed the 1980 coup.<sup>330</sup> Yet as this section explores, some tried to use it, often allied with other forms of advocacy such as public protests, in pursuit of justice.

Cemil Kirbayir was among the first victims of the post-coup crackdown. Military officials, police, and Turkish intelligence agents interrogated and tortured him beginning in September 1980 in a school converted into a makeshift detention center.<sup>331</sup> Kirbayir disappeared and his body has never been found. Co-detainees have described his torture; security forces claimed later that he escaped from the first-floor balcony of the center.

Following his disappearance, his mother began participating in the “Saturday Mothers” group<sup>332</sup> of relatives of the disappeared. This attracted media attention, public sympathy, and ultimately political attention. Berfo Kirbayir was 100 years-old when

Prime Minister Recep Tayyip Erdoğan met with her and a number of other mothers in February 2011. At his request, the Parliamentary Human Rights Commission initiated an investigation, but even after hearing from direct witnesses, as well as members of the intelligence agency, police and military, the investigation never led to criminal charges.<sup>333</sup> It did, however, generate greater public debate, and a degree of outrage, regarding the on-going failure to find the truth or even the remains of Cemil Kirbayir. The case, assisted by his family members' commitment and high profile political intervention, exposed the barriers protecting security forces and raised awareness of torture and disappearance, and the intransigent impunity surrounding it.

Although rare, the cases of İlhan Erdost, M. Siddik Bilgin, Cennet Değirmenci, and Bedii Tan did go to trial, and they received considerable attention from the international community and media. Erdost, a journalist, publisher, and editor, was arrested with his brother shortly after the coup, on November 5, 1980. Banned literature was seized from their premises and he was accused of belonging to an illegal leftist organization. Erdost was beaten to death in Mamak Military Prison. His brother's direct testimony and Erdost's reputation as a journalist attracted media attention. The case proceeded to trial and resulted in convictions. On appeal, the Military Supreme Court upheld the convictions of four offenders but quashed the conviction of their superior officer. The retrial of the superior took years; in 1987 he was given six months imprisonment for neglecting his duty.<sup>334</sup>

Bilgin was a schoolteacher in Bingöl province. The authorities originally alleged that he was shot to death while attempting to escape detention, but his family's persistence, coupled with rare confessions by some soldiers involved in the incident, provided clear evidence to the contrary. Despite this, the criminal trial, which lasted 10 years, resulted in acquittal. The public reaction and favorable media coverage of the case was perhaps more noteworthy than the trial's outcome. The killing of an innocent teacher and the blatantly falsification of facts by the state brought significant attention, and the Human Rights Foundation of Turkey credited the case with increasing coverage of torture incidents.<sup>335</sup>

Cennet Değirmenci was the only woman known to die under torture, in Gaziantep province in 1982. The case her family brought resulted in the conviction of some low-level police officers who participated in her interrogation. One of them, Sedat Caner, one of the justice minister's personal guards, gave a long interview to *Nokta* magazine in 1986 incriminating other perpetrators, revealing details of the torture methods the security forces had been using, sharing several names of the victims his team tortured and the identities of other members of the team.<sup>336</sup> The interview had enormous repercussions, starting a huge public conversation and provoking harsh reactions by the state. The authorities claimed Caner was a member of a terrorist organization and launched a criminal investigation into the magazine that published his story.

Bedii Tan, 49, was tortured, beaten, and forced to swallow excrement before his death in Diyarbakir Military Prison on July 14, 1982. A stunning 150 detainees gave statements claiming that they had seen nothing and that Bedii Tan had been “aged and sick.” His son, Altan Tan, described in an interview how a number of the detainees visited him subsequently and explained how they had been forced to give false statements.<sup>337</sup> Two of Tan’s cellmates testified to the truth,<sup>338</sup> which ultimately led to the sentencing of Adnan Gunduz, known as “Gestapo Adnan,” to six years and eight months’ imprisonment in 1987—the same year that Turkey accepted the right of individual petition to the ECtHR. The Bedii Tan case is reportedly the first in Diyarbakir to result in conviction<sup>339</sup> and gave rise to extensive media coverage. After his release, Gunduz told a news magazine that he had only done “what he was asked for.”<sup>340</sup> His superiors were never held to account.

### ***The Trial of the Coup-plotters***

A referendum on September 12, 2010 removed Provisional Article 15 of the Coup Constitution that had protected the coup-plotters from prosecution. As a result, a number of complaints were submitted to the public prosecutors regarding torture during the coup. Two generals, Kenan Evren, the military officer leading the coup and president of the country from 1980 to 1989, and Tahsin Sahinkaya, the former air force chief, were found guilty of crimes against the state and sentenced to life in prison on June 18, 2014.<sup>341</sup> Tellingly, the prosecutor who prepared the indictment decided not to include torture-related offenses, although the case included statements about at least 16 incidents of torture. The court therefore did not deliver a judgment on systemic torture practices, stating that no indictment on these allegations was submitted. This decision was appealed, but the suspects both died before the Court of Cassation finalized its review. Nonetheless, victims and their relatives described in positive terms the opportunity to give statements, on the record, accusing high-level perpetrators. It was important, one said, to see Kenan Evren, then in his 90s, “made uncomfortable in his bed.”<sup>342</sup> The trials also led to a number of applications challenging the abandonment of torture investigations because of the statute of limitations. While the Constitutional Court has rejected at least three of them on the ground that it cannot hear complaints concerning events that took place before it was given competency to receive individual applications in 2012, more were pending at the time of writing this report.<sup>343</sup>

### ***Strategic Litigation Related to Anti-Terrorism Policies of the 1990s***

Birtan Altinbaş was a student at Hacettepe University when the anti-terrorism branch of the Ankara Police Department arrested him in January 1991; he died in custody.<sup>344</sup> The Provincial Administrative Board of Ankara, whose consent was required for an

investigation under applicable law, held the file for six years before giving its permission. The Ankara 2<sup>nd</sup> Heavy Penal Court finally rendered two judgments convicting several police officers, but the Court of Cassation quashed them both. A further investigation of the Altinbaş case was ordered against 10 police officers, but 16 years later investigators announced that the statute of limitations had expired and closed the case. The unreasonable length of the proceeding and concerns over the statute of limitations led to protests by civil society organizations and lawyers' associations, media attention, and international pressure including a letter from US Secretary of State Colin Powell to Deputy Prime Minister Abdullah Güл.

Finally, in March 2007, the Ankara 2<sup>nd</sup> Heavy Penal Court found four police officers guilty and sentenced them to eight years, 10 months, and 20 days of imprisonment.<sup>345</sup> Altinbaş's mother was awarded damages in a compensation case against the Ministry of Interior,<sup>346</sup> but a dispute ensued as to the amount and, 25 years after her son's torture, the legal battle has yet to conclude.<sup>347</sup> The case of Birtan Altinbaş illustrates how inordinate delay can protect offenders and impede justice, but also how in extreme cases, with international collaboration and pressure, progress can be made.

The "Manisa Youth" case, like the case of Birtan Altinbaş, drew wide public attention. It also brought pressure from parliament to bear on the courts. The case involved the torture of 15 young people between ages 14 and 20, including the rape of several girls, in December 1995. The families asked MP Sabri Ergül to enquire into the missing youth, and he personally visited the detention site, saw the victims lying naked, and heard their screams. Although they had been seriously injured through torture, a state security court judge ordered them held in pretrial detention, which lasted about ten more days. The case raised widespread public attention and a degree of parliamentary pressure. Accused police officers were prosecuted, and 10 of them were ultimately found guilty and sentenced to between five and 10 years. The victims were eventually also granted compensation.<sup>348</sup> Ergül credits this case with increasing the number of cases opened against police, influencing a more sensitive approach towards torture cases by the courts, sensitizing the public, and prompting a number of subsequent legislative changes.<sup>349</sup>

In several other criminal cases, the nature of the victims and coordinated action appear to have influenced media scrutiny and public mobilization. For example, Metin Göktepe was a young journalist covering a demonstration in Istanbul on January 8, 1996 when he was detained, taken to an informal detention center, and beaten to death; his body was then thrown in the street. The security forces and the public prosecutor initially denied all knowledge, but witness statements of people detained at the same time made it impossible to continue these denials. In an unusual response, the minister of interior apologized to the family. The family did not accept the apology, and instead pressed for prosecution. Media coverage ensued, political figures lent their weight,

and more than 350 lawyers submitted letters to the prosecutor. Ultimately, 11 police officers were suspended from service and their cases proceeded to trial following strong public pressure. The state transferred the case twice, purportedly on “security” grounds, making it difficult for witnesses to attend. Although the trials lasted for years, press coverage and public attention remained unusually high. Six suspects were convicted and sentenced to seven years and six months’ imprisonment in May 1999.<sup>350</sup> As one of very few cases where the torture of a journalist did not go unpunished, the case became an important reference point for violations of the era, and for the power of popular pressure against impunity.

Trade unionists, like journalists, have often been targeted in Turkey. The case of union leader Süleyman Yeter is emblematic. Yeter lodged a criminal complaint concerning his torture in 1997, and shortly before the hearing of the case at the Istanbul Assize Court, Yeter was arrested and tortured again; he died two days later, on March 7, 1999. All accused police officers named in his complaint were either acquitted or the investigations time-barred. Yeter’s torture and death is a chilling example of the potential negative outcomes of litigation. The criminal case that ensued against those responsible for Yeter’s death, despite its failure, is considered a landmark because of the way it galvanized civil society organizations, lawyers’ associations, the media, and trade unionists. As a symbol of intractable impunity, the case influenced public opinion<sup>351</sup> and led the ECHR to find Turkey in violation of Article 3 of the European Convention on Human Rights.<sup>352</sup>

## **European Court Litigation against Turkey**

### ***Inter-state Applications***

Prior to 1987, the only way to bring legal action to the ECtHR against Turkey was by inter-state application, either where the direct interests of the state were at stake or on the basis of “collective interest” in ensuring compliance with basic human rights standards. This happened twice in relation to torture. The inter-state complaint mechanism had only rarely been invoked when, in 1982, France, Norway, Denmark, Sweden, and the Netherlands accused Turkey of violating European Convention rights during the coup era.<sup>353</sup> The Council of Europe’s fact-finding mission six months earlier and the Legal Affairs Committee’s opinion (Doc No 4849) and PACE resolution No. 765(1982), which identified a climate of torture in Turkey, may have led to this unusual and therefore relatively politically weighty legal action.<sup>354</sup> However, proceedings only went as far as an admissibility decision, as the parties agreed to a friendly settlement, but the message and impact of the admissibility decision are clear. It described torture as a

continuous administrative state practice and state officials as systematically preventing the effective investigation of the phenomenon.

The friendly settlement negotiations provided a framework for political commitments to reform. Turkey guaranteed that it would join the European Convention for Prevention of Torture and the UN Convention against Torture and make the necessary declaration for the European Commission and ECtHR to receive individual complaints; those declarations were made in 1987 and 1988.<sup>355</sup> It agreed to submit reports to the commission on its implementation of anti-torture measures, and to create a continuing dialogue between the parties to the case.<sup>356</sup> While the settlement was being negotiated, Turkey shortened maximum periods of pretrial detention.<sup>357</sup> The cases also brought international attention and gave a platform to NGOs such as Amnesty International, which published a series of reports on torture in Turkish prisons, and the International Commission of Jurists and the International Federation of Human Rights, which sent fact-finding delegations.

The other torture related inter-state application, *Denmark v Turkey*, concerned the detention and torture of Danish citizen Kemal Koç in 1996. It was deliberately framed to have a broad scope and repercussions, asking the commission to determine “whether the interrogation techniques applied to Mr Kemal Koç are applied in Turkey as a widespread practice designed to extract confessions under severe pain and suffering.” It closed with a significant friendly settlement<sup>358</sup> that included a range of short-term measures, such as compensation to the applicant, as well as a framework for longer-term action. Notably, the government apologized, but only for what it termed “occasional and individual cases of torture and ill-treatment in Turkey.”<sup>359</sup>

Turkey also agreed to participate in activities of the Council of Europe on torture prevention, including collaborating in police training projects. The Danish government agreed to provide financial and technical support for such training, and other governments followed suit. Several witnesses, including a Turkish former ECtHR judge who was personally involved in some of the trainings, have credited them with contributing to gradual change in attitudes and practices on the part of the police and judiciary.<sup>360</sup> The settlement has been described as providing the impetus for the adoption of the legal reform that broadened the definition and scope of torture offenses and increased sentences.

### ***Individual Petitions***

In 1987, Turkey accepted the competence of the European Commission and in 1990 of the ECtHR, to receive individual complaints. Since then, the ECtHR has received high numbers of cases against Turkey, particularly in relation to the “fight against terrorism” in the Kurdish region. By late 2016, there were 3,270 ECtHR judgments against Turkey,

with 2,899 of them finding at least one violation.<sup>361</sup> Almost one-quarter of all the court's judgments on torture, and one-third of those dealing with ineffective investigations, involve Turkey.<sup>362</sup>

*Aksøy v Turkey*<sup>363</sup> is a seminal torture case, the first in which the court found that the treatment imposed on an applicant amounted to torture. Zeki Aksøy was a metalworker in southeast Turkey. On November 24, 1995, 20 police officers arrived at his house, accompanied by a detainee who identified Aksøy as a PKK member. In detention, he was stripped naked, suspended by his arms from the ceiling with his hands bound behind his back, and his genitals were electrocuted over four days.<sup>364</sup> As a result of the torture he suffered nerve damage and paralysis of his arms and hands. But a doctor stated that he bore no traces of violence, and the public prosecutor's report shows that two days later he signed a statement denying his involvement with the PKK and renouncing any complaint of torture. Aksøy was released that day. An independent doctor later diagnosed him with bilateral radial paralysis.

Aksøy presented a complaint to the European Commission. The authorities responded with threats of death if he did not withdraw his application. The last threat allegedly occurred two days before his murder on April 16, 1994. His father took the case forward after his son's death, and was himself detained and tortured, including being castrated. He was forced to sign statements denying his torture.<sup>365</sup>

When the case went before the ECtHR, the court found the state responsible for torture. It effectively absolved the applicant of exhausting domestic remedies, which it acknowledged were "inadequate and ineffective." It also found that the burden fell on the government to provide a plausible explanation for injuries sustained after individuals are taken into custody. The case has had an important influence on the court, and its jurisprudence, in many ways.

*Aksøy v Turkey* has been described as a moment of realization for the ECtHR. Until the *Aksøy* judgment, the court had been reluctant to reach a finding of torture.<sup>366</sup> The case shaped the court's jurisprudence on flexible interpretation of domestic requirements, on torture and the burden of proof, and on detention rights and procedural guarantees, influencing the court's approach in the future cases.

The *Aksøy* case had direct effects at the national level as well. Turkish courts have frequently referred to *Aksøy* and other cases that followed, thus introducing elements of ECtHR standards into national law and practice. Immediately after the *Aksøy* judgment, a bill was put forward to reduce the period of detention before being brought to a judge from 30 to 10 days in emergencies, and from 15 days to 7 outside of emergencies. While undoubtedly fueled by other processes and other cases, the Council of Europe Committee of Ministers that oversees implementation of this and other judgments against Turkey (known as the "Aksøy group" of cases) has attributed the legislation that was eventually passed to this case.

Courts cite the *Aksoy* case the world over. The case illustrates the transformative impact that litigation can have, but it also shows the horrendous price that victims and family members have paid to make this impact possible. As Aksoy's father said years later, "If I withdraw, he withdraws, and they withdraw, who is going to bring the torture to light?"<sup>367</sup>

A group of cases following *Aksoy* exposed the systematic nature of torture and violations of detainees' rights in southeast Turkey. Among these, the *Aydin* and *Akkoc* cases exposed sexual violence in detention and led to groundbreaking recognition of sexual crimes as torture.

The *Aydin v Turkey* judgment<sup>368</sup> emerged from events on June 29, 1993 when a group of village gendarmes forcibly removed families from their homes and brought them to the village square in the town of Tasit. The gendarmes singled out 17 year-old Şükran Aydin, her father, and her sister-in-law and drove them to the Derik gendarmerie headquarters. They stripped Aydin naked, beat her, sprayed her with cold water from high-pressure jets, and a man in military clothing raped her. Over the next two days they brought her back to the room where she had been raped and warned her not to report the torture.

After Aydin's release on July 2, 1993, a doctor examining her reported widespread bruising on the inside of her thighs and vagina. However, a public prosecutor appointed to the case reported that there was no doctor with expertise in rape victims to verify what had happened. He also claimed that her house harbored PKK members, with whom she had had sexual relations. Aydin and her family claim they were subject to intimidation and harassment following the communication of her application to the European Commission.<sup>369</sup>

The state claimed there was no record of Aydin's detention and argued that the application was brought for propaganda purposes to tarnish Turkey's image. The court rejected the government's preliminary objections and found the Turkish government responsible for torturing Aydin and failing to provide a remedy through its failure to adequately investigate the sexual violence. It underlined the deep psychological scars rape and sexual humiliation cause and found for the first time that sexual crimes constitute torture.

*Aksoy v Turkey* and *Aydin v Turkey* helped change the dialogue around torture in Turkey. Jurisprudentially, *Aydin* has been widely referred to for its understanding of rape as torture, and for recognizing the need for effective investigation of rape. Following the court's judgment, the CPT visited Turkey, where they investigated prisons, medical facilities, and public prosecutor offices in southeast Turkey, Izmir, and Istanbul, building on the pressure for change generated by the cases, and the debate they sparked.<sup>370</sup>

Another notable torture case, *Akkoc v Turkey*, reflects the influence of the *Aydin* decision.<sup>371</sup> Nebahat Akkoç and her husband Zübeyir Akkoç were teachers of Kurdish

origin and members of the Eğitim-Sen trade union. On January 13 1993, Zübeyir Akkoç was shot to death on his way to school. The public prosecutor indicted a suspect, but the Diyarbakir National Security Court released him due to lack of evidence.

Believing the police killed her husband, Akkoç sent an application to the European Commission and a letter to UK lawyer Kevin Boyle. Shortly thereafter, on February 13, 1994, police officers detained Akkoç at the anti-terrorism branch of the Diyarbakir Security Directorate for nine days, accusing her of involvement in the PKK and asking about her application to the commission. The police reportedly stripped her naked, groped and verbally abused her, sprayed her with hot and cold water, administered electric shocks to her feet and nipples, beat her, detained her in a cell that was constantly lit and had loud music playing, and told her that her children were being tortured. Doctors reported she had not suffered any physical blows and she was forced to sign a statement denying she had been tortured. She suffered chronic post-traumatic stress disorder after her release. On several subsequent occasions, the police detained Akkoç on the suspicion of her involvement in the PKK.

Despite the government's denials, the ECtHR found Turkey in violation of Articles 2 (life), 3 (torture and ill-treatment), 13 (remedy), and 25 (right of petition to the court) of the convention. It referred to a growing body of evidence, including from CPT reports in December 1992, December 1996, and October 1997. The court grappled with the definition of torture<sup>372</sup> and significantly consolidated jurisprudence on torture as comprising physical or psychological suffering. Together, *Aydin* and *Akkoc* exposed the systematic use of sexual violence, and the myriad impediments that confront victims seeking to give effect to their rights in this context, including police-supervised doctor examinations.<sup>373</sup>

Applications before the ECtHR and domestic courts have continued apace since the turn of the century,<sup>374</sup> exposing on-going torture in detention and obstacles to addressing it. *Tahir Elçi and Others v Turkey*, which involved 16 human rights lawyers arrested in 1994 while representing a number of applicants before the ECtHR, is among the cases that reveal the intimidation of the lawyers who represent torture victims.<sup>375</sup> That case facilitated the development of international networks of support and an awareness of the problem in Turkey today.<sup>376</sup> One of the impacts of litigating is exposing the cost of litigation, in terms of the intimidation and reprisals that face both applicants and their lawyers, and the courage of those who continue anyway.

The European Court's judgments—and the enormous efforts they represent—have facilitated a gradual shift in public discourse and government policy, and, particularly, the legal evolution in response to problems exposed by the claims. However, the process of implementing these judgments is potentially as important a vehicle for impact as the friendly settlements and the judgments themselves. It is worth noting though that as of August 2016, 1,595 judgments against Turkey were still pending

proper execution (outpaced only by the 1,663 pending in respect of Russia).<sup>377</sup> Multiple resolutions adopted by the Committee of Ministers regarding Turkey's implementation criticize the state's failure to address persistent structural problems and impunity—a reminder that while the rulings may be groundbreaking, their implementation is still lagging.

## Conclusion

Torture and ill-treatment in Turkey has been confronted persistently by victims, activists, and lawyers through litigation and other means. Reprisals, entrenched impunity, lingering lack of judicial independence, and poor implementation stand out among the challenges that have impeded this work. Despite setbacks and frustrations, those with whom we spoke in Turkey unanimously agreed that torture litigation has had a significant effect.

Torture litigation in Turkey has had a clear, if not always robust, impact on victims, perpetrators, and the country's legal framework. The litigation has both contributed to and benefitted from a complex medley of changes in governance and politics, civil society efforts, judicial shifts, cultural development, public awareness, media attention, and international obligations and relations. While litigation has not resolved the structural problems at the heart of violations in Turkey, it has contributed to a much larger process of grappling with torture and accountability in the country.<sup>378</sup>

This impact is best understood by looking at the accretion of complaints and judgments, rather than at any single case. The onslaught of ECtHR cases revealed the facts about the existence and nature of torture in Turkey. Step by step, the court has gradually made progress in exposing and condemning violations and reiterating, finessing, expanding, or simply consolidating convention standards on the elements of torture and ill-treatment. It has addressed safeguards in detention, the prerequisites of effective investigation, and issues of evidence and proof that have shaped jurisprudence in the ECtHR, and been relied upon internationally.<sup>379</sup>

The impact of human rights litigation, like the incidence of torture and ill-treatment itself, is fluid. In particular, the ECtHR judgments' impact on torture in Turkey can and must be read in parallel to the EU accession process, which provided a framework and political impetus for reform, to which the ECtHR judgments gave content. But the story goes beyond that. Most interviewees viewed litigation as part of a broader pattern of human rights struggle in Turkey, and progress on torture as the result of this struggle as a whole.<sup>380</sup> As one element of a larger movement, litigation has indeed had an impact in keeping torture on the public, media, and political agendas,

and in changing the way in which the judiciary, the government, and perhaps society more broadly consider human rights.<sup>381</sup>

But gaps in impact also loom large. These include the sense that a fuller factual narrative of responsibility, causes, and contributing factors in respect of torture has not yet emerged from national or ECtHR litigation processes.<sup>382</sup> Turkey lags other states in acknowledgment, apology, and commemoration, as well as in recognizing torture as state policy, recognizing the victims, and reflecting on lessons learned. Such shortcomings are closely connected to the country's systemic impunity. Although complaints continue to come before the courts, and occasionally succeed, this remains so exceptional and unpredictable that it renders the other advances more fragile, as recent events in Turkey sadly confirm.



# Chapter 4: Impact Analysis

The preceding country chapters reveal an array of impacts arising from particular examples of litigation against torture in Argentina, Kenya, and Turkey. This chapter looks across the three states and presents an analysis of the different ways in which litigation on torture and ill-treatment in detention have had an impact. Some of the impacts have arisen quite directly as the outcome of cases, through for example, victim compensation, individual accountability, declaratory judgments, or the development of jurisprudence.

More often, however, the impact of litigation has been less direct. Many of the cases examined here, if considered in isolation, generated little or no impact. However, their effects can be discerned when considering the cases cumulatively.

First, while there can and have been notable impacts from a single case, impact is often best understood by looking at a series of cases. Thus, while progress may have been made at various stages in relation to improving safeguards in detention in Turkey, for example, it is only when we consider the whole series of ECtHR cases and the evolution of responses—each of which advanced the framework further—that these small steps represent significant strides forward.

Secondly, the impact of litigation has to be understood alongside other processes, including domestic and international political processes, the contribution of quasi-judicial bodies, and advocacy and social mobilization. As interviewees in all three states repeatedly stated, the contribution of litigation to other gradual processes of change is often difficult to discern and impossible to quantify. Yet litigation’s contribution to social, political, legal, and cultural change may be among the most important ways in which litigation helps alter the human rights landscape.

Finally, findings on the impact of litigation should not be seen as a static. Impact is not linear, but part of a fluid process of advances and setbacks. The challenge for litigation as an agent for change is not only securing, but also sustaining, positive impact.

The impact identified in this study is considered below according to three categories that overlap and interrelate, and are non-exhaustive: the impact on victims; on the practice of torture; on law, policy, and institutions; on perpetrators and impunity; on social and cultural change; and on civil society mobilization. They are grouped according to categories explored across the Justice Initiative studies in this series: material impacts, such as finding perpetrators guilty or the payment of reparations to victims; legal and policy impacts, such as advances in jurisprudence or changes in government policy; and less tangible non-material impacts, such as changes in attitude or discourse.

## Material Impacts

*“There is no justice. You are talking to a wall. . . I just want justice for my son.”*<sup>383</sup>

The quest for concrete improvements to people’s lives is often at the heart of strategic litigation—and is especially obvious regarding litigation to stop and prevent torture. Although litigators and activists may aspire to win broader changes in policy or jurisprudence—or even changes in attitudes and perceptions—most strategic litigation begins with the drive for material impacts. This section studies the material outcomes of anti-torture litigation.

### Victim Impact

A primary purpose of this study is to examine the impact of litigation on the victims themselves: to what extent did litigation meet their goals or contribute to meaningful reparation and what was the relationship between that impact and any broader strategic impact? As the research bears out, it is impossible to generalize about the impact on the victims, just as it is short-sighted to pretend to dissociate the impact on those affected by egregious violations from the impact on the larger societies in which they live. Victim impact takes many forms, reflecting among other things the variable goals of the individuals concerned.

### Compensation

Perhaps the most obvious vehicle for direct victim impact is the payment of compensation to victims—one important aspect, among others, of the reparation to which they are

entitled under international law.<sup>384</sup> In Kenya, where the focus in the Nyayo House cluster of cases was on individual civil litigation, compensation was the object of the legal action and led to hundreds of damages awards against the state in favor of individual victims. A record level of compensation was also part of the settlement concerning the torture of members of the Mau Mau organization under British colonial rule, following the English court's admissibility decision. In Turkish and Argentinian courts, where the focus was on criminal action, compensation has been a secondary consideration—partly because of legal systems in which compensation is extremely difficult to obtain until a criminal conviction is secured, as well as differing strategic priorities.<sup>385</sup> On the supra-national level, however, just satisfaction, reparations awards, or friendly settlement agreements in cases against Turkey and Argentina have generally led to relatively prompt payments to victims.

In all three jurisdictions, these awards have had real significance for survivors. Given that many of the victims were in situations of economic vulnerability often linked to their torture, compensation has at times provided much needed relief and proved essential to reestablishment in society.<sup>386</sup> Significantly, the compensation awards have offered not only material but also symbolic value. Several victims and representatives spoke of such awards as a source of vindication,<sup>387</sup> and as one put it, having a “fundamental value” because it “influences both individual and collective processes of addressing the past.”<sup>388</sup>

In Kenyan and Turkish courts, civil litigation has consisted of individualized damages claims, while the Mau Mau claims in UK courts or the reparation claims by victims of the Argentinian dictatorship before the IACHR were on behalf of a broader group of claimants, collectivizing the claims and to some extent the impact. The collective negotiations around the settlement in the Argentina litigation, for example, show how an agreement to compensate particular applicants led to the establishment of a broader reparation fund for a larger range of persons affected by torture and ill-treatment. In Kenya, the Nyayo House awards directly benefitted only the individuals affected, although the sheer volume of that litigation, and its high profile, has driven demands for broader reparation. In Turkey, any successful claims appear to have benefitted individual applicants, and there is no broader reparation scheme, just as there has been no acknowledgment of and reckoning with the past.

While compensation orders have had significant practical and symbolic effect, the study shows multiple obstacles hindering their impact in practice. These roadblocks include impediments to accessing courts at all. Such impediments include rules and practices in Turkey and Argentina, under which compensation realistically depends on criminal convictions,<sup>389</sup> as well as widespread impunity for torture in Turkey and in contemporary Argentina. Across the three systems, very slow processes, inconsistency and lack of clarity in quantifying damages,<sup>390</sup> and what are sometimes perceived as

insultingly small awards, disproportionate to the egregious harm suffered, have undermined impact.<sup>391</sup>

The most serious factor undermining the impact of compensation is shockingly variable levels of implementation. Relief is non-existent, frustration huge, and the symbolic force of awards tempered when awards are not paid. Compensation from international courts and bodies has a high record of implementation, as seen in payments in ECtHR and IACtHR cases against Turkey and Argentina, respectively. Extremely poor implementation of awards in the Kenyan Nyayo House cases stands out, where almost all remain unpaid, in some cases many years later.

In addition, the target of the compensation claims necessarily influences their impact. Claims against officials are precluded in Turkey, for example, and the payment of a limited number of relatively small awards by the state has been described as too easy for the state to pay, and thus lacking in economic impact. Unless the state makes individual perpetrators pay the full amount, the impact on perpetrators—and on accountability—is limited.

The symbolism, empowerment, and practical significance of compensation have also been somewhat sullied in all three states by controversies surrounding monetary payments. The tendency of the media to focus more on awards being paid by “tax-payers’ money” than on torture, the occasional adverse reaction of other victims and subsequent tensions, and the discomfort on the part of NGOs supporting victims, all manifest a great deal of ambivalence and mixed messaging in respect of victims’ rights. Some victims described a sense of guilt over receiving financial payment from the state. Despite recognition of the significance of compensation, a complex picture emerges in terms of the ultimate impact of such awards.

### ***Restorative Function***

*“...the trial has a restorative effect as the victim can talk about the situation...it allows [us] to confirm that something has happened, and someone says “this cannot happen again.”*<sup>392</sup>

Research suggested that across the three states, cases have had a restorative impact at various stages and in diverse ways, as survivors and families confront their experience in deciding to bring litigation, as they speak out about it in testimony, or outside of court, and in the recognition and relief that follows.

Several victims and those supporting them spoke to the importance of some—but by no means all—litigation processes in hearing victims and enabling them to find their voice. This comes over forcefully in accounts of the public fact-finding hearing by the European Commission in Turkey. As Nebahat Akkoç stated: “No voice was heard here [in Turkey] in litigation, whereas with the European Commission, despite the proceeding

being a long one, you could see that someone was hearing your voice. This gives you more energy. You find power in yourself to encourage others to pursue the same path.”<sup>393</sup>

As the scope of criminal cases for torture during dictatorship has gradually expanded in Argentina, a greater focus on victim participation and personal experience has enhanced the restorative role of the litigation over time.<sup>394</sup> Less consistently, cases on torture and ill-treatment in prisons today have also given a platform for the often ignored voice of prisoners and family members, though for many it was plainly a struggle to feel heard and valued.<sup>395</sup> Likewise, while some in Kenya found the litigation process vindicating, others felt that victim participation was minimal and the authentic voice of victims was not always given adequate space in lawyer-led processes focused on results more than inclusion.

Alongside the importance of being heard, victims and family members in Turkey and Argentina emphasized the value of seeing those responsible being forced to render accounts through the litigation process. Akkoç commented on the significance of the palpable stress caused to state officials, prosecutors, and police when they were questioned at the commission’s on-site hearing. This was consistent with several interviewees who noted the importance of criminal trials in Turkey and Argentina, where victims saw perpetrators confronted with their wrongdoing. Several interviewees suggested that even unsatisfactory litigation, or trials resulting (as they so often do) in acquittals,<sup>396</sup> have a positive impact for victims. This has been less the case in Kenya where the only defendants have been the state and there has been less opportunity for victims to confront those directly responsible for torture.

Where victims have felt empowered by their role in the process, one knock-on positive effect has been their subsequent engagement in activism on the problem of torture in detention. Examples of applicants and family members turned spokespeople, mentors, or lawyers supporting others, can be found in all three states.<sup>397</sup>

The research also raised the question of whether the legal process can reframe society’s perceptions of victims, a significant question for the individuals as well as for society more broadly. This is of particular importance where labelling detainees as “enemies,” “terrorists,” “traitors,” or “dangerous criminals” has accompanied torture, as has so often been the case in the three states and others. In Turkey, it was noted that individual criminal cases shone a light on the human beings who were being subject to torture in detention, exposing the myths behind the popular conception that it was reserved for terrorists.

A striking example from Argentina, which highlights the need for this reframing, are the cases of sexual violence during dictatorship. Victims of rape during the Argentinian dictatorship, who were labelled as “traitors” or accused of romantic involvement with perpetrators, have been acknowledged through the judicial process as victims of sexual violence.<sup>398</sup> Litigation can and has played a role as a vehicle to see the human

beings that have been dehumanized by torture, and establish that they are “not responsible for their own suffering.”<sup>399</sup>

On the other hand, “counter propaganda” against litigating survivors, witnesses, lawyers, and family members in some cases suggests a very negative reframing of those bringing litigation. This is most striking in Turkey, where allegations of lying, “degrading the state,” and “propagandizing” for a terrorist organization have re-victimized individuals pursuing justice, necessitating further litigation and other action to expose and challenge the vilification.<sup>400</sup> Press coverage and debate on cases of torture and ill-treatment in detention in prisons in Argentina and in Kenya have at times focused more on victim’s alleged wrongdoing than on their victimhood.

Finally, it is noted that the nature of the litigation process, victim participation, and support, are clearly key factors in securing positive restorative impact, and experience varies vastly between different countries and contexts. For example, state-supported dictatorship trials in Argentina have offered therapeutic accompaniment and interdisciplinary support teams of lawyers, psychologists, and social scientists throughout the trials, which transformed the process and its impact on victims.<sup>401</sup>

It was also clear that the litigation process in all three states, as in others, can and on occasion has been traumatizing for victims: from feeling invisible, or ignored, or that they had to fight against judges who refused to see the truth, to being actively harassed by judges and prosecutors,<sup>402</sup> and marginalized by lawyers acting in their name.<sup>403</sup> On the international level, the restorative effect of some international human rights proceedings, such as at the ECtHR, may also be diminished by the limited scope for the direct participation of victims. By contrast, where the decision has been taken to conduct on-site visits and hearings at which victims have been heard, such as by the European Commission in Turkey or the IACtHR in Argentina, this has played an important role in maximizing the victim-focused impact of the process.<sup>404</sup>

### ***Recognition and Apology***

Several victims, family members, and advocates interviewed described the importance of recognition and acknowledgment as a critical dimension of reparation. The terms of judgments have themselves on occasion provided that recognition, and they have also prompted recognition by the state, institutions of the state, and individuals. In some instances, official apologies (generally in respect of historical as opposed to on-going injustice)<sup>405</sup> have followed. These developments may be important for society as a whole, and they definitely have significance for victims and survivors who derive a feeling that their suffering has been officially acknowledged.

This recognition may come not from judgments, but from policy statements that arise before, during, or after judgment. Nebahat Akkoç described how she cried as she

listened to the Turkish prime minister announce a “zero tolerance” policy toward torture, which she took as an acknowledgment linked to the litigation.

Of particular note was the impact of the apology issued by UK Foreign Secretary William Hague in the wake of the Mau Mau settlement. The filing of the Mau Mau case and its successful admissibility decision drove the British government to a settlement that, in addition to individual compensation, involved an official apology that brought recognition and satisfaction to victims. This historic turn was accompanied by the agreement to construct a monument to memorialize all victims from the emergency period (not just the immediate beneficiaries of the settlement). Like monuments erected in Argentina to honor the memory of victims of the dictatorship, the Mau Mau monument was described as transformative for the aging victims of colonial torture. In turn, it led to the Kenyan president’s public pledge to address concrete needs of the Mau Mau war veterans through welfare programs and recognition at national days, and to broader apologies and pledges of restorative justice to victims of torture under previous regimes in Kenya.

### ***Other Remedies and Reparations***

It is unclear whether and to what extent the human rights litigation surveyed has embraced a broad approach to reparations in line with current international law.<sup>406</sup> In Kenya in particular, a number of people have questioned the narrow focus on monetary compensation, rather than broader reparations recognized in international law. It was further noted that the compensation awards “often do not come close to matching victim needs such as specialized medical treatment and expunging of criminal records to restore reputations and livelihoods.”<sup>407</sup> Whether this stems from inherent limitations in the legal system’s approach to damages, judicial conservatism, or, uncreative lawyering as regards remedies sought, is a matter of dispute.

Thus, it is noteworthy how the Nyayo House litigation opened doors to a broader conversation on the need for more holistic reparations. This emanates from the realization that awards issued by the court were “neither sufficient to cater to the needs of victims nor fully responsive to the need to foster healing and instill corrective behavior in the affected institutions.”<sup>408</sup> This recognition has influenced law reform,<sup>409</sup> as well as the approach of lawyers and judges in later cases—on post-election sexual violence and counterterrorism-related abuses—where a broader approach to reparation has been pursued.<sup>410</sup>

The Argentinian courts’ and the Inter-American system’s approaches to cases concerning torture and ill-treatment in prison reveal how litigation has led to a range of creative remedies, including measures to enhance the security, medical support, and welfare of detainees, among other forms of reparation. Specific forms of reparations in

the dictatorship-era cases from Argentina have included access to information and the right to truth, sometimes pursuant to the concrete needs of victims such as finding the missing children of disappeared detainees.<sup>411</sup>

The most basic aspect of states' obligations in the face of wrongs is cessation, but the ability of slow litigation processes to meet urgent needs is questionable. Precautionary measures have occasionally been a vehicle to call on the state to stop torture and to protect victims.<sup>412</sup> Although by no means always or even typically the case,<sup>413</sup> some processes have themselves brought a degree of protection and harassment has stopped once litigation had generated a certain profile and level of attention.<sup>414</sup>

### ***Reprisals and Negative Victim Impact***

The discussion of victim impact cannot neglect the terrible reality of the negative consequences for victims that can flow from litigation. The cases reveal ample and shocking examples of brutal reprisals for bringing legal action. Turkish examples include: the first ECtHR torture and ill-treatment applicant, Aksoy, who was tortured and ultimately killed, and his father, who was repeatedly tortured for refusing to withdraw his complaints; Akkoç's description of persistent arrests, torture, and insults for complaining to a foreign court;<sup>415</sup> or the *Tahir Elçi and Others* case, which focused specifically on the torture and intimidation of lawyers. As one Turkish lawyer stated, clients often cannot withstand the pressure and withdraw criminal complaints for torture, leading either directly or indirectly to truncated investigations.<sup>416</sup> Perversely, false criminal complaints have been lodged against the torture victims, constituting a further disincentive to complain.<sup>417</sup>

The recent punishment of complaining detainees highlighted by the *Brian Nuñez case* signals the on-going nature of these problems. This case, like others, underscores the particular vulnerability of those subject to ongoing detention and torture, which poses a key challenge to the effectiveness of litigating torture in detention.

The litigation process itself can also be traumatizing.<sup>418</sup> Litigants' initial hopes are often dashed by impunity, unfulfilled expectations<sup>419</sup> and a sense of being, once again, the victim of injustice. Given the range of negative consequences, it is not surprising that many victims withdraw their claims, and the potential benefits of litigation are never realized.<sup>420</sup>

For several victims across the three states, an important part of the motivation in pursuing litigation was to ensure that the crimes do not occur again, that others do not suffer, and that lessons are learned. The impact for them is therefore closely linked to the other levels of impact explored below.

## Impact on the Practice of Torture

*“A case is actually useful when it modifies practices.”<sup>421</sup>*

It is virtually impossible to say whether litigation caused a reduction or cessation in the use of torture. This study has not engaged in the daunting task of trying to measure changing rates of torture and ill-treatment.<sup>422</sup> The chapters do however map out a connection—if not a causal relationship—between litigation and apparent shifts in the practice of torture. In some scenarios, the systematic torture and ill-treatment of political opponents ended with the regime that employed it—as with the fall of the Argentinian dictatorship. More commonly, progress has been gradual, fluid, and difficult to identify. In all of the states, there were strong indications of an overall reduction in torture and ill-treatment during the periods under examination,<sup>423</sup> but this was subject to repeated and consistent qualification across the three states. It was suggested in all three that torture remains prevalent in some “exceptional” contexts, often linked to security threats of one type or another (mainly terrorism or threats to the state in Turkey or Kenya, or high rates of common crime in Argentina). The research suggested that the incidence of torture, like attitudes toward torture, may still depend to some extent on who is being tortured and why.

There was remarkable consistency across the three states in the suggestion by interviewees that, more than straightforward reduction, there has been a transformation in the nature of torture practices. All three states saw a reduction in brutal forms of torture in favor of less detectable and visible forms, as well as increases in torture committed outside regular places of detention,<sup>424</sup> or taking alternative form,<sup>425</sup> and the outsourcing of torture and ill-treatment to third parties.<sup>426</sup> The shift to alternative measures or less visible forms of torture and ill-treatment (which may be a negative rather than positive outcome) was widely attributed to litigation as a vehicle for oversight and accountability.

The extent to which any such shifts are attributable to litigation is extremely difficult to ascertain. As one interviewee noted: “It is very difficult to affirm that strategic litigation of torture and ill-treatment has a direct impact on the eradication of the practice. It can be perceived but it is difficult to prove it on empirical bases, because it is very complicated to measure these practices [and] even when it is possible to identify a change in practice, this can respond to multiple causes, where strategic litigation is only one of them. It is difficult to isolate its impact.”<sup>427</sup>

Nonetheless, many interviewees believed that litigation, albeit usually alongside other action, contributed to reducing the incidence of torture and ill-treatment. As one interviewee noted: “It is more difficult for systematic torture to persist, as now torture is more visible and there are more institutions to help denounce and prevent these practices... If we look retrospectively, in the past there were high levels of invisibility that

made this practice normal. Nowadays, it may be a regular practice, but it is not seen as normal; it is clearly seen as an illegal practice.”<sup>428</sup>

Across the three states, interviewees described impact on the behavior of detaining authorities and personnel. One interviewee noted of changes in Argentinian prisons in recent years: “Usually they don’t hit, not because they don’t want to, but because they think they are observed. The impact is not because they internalized the discourse, but because they feel they are monitored.”<sup>429</sup>

Impact on practice is closely associated with and a consequence of other types of impact explored below. Litigating torture in custody has had an impact on legislation aimed at prevention, contributed to the establishment of monitoring mechanisms, raised awareness, forced accountability, and arguably contributed to the prevention of torture.

## Legal, Judicial, and Policy Impacts

*“The Nyayo House cases helped spark the conscience of constitutional reform”*<sup>430</sup>

Material impacts that provide measurable improvements to people’s lives by preventing or reducing torture may be the first goal of anti-torture litigation. But strategic litigation often aims at a larger goal that can produce improvements on a much greater scale, including changes in policy and jurisprudence. This section examines how litigation has had an impact on law, policy and institutions, with far-reaching ramifications.

### Legal and Jurisprudential Impacts

Litigation on torture and ill-treatment in detention has had a profound and lasting impact on legal standards in the three states, and internationally. Legal change has taken many forms, from broad constitutional development in Kenya, to comprehensive legislative reform (linked to European Commission processes and EU accession) in Turkey, to legislative and regulatory repeal and amendment in all three states. As the examples below illustrate, the law-making role of litigation has been incisive<sup>431</sup> if gradual, and it has arisen through the processes of litigation, through judgments, and through their implementation.

#### ***Constitutional and Legislative Reform***

Litigation has had a transformative impact on the legal framework governing torture in detention on the national and international levels. Significant legal reform processes

have arisen in all three states, often linked to broader political transitions and processes. In Kenya, for example, litigation was said to have exposed the need for constitutional reform and consolidated its significance.

More tangible perhaps is the impact of litigation on the large-scale legislative reform on torture and ill-treatment and detention rights that has taken place in Turkey within the last two decades, in close association with the long EU accession process. ECtHR litigation played a role long before that process got underway in exposing torture and ill-treatment and the shortcomings in the legal framework. Legal reform to remedy this situation has been incremental, unfolding in close relationship with ECtHR litigation, with tranches linked directly to the friendly settlement negotiations in the interstate cases, the 1999 reforms following and reflecting the *Aksøy* and *Aydin* judgments, and further legislative reform after the *Akkoç v Turkey* judgment was delivered in the early 2000s. In the wide-reaching reform and negotiation process that began after formal recognition of Turkey as a candidate country in 2004, ECtHR litigation provided key benchmarks for measuring the sufficiency of reforms undertaken.

Taken together, the myriad examples of legislative change linked to particular cases have contributed to gradual but significant normative shifts, developing and consolidating legal standards on torture and its prevention and response. Across states, a few specific areas of legislative impact stand out as having transformed the legal framework and are highlighted below.

**Legal scope of offenses and penalties:** The lack of appropriate torture and ill-treatment offenses, and the inadequacy of applicable penalties in Turkey and Kenya in particular, were exposed through litigation and the surrounding debate on torture and ill-treatment in detention. In Turkey, the old penal code provided for a weak and limited torture offense, applicable only to forcing suspects to “confess.”<sup>432</sup> The scope of the offense was broadened during the friendly settlement negotiations between Turkey and Denmark in 1999<sup>433</sup> and explicitly mentioned in the friendly settlement declaration.<sup>434</sup> Further improvements followed litigation in 2005,<sup>435</sup> (with the official reasons for reform cited as Turkey’s international obligations to effectively prevent and investigate torture).<sup>436</sup> At each stage of legislative reform, penalties were also significantly increased: up to 8 years in 1999,<sup>437</sup> and in 2005 to mandatory life imprisonment in case of death resulting from torture.<sup>438</sup>

In Kenya, the debate on the criminalization of torture was put firmly on the agenda by the increased focus on torture and ill-treatment brought about by the Nyayo House cases in particular, leading to significant (but still insufficient) legislative proposals and developments. The decision to define and criminalize torture in the National Police Service Act 2011 has been attributed to this shift.<sup>439</sup> But a definitional deficit remains: torture (committed by anyone other than the police) is still not criminalized. A bill that would change this has been pending for several years.<sup>440</sup>

**Legislative measures removing legal obstacles to impunity:** A crucial part of the litigation struggle in Argentina, Turkey, and to a lesser degree in Kenya, relates to the removal of legal obstacles to accountability. The Argentinian Congress's annulment of the amnesty laws in 2003 is perhaps the best known of the legislative changes directly associated with years of litigating around the obligation to investigate and prosecute, culminating in the *Simón* judgment of the Supreme Court that found the laws to be incompatible with international human rights obligations. In Turkey, laws requiring permission by the superiors to initiate an investigation against public officials or civil servants<sup>441</sup> had likewise impeded or blocked accountability, as the *Birtan Altınba* case and others illustrate.<sup>442</sup> Although the litigation failed to set it aside, the reaction to this and other cases contributed to the requirement being changed in 2003 as a part of the EU harmonization process<sup>443</sup> (though it has recently been partly reintroduced).<sup>444</sup> The statute of limitations for torture, another key impediment exposed by and challenged through litigation, has been amended in all three states.<sup>445</sup>

**Legislation on incommunicado detention and safeguards:** Given that prolonged detention and isolation have been deemed important contextual facilitators of torture and ill-treatment,<sup>446</sup> amendments to detention safeguards in the three states are of key importance. In Turkey, these changes are most wide-reaching, closely linked to a group of ECtHR judgments condemning the Turkish state for prolonged incommunicado detention and failure to meet its positive obligations of protection and response.<sup>447</sup> The most striking example is the Turkish bill reducing permissible incommunicado detention in the immediate aftermath of the *Aksoy* judgment.<sup>448</sup> But the process of reduction has been part of a much longer story of gradual, incremental change, with steady alterations to permissible periods of detention. A first round of changes in 1992<sup>449</sup> made improvements by reducing the period of incommunicado detention to 24 hours in ordinary cases, and to four days in collective cases, but security-related cases remained unaffected.<sup>450</sup> These provisions were condemned internationally,<sup>451</sup> and on March 6, 1997,<sup>452</sup> shortly after the *Aksoy* judgment and while others (such as *Aydin*) were awaiting resolution, a further reduction was introduced. Eventually, in 2002,<sup>453</sup> four days was eventually set as the maximum time for all types of cases, a significant development that was partly attributed to the persistent role of the ECtHR.<sup>454</sup>

Gradually, other safeguards have been introduced in Turkey, notably the right to access a lawyer while in police or gendarmerie detention. This was not guaranteed in Turkish law until the domestic law reform of 1992,<sup>455</sup> and again exceptions were made for the offenses falling under the scope of the State Security Courts, and during a state of emergency or martial law.<sup>456</sup> It was not until the March 1997 reform process, following the *Aksoy* judgment of December 1996 and the submission of the inter-state application in *Denmark v Turkey* in January 1997, that the right to access a lawyer was also recognized for security courts, and even then it remained subject to limitations.<sup>457</sup>

These exceptions and limitations for terrorism-related cases were further litigated, criticized, and squeezed with the reform of 2005, which established the right to counsel at all stages of proceedings.<sup>458</sup> The report of the Parliamentary Assembly of the Council of Europe states that improvements regarding the right to counsel were a direct impact of ECtHR cases, notably the *Salduz v Turkey* application.<sup>459</sup> In a small reminder of how the legislative impact of judgments goes beyond the states affected, it also noted how this judgment provided the basis for other states to make amendments to their criminal procedure law.<sup>460</sup>

The reduction of incommunicado detention (alongside the bolstering of safeguards) was described by several interviewees as among the most important developments in preventing torture and ill-treatment. Sadly, in the Turkish context much of this progress was being undone at the time of writing.<sup>461</sup>

### ***Other Areas of Law Reform***

The gradual shaping of Turkish law through the interplay between the ECtHR, EU accession processes, and domestic law reform is only one example of the range of ways in which the legal framework in all three states has been affected by the responses to torture and ill-treatment.<sup>462</sup> Other examples include the shaping of legislation and regulations prohibiting detention in police stations and governing prisoner release (contributing to declining incarceration rates associated with torture and ill-treatment) as a direct consequence of the *Verbitsky* case and other collective litigation in Argentina.<sup>463</sup> Likewise, statutory reforms undertaken in Kenya have been influenced by the legacy of torture and ill-treatment claims. For example, the Victim Protection Act 2014 was said to emerge from the acknowledgment and compensation resulting from the Nyayo House litigation.<sup>464</sup> Laws establishing reparations schemes for victims in Argentina were a direct result of negotiations before the IACtHR.<sup>465</sup> There is no such scheme for victims of torture and ill-treatment in Turkey.<sup>466</sup> Finally, laws governing procedure and evidence, including on the admissibility of torture evidence in Turkey and Kenya, while far from perfect, provide other examples of positive law reform following widespread claims of the use of torture and ill-treatment in custody.<sup>467</sup>

### ***The Development of National Jurisprudence***

The litigation on torture and ill-treatment in detention has also had a transformative effect on legal standards through the development of jurisprudence on the national and international levels. In some respects, these evolving standards have had an impact far beyond the torture context.

Courts have developed standards around many of the same issues—including the concept of torture, safeguards, and obstacles to impunity—that have been addressed

through legislative reform, particularly in the Turkish context. A few of the areas of noteworthy jurisprudential development are noted below.

Given the historical nature of most of the claims made in these and other torture and ill-treatment cases, one of the immediate and critical issues for consideration by the courts in many of these cases was whether the claims were time-barred. In the course of torture and ill-treatment litigation, courts in Kenya (in the *Wachira Wehere* case)<sup>468</sup> and Argentina (in the *Simón* case) have determined that statutes of limitations do not apply to “the fundamental rights and freedoms of the individual.”<sup>469</sup> Only in the Turkish system have the courts refused to allow individuals to bring historical claims for torture and ill-treatment on the basis of the statute of limitations in place at the time.<sup>470</sup>

In both Argentina and Kenya, innovative cases have developed the definition of and approach to torture, in line with international standards. Judgments reflect torture and ill-treatment as embracing psychological pressure (e.g. *Molina*, *Cisneros*, and *Nuñez*); prison conditions themselves (e.g. *Penitenciarías de Mendoza*, *Verbitsky*); and even unlawful deprivation of liberty and flagrantly unfair trial of an underage prisoner (e.g. *Arruga*).<sup>471</sup> The labelling of police and prison brutality as “torture,” and not as a lesser offense involving lesser punishment, has been said to serve important jurisprudential, restorative, and accountability functions. In a range of other respects, such as on standards of proof, evidence, and procedure, the development of standards and procedures through the cases themselves has been significant across states.<sup>472</sup>

### ***Contribution to International Jurisprudence***

The cases against Turkey stand out for their contribution to regional and international legal standards. *Aksøy v Turkey* was the first case in which torture was found before the ECtHR, and this and other torture and ill-treatment cases against Turkey have been referred to as having shaped not only the jurisprudence on particular rights but also the court’s principles of interpretation, which have a profound impact on a range of rights. The jurisprudence in relation to the elements of torture and ill-treatment, including psychological distress (*Akkoç v Turkey*), rape as torture (*Aydin*), and permissible length of detention before being brought before a judge (*Aksøy*), continue to be cited as the key authorities on torture and ill-treatment in Europe.<sup>473</sup>

Of key importance, and with a significant impact on other cases, was the court’s evolving approach to the burden and standards of proof. Presumptions that arise as to state responsibility in situations of detention broke new ground. Determining, for example, that the burden of proof falls to the state to explain injuries sustained during detention (*Aksøy* and subsequent cases) has been crucial to the ability of victims to sustain torture claims since then in light of states’ denials and failure to investigate.

This ECtHR jurisprudence on torture has in turn had an impact on the jurisprudence of other international judicial courts and bodies.<sup>474</sup>

## ***The Evolving Relationship between National and International Law***

It is a noteworthy feature of legal and constitutional reform in all three states that international human rights law has been given greater weight in the domestic legal system, and in some cases afforded priority status over national law.<sup>475</sup> At times litigation has also been the trigger to states' accepting new international obligations through the ratification of international human rights treaties. This is exemplified by Turkey accepting the competency of the ECtHR to receive individual applications and becoming a state party to the UN and CoE Conventions against Torture in late 1980s as a result of the friendly settlement talks in the *France, Norway, Denmark, Sweden, Netherlands v Turkey* case.

In addition, courts in all three countries have developed the practice of referring to international standards, opening up domestic judiciaries to international and comparative standards. Perhaps because of the relatively developed nature of standards in relation to torture, there are many examples from this study of international and comparative arguments being invoked by parties and relied upon by judges.

In Argentina, it was through regard to international law standards (in particular, Inter-American jurisprudence on the obligation to investigate) that courts set aside the amnesty laws and paved the way for the reopening of proceedings for crimes during dictatorship.<sup>476</sup> This was not a simple step but an evolution in approach by lawyers and judges through what was described as "a dialogue between the Inter-American System and the internal jurisprudence regarding which cases should be investigated, the non-applicability of statutes of limitation for these the crimes, and the *res judicata* issue."<sup>477</sup> Eventually, the courts rejected the impunity laws as inconsistent with human rights standards (*Simón*). In so doing, they established an approach to give direct effect to international law that has crossed over into decisions in some other contexts, including the litigation of torture and ill-treatment in detention today (e.g. *Verbitsky, Cisneros, Arruga*).<sup>478</sup>

Over time, a growing number of local courts have incorporated international standards into national jurisprudence on the full gamut of torture and ill-treatment issues.<sup>479</sup> They have gradually increased their vision outwards, beyond the IACtHR system to other sources (such as jurisprudence from international criminal tribunals, for example in sexual violence cases,<sup>480</sup> and soft law standards on prison conditions).<sup>481</sup> In this way, the relevance and impact of human rights law has been greatly enhanced.

A similar picture of progressively more regard for international human rights law emerges from the other two states, albeit less strikingly. In Kenya, the courts have set aside domestic provisions on the basis of the international right to redress.<sup>482</sup> In Turkey too, interviewees spoke of how the judiciary now routinely has regard to ECtHR jurisprudence in particular, changing the legal tools at the disposal of lawyers and courts, in large part as a result of the significant volume of EtCHR cases against Turkey over the years.

In turn, some national practice has contributed to standards internationally. Decisions of Argentinian courts on impunity have been cited in many other systems, including in Turkish courts, contributing to the corpus of international practice against impunity for torture.<sup>483</sup>

In conclusion, through constitutional, legislative, and regulatory change, litigation in Argentina, Kenya, and Turkey has contributed in a striking way to the transformation of the legal framework around torture and ill-treatment.

## **Impact on Policy**

The relationship between policy change and litigation is often dynamic and symbiotic. On the one hand, the post-transition regimes in Kenya or Argentina had already shifted from using torture and ill-treatment as a systematic instrument of state policy when the bulk of the Nyayo House and Argentinian dictatorship litigation took place. Arguably, this shift opened the space within which that litigation became possible, and/or enhanced that litigation's impact. It is perhaps unsurprising that many of litigation's most striking and obvious advances on the domestic level have evolved in sync with favorable state policies.

But the research also shows how, in less favorable political environments, litigation has played a role in influencing policy shifts in respect of torture and ill-treatment, its prevention and response. Even when unsuccessful, litigation has served to expose, catalyze reactions, and record: the litigation before the transition to democracy in Argentina, most of which was unsuccessful, added to the weight of international pressure. Post transition, one of the main ways in which the social clamor for justice was given expression was through litigation efforts to circumvent or overthrow the amnesty laws. This in turn helped to create an environment conducive to the development of policies of “truth, justice and memory” that came with later administrations. Moreover, once broad policy shifts have been achieved, and state policies and litigation goals aligned, litigation has had a role in sustaining political attention and influencing implementation and effect of those policies.

Regarding torture in Argentinian prisons today, litigation has played a key role in forcing the state to express policies of prevention and accountability in the face of political apathy. It has done so through a creative range of individual cases and collective action (*habeas corpus* and precautionary measures actions on the national and international levels respectively),<sup>484</sup> and increasingly through associated advocacy measures. While still not a central government priority, during the last 15 years the public policy of some state-run institutions<sup>485</sup> has explicitly shifted to include the prevention, registration, and official complaint of torture in detention as among their goals. Through judi-

cial resolutions in some cases, and settlements in others, a series of innovative spaces for dialogue were established, which led to the adoption of multiple specific policies and political commitments, legislative and administrative rules and protocols, and concrete measures affecting when, where, and how people are detained and punished.<sup>486</sup>

Questions remain as to the impact of these policies themselves,<sup>487</sup> and much more is needed in terms of institutional reform, accountability, and resources to tackle the structural issues they address. Some of the gains have been short-lived when litigation came to an end, even if they remained on the political agenda.

It is difficult to assess the extent to which litigation has influenced policy in Turkey, because it is difficult to parse the difference between the country's stated policy and actual policy. The explicit repudiation of torture and ill-treatment in public statements during the 2000s by Prime Minister Erdogan and Minister of Foreign Affairs Abdullah Gül were powerful indicators of a policy shift to which litigation contributed. The public assertion of a "zero tolerance" policy on torture, and that torture is a crime against humanity, are examples of clear statements of policy attributed to the EU harmonization and democratization process. The shift from systematic practices of torture and ill-treatment to such overt repudiation is part of what was described in 2015 as a "revolution in Turkey as regards torture."<sup>488</sup>

But some interviewees questioned whether what emerged in Turkey was a genuine shift in state policy, still less a revolution. Several interviewees emphasize the disconnect between the publicly stated "zero tolerance" policy and recent allegations of torture.<sup>489</sup> Despite these pressing questions and the vulnerability of any gains, the shift in stated policy on torture and ill-treatment in Turkey at a minimum changed the landscape within which anti-torture work was done.

In Kenya, a "pivotal moment"<sup>490</sup> arose in March 2015, when the president in his state of the nation address acknowledged episodes of torture, and pledged measures to introduce a reparations scheme and restorative justice.<sup>491</sup> The attorney general went on to publicly commit to paying all Nyayo House torture claims without contesting them in court.<sup>492</sup> This policy of acknowledgment and apology is thought to have been influenced by the outcome of the Mau Mau litigation, and the UK government's open apology and acts of commemoration. Within Kenya, it seems the emerging policies of acknowledgment, redress, and commemoration have been shaped by litigation.<sup>493</sup>

In all three states, the policy of the state towards the litigation itself has evolved. While wavering at times, all three states' policy is to give effect, or to be seen to be giving effect, to decisions of domestic and international courts and bodies. This is itself significant for the authority of the courts and the rule of law, and it has been a critical factor in increasing the potential impact of litigation.

In conclusion, the research suggests that the litigation process, often in concert with other processes, played a role in shifting official policy regarding torture.<sup>494</sup> The

change in stated policy is embodied in the explicit repudiation of torture and ill-treatment by all three states in all contexts,<sup>495</sup> reflecting the broader consolidation of the absolute prohibition on torture and ill-treatment. Torture and ill-treatment was never openly endorsed in any of the three states, and it may be misguided to believe a shift in stated policy will lead to actual changes in practice. The ultimate impact of policy statements depends on their implementation.

While the extent of policy shifts, and whether they are attributable to litigation, remains somewhat controversial, it seems incontrovertible that litigation has placed or kept the issue of torture on the political agenda. Multiple examples of this can be seen in the three states. ECtHR cases against Turkey quite literally put torture and ill-treatment, and its associated safeguards and standards, on the agenda of negotiations towards EU accession. Transnational and international litigation of torture and disappearances in Argentina helped ensure that accountability remained on the agenda in the Americas and internationally. Ongoing litigation, and broad public support for it, has ensured that successive governments of different political persuasions remain committed to the continuation of the dictatorship-era trials. Creative litigation on prison abuse has kept the underlying issue of prison reform and conditions of detention on the political agenda, despite an uphill political struggle. The Mau Mau litigation of colonial torture has restored or reinvigorated discussion of colonial accountability beyond Kenya and the UK.

In these and other ways, litigation has, at a minimum, helped ensure that the issue of torture in detention remains a relevant aspect of political discourse and on the agenda of states, the international community, and civil society groups. Exposing the issue to debate is an essential first step toward significant impact.

## **Institutional Impact**

Considerable institutional reform and development has emerged in all three states, though the extent to which this is related to litigation, (as opposed to broader movements such as EU accession, the constitutional review process, or transitions to democracy) is often difficult to ascertain. However, some noteworthy institutional developments emerged directly from litigation, as well as in response to deficits exposed through the litigation process.

### ***Creation of New Institutions***

The proliferation of Turkish institutions, and their limitations, has been set out in Chapter 3. They include the Ombudsperson's Office established in 2012 specifically to

enhance compliance and implementation with ECtHR judgments (although ironically compliance by the state with the Ombudsperson's recommendations has reportedly been lamentable). Numerous parliamentary commissions have also been set up to work on issues raised in ECtHR cases, but few of them have finished their work, and as a member of parliament bleakly put it "It is like cases going through a long and dark corridor without seeing a light in the end."<sup>496</sup>

These institutions are signs of impact in themselves, and by relying on ECtHR cases in their work they enhance the domestic relevance of that litigation. Despite the criticism of them, these institutions have undoubtedly had some positive impact, and may pave the way for greater impact in the future.<sup>497</sup> However, these new institutions have been frequently cited by the state in litigation and EU accession discussions to show positive momentum and to suggest that domestic remedies exist in Turkey. It can thus be argued that if these institutions are not effective and only represent cosmetic change, they serve to cover up state failure.

In Argentina, too, various institutions were established specifically to support the policy of "truth, justice and memory" and to facilitate the reopened dictatorship-era cases. Programs within the executive branch established mechanisms and vehicles to, for example, seek out information, accompany victims, and to stand as plaintiffs in criminal cases.<sup>498</sup> Specialized offices to investigate these cases were created at the Attorney General's Office and some local public prosecution offices,<sup>499</sup> among others.

Notably, as a direct result of cases on prison conditions as torture and ill-treatment in democracy, and often as part of settlements and implementation, the executive established mechanisms such as the Provincial Mechanism against Torture and the Ombudsman for People Deprived of Liberty.<sup>500</sup> A specialized office to investigate these cases at the Attorney General's Office<sup>501</sup> was set up by the executive, while a "control system" for monitoring prisons was established by the judiciary.<sup>502</sup> Interviewees said these monitoring institutions, whose origins are closely linked to litigation processes, have had a real impact in practice: "It is more difficult for systematic torture to persist, as now torture is more visible and there are more institutions to help denounce and prevent these practices."<sup>503</sup>

While there may be fewer examples of institutional development in Kenya, one important change is the establishment of the Independent Policing Oversight Authority (IPOA) which, alongside legislation on police accountability, is believed to have had some perceptible impact on torture by police.

### ***Impact on Institutions Responsible for Perpetrating Torture***

A very different and essential type of institutional change—one much more challenging to measure—is the cultural shift within institutions responsible for torture and ill-treat-

ment. Legal and political shifts in all three countries, and even a measure of individual accountability, have influenced institutional culture in police departments and prisons. The absolute guarantee of impunity for those who commit torture has eroded.

But the fragility of institutional reforms means that guaranteed impunity could return. As an interviewee from Argentina put it, “The lack of institutional reforms after dictatorship set the conditions that allow torture to persist.”<sup>504</sup> Limitations on institutional reform in this sense may be influenced by the focus of domestic litigation: on criminal accountability in Turkey or Argentina, or on civil damages in Kenya. By contrast, where collective action (e.g. the collective *habeas corpus* claims or Inter-American petitions) has by its nature focused on the need for structural and institutional change, it has at least forced discussion on addressing systemic institutional problems and reform.

### ***Impact on the Judiciary and Judicial Process***

A crucial dimension of litigation impact relates to the impact on the judiciary itself, and on the justice system more broadly. Weaknesses in judicial independence, lack of capacity, and absence of will to give impartial effect to the law have been an impediment to effective strategic litigation. But at the same time, litigation has influenced judicial awareness, attitudes, and approaches.

The civil claims by Nyayo House survivors were said to have had a “demonstrable impact on institutions such as the judiciary, which was seeking to redeem its estimation in the eyes of the public after it had been considered complicit in the acts of torture and arbitrary detention suffered during the KANU regime.”<sup>505</sup> This is best seen in statements emanating from the bench, such as those of M.S.A. Makhandia, a judge of the High Court who in a 2008 decision stated: “We are no longer in the 1980’s where the fundamental rights of the citizens were trampled upon by the police. The courts of law could not stand up to challenge such conduct. ... [T]he courts chose to see no evil and hear no evil, giving rise to the infamous Nyayo House torture chambers....It should never be allowed to happen again in this country.”<sup>506</sup>

Many interviewees felt that successful torture litigation made judges more inclined to grapple with torture and ill-treatment, and to define particular acts in particular contexts as “torture” in subsequent cases. In addition, the possibility of litigation against Argentina or Turkey being conducted elsewhere—whether in supranational human rights tribunals or foreign courts—has been described as sending “shock waves” and catalyzing a more proactive approach by domestic judiciaries.<sup>507</sup> The training of judges was also said to have made a difference. In Turkey this was an integral aspect of the implementation of ECtHR judgments and settlements, and necessary to meet the requirements of the EU accession process. Judicial training on human rights is then

one form of impact of litigation. As for the impact of those trainings themselves, Riza Türmen, a former ECtHR judge, acknowledged that their impact varied significantly, in part because some high judicial members of the Court of Cassation felt they did not need training. But Türmen argued that training focused particularly on younger judges had greater impact.<sup>508</sup>

Several interviewees, across states, spoke of the significance of gradual but perceptible shifts in judicial attitudes over time, attributable in part to the process of litigation, alongside myriad other incremental changes described elsewhere. Judges and prosecutors in Turkey described a significant change the 1980s, when judges would have to take into account the reactions of higher authorities before starting a sensitive investigation.<sup>509</sup> Others in Turkey were more skeptical and referred to slight shifts, and sometimes to more subtle forms of continuing judicial deference to the state, and a continuing deficit in judicial independence, seen as a major impediment to effective justice in Turkey.

There is no doubt however that progress in the development of an outward-looking judicial approach is seen across all three states. This has already been noted for its influence on jurisprudence, but it reflects also an opening up of judges to comparative and international approaches, to the international judicial community, and human rights values. In Turkey, the coup trials and *Manisa Youth* cases, for example, involved close attention to ECtHR jurisprudence. In Argentina, the Supreme Court's seminal *Simón* decision to overturn amnesty laws was grounded in Inter-American Court rulings.<sup>510</sup> In turn, *Simón* has been cited by courts in other states for its approach to incorporating international standards in domestic judicial deliberations.<sup>511</sup>

The litigation explored here has had an important impact on the creation of new remedies and litigation procedures. One very direct example is the introduction of the right to individual petition to the Turkish Constitutional Court, established in reaction to the onslaught of litigation before the ECtHR, in an attempt to create a domestic remedy that might stem the flow of cases to the ECtHR. This was described by the Council of Europe Parliamentary Assembly as a clear example of "the direct impact of the European Convention of Human Rights in States Parties."<sup>512</sup> While potentially positive, the ultimate impact of these remedies on torture and ill-treatment remains uncertain at this early stage. The arguably problematic impact—in terms of impeding access to the ECtHR—is already apparent, as the ECtHR has indicated its willingness to defer to Turkey's Constitutional Court.

Another novel remedy to emerge from the litigation process itself was the introduction of the collective complaints mechanism in Argentina, through the acceptance of collective *habeas* cases. As one interviewee noted, this was trail-blazing litigation, and enabled similar remedies to be pursued by others in the future.

Changing litigation rules, procedures, and practices in the context of human rights processes is evident in more subtle forms in all three states. In Argentina, the nature and scale of the reopened dictatorship-era trials brought forth innovations in the rules of procedure and evidence, designed to meet the challenges of multiple victims and facilitate the proceedings. As one interviewee noted, “The Judiciary was not prepared to investigate complex crimes and to develop hearings with more than two plaintiffs, so they made changes to adapt the system.”<sup>513</sup> These innovations in the established criminal law rules of procedure and evidence are likely to have broader, sometimes controversial, implications for criminal procedure beyond cases of crimes during dictatorship.<sup>514</sup>

Another example of how procedures are shaped through the practice of litigation, with positive longer-term human rights repercussions, is how *amicus* briefs that had been alien to Argentinian procedure came to be accepted through the “right to truth” cases<sup>515</sup>

In addition, interviewees pointed out how approaches to victim participation in legal processes has been shaped by large-scale torture and ill-treatment cases. In Kenya, adaptations in procedure to accommodate the Nyayo House cases were described as the creation of a “super-highway” of human rights litigation. In Argentina, a change in the victims’ role during criminal processes and their interaction with the judiciary meant “[t]here was also a change in the way judiciaries contacted and listened to the victims. They realized it was necessary to change the way they asked questions.”<sup>516</sup> This has had a lasting impact on litigation practice beyond these cases.

### ***Impact on International Institutions***

A final observation relates to the positive institutional impact that litigation can have on human rights courts and bodies themselves. Some of the early Argentinian challenges helped to shape the Inter-American Commission’s approach to impunity and amnesty, which it has continued to develop in many cases since. More notably, the Turkish ECtHR cases have been said to have “educated” the ECtHR on the nature of violations within Europe, and the need for greater rigor and more “careful scrutiny” in the discharge of its functions than it had employed before 1997. The gravity of the situation prompted the development of on-site hearings. It has been argued that the Turkish litigation contributed in the court’s reaching a strong level of supervision, which has been essential in subsequent cases of massive violations.<sup>517</sup>

### **Impact on Individuals Responsible**

This study reveals many cases in Argentina, and some in Turkey, in which individuals have been held to account for torture. But it also finds very serious limitations on

individual responsibility. The problem of impunity remains widespread, and advances in accountability for some actors appear to contrast with pervasive impunity for others.

In Argentina, the impact of the dictatorship-era cases on impunity is remarkable on many levels. The sheer volume of individual convictions (2,166 defendants, 622 convicted, 57 acquitted) sends a strong anti-impunity message, symbolizing litigation's ability to hold individuals to account many years later. Other litigation, including criminal processes in Europe, alongside other social processes, contributed to impelling national authorities to ensure that justice could be done at home. Massive political support for the trials, and organized civil society coalescing around criminal accountability, were critical.

Conversely, while not absolute, impunity remains rife for on-going situations of torture in detention. There are few convictions in these cases, and those are usually focused on the direct author and not superiors, thus failing to grapple with the structural nature of torture. Indications are, however, that those cases have resonated within places of detention and made officials at least more cautious in their practices. Litigation has on occasion also created push-back in various forms, from direct reprisals to reactions by authorities feeling persecuted and attacked.<sup>518</sup>

Impunity in Turkey was described as "administrative state policy, a custom."<sup>519</sup> Until that changes, litigation will only have a limited impact. The blatant failure to investigate, common in the 1980s and 1990s, has changed, but investigations are often ineffective and "exist just on paper."<sup>520</sup> Practices have also evolved to circumvent the impact of legal reform, for example by charging torture as a lesser offense to which the statute of limitation still applies.<sup>521</sup> But when, exceptionally, criminal cases have led to conviction, they were believed to have had considerable chilling impact on individuals and authorities.

Where domestic justice has failed, international cases have sought to establish accountability, but implementation has been weak in this area. Addressing impunity is commonly the most challenging aspect of human rights litigation implementation, and the states in this study are no exception.<sup>522</sup>

The research suggests how other form of litigation, beyond criminal processes, can have a degree of impact on individuals responsible, contributing to awareness and a sense of being accountable. Even regional processes, used in Turkey and Argentina, which address state (not individual) responsibility, have generated a sense of accountability among individuals. It was noted how police officials in Argentina knew about Inter-American cases (such as *Bulacio*) and had a clear sense that "if they committed violence, they could be tried not by the Argentinian judiciary, but by international bodies."<sup>523</sup> Accountability through administrative and disciplinary processes has been less utilized as a litigation tool or strategy, but where invoked, lawyers suggest an unusually direct impact on individuals, institutions, and policy.<sup>524</sup>

Interviewees recounted many individual stories of how litigation generated apprehension among perpetrators at the prospect of accountability, in several cases prompting disclosures by the perpetrators themselves. Individual accountability is one essential measure, alongside institutional reform, of the impact of strategic litigation on the practice of torture and ill-treatment.

## Non-Material Impacts

Strategic litigation can generate multiple effects, from material improvements, to changes in government policy and court jurisprudence, to the creation of new institutions. But there is another category of change attendant to strategic litigation: the less quantifiable impacts which can be seen in changes in attitudes and perceptions. These hard-to-measure impacts may include the way strategic litigation can influence views of the historical truth and feelings about reconciliation and healing. Finally, in assessing anti-torture litigation, it is necessary to consider how litigation can spur other victims to come forward and engage in further litigation.

### Truth-finding and Historical Narrative

#### *Access to Information and the Right to Truth*

Many of the cases discussed have served to clarify and expose facts about torture and ill-treatment. The Argentinian experience in particular features litigation directed specifically at obtaining information and evidence, including the truth trials, freedom of information requests, or petitions to access official information.<sup>525</sup> In addition, a crucial aspect of the impact of other litigation processes has been the exposure to public view of torture, and the misrepresentations used to obscure it.<sup>526</sup>

It was clear from victims, activists, and lawyers that litigation has also contributed to the historical record. This has proved useful in subsequent litigation, at a time when the conditions were more favorable, or it has simply informed the collective narrative around torture and ill-treatment. To varying degrees, the processes have themselves fulfilled a truth-telling function, though the extent of this is a matter of debate, as the Turkish ECtHR cases illustrate. One commentator has suggested that the proceedings against Turkey provided a forum for truth telling by victims, and the creation of a historical archive, and argued for “the ECtHR as a truth telling commission.”<sup>527</sup> Others are more qualified, recognizing that the cases served to elucidate important basic facts around violations, but questioning whether a fuller truth emerged regarding the nature

of violations, their causes, and the parties responsible.<sup>528</sup> False information provided by the government and the use of litigation to present counter-narratives have also impeded the truth-telling function.<sup>529</sup>

In some situations, in Kenya and Argentina, litigation has played a role in a dynamic relationship with other truth processes. In the absence of any such process, as in Turkey, the contribution to the historical record of human rights litigation is more challenging, but all the more important.

### ***Acknowledgment, Reconciliation, and Healing***

An important related question is the extent to which litigation has contributed to acknowledgment of wrongs by the authorities and/or the courts.

Acknowledgment by the UK of colonial-era torture following the launch of the Mau Mau claims stands out. This case brought about an unprecedented act by the British government in offering a statement of regret<sup>530</sup> and the construction of a memorial monument<sup>531</sup> that reopened an international debate on the legacies of colonialism and a national debate on how the veterans of the freedom struggle have been treated since independence. One survivor described this as the beginning of the journey towards reconciliation.<sup>532</sup> A notable development since the unveiling of the monument has been the government's efforts to address the welfare of Mau Mau war veterans.

The clear repudiation of torture and ill-treatment by the authorities in Argentina underpins the proactive state policies regarding truth and justice. As the reopened criminal trials expand their scope, they gradually reveal the causes of and contributors to the systemic policy of torture and disappearance. While some debate remains as to the extent of the trials' contribution to social cohesion, there is overwhelming support for the trials, which are described as having become ingrained in the social fabric of Argentinian society. While the commitment to "*nunca mas*" is questionable in light of on-going torture today, collective *habeas corpus* and the criminal cases concerning contemporary torture have led to important official acknowledgment of structural prison problems and torture in the Federal Penitentiary Service today, as seen in the *Mendoza*, *Verbitsky*, and *Nuñez* cases for example.

In this respect, a striking contrast emerges with Turkey where there has not been such truth telling, acknowledgment, and reckoning. There is no doubt that torture and ill-treatment litigation in Turkey and before the ECtHR has exposed facts and failures, and shone a light in dark corners. But whether it has contributed to moves towards a comprehensive approach to acknowledging and addressing the past is far less clear. Turkey's failure to make peace with the past was described as a key factor in the continuation of serious human rights violations.<sup>533</sup>

## **Social and Cultural Impact**

As one interviewee put it, the survivors who dared to litigate torture contributed to a certain degree of public condemnation for the phenomenon.<sup>534</sup> However, with regard to that condemnation, another noted that much depends on “who tortures whom.”<sup>535</sup> A resoundingly similar sentiment, that abhorrence of torture and ill-treatment has grown, but has limits, was echoed in interviews in Kenya and Argentina.<sup>536</sup> Public prejudice towards detainees was identified as an on-going challenge in all three states.

Media coverage is a key contributor to litigation’s ability to alter public opinion. The nature of that coverage, like public opinion itself, has varied considerably over time, and depending on the issue, the context, and the individuals involved. There are examples of helpful exposure of issues to public gaze, and others of a rhetoric that may be seen to almost legitimize torture, promote official positions, or further stereotype victims.

Media coverage of torture cases has been very selective. Factors influencing coverage appear to include the nature of the accused, and of the victims, freedom of the press (notably in Turkey), and the nature of the litigation process (for example civil claims have generally attracted less attention than criminal cases). In Turkey, false accounts presented to the judiciary were also then presented to the public, limiting broader social impact, and acquittals have been portrayed as proving that allegations of torture and ill-treatment were fabricated.<sup>537</sup> Though lack of freedom of the press continues to influence the impact of litigation, the litigation contributed to provoking a more questioning approach by the media over time.<sup>538</sup>

Research revealed that the media often focused on torture that was linked to criminal cases. In Turkey, torture was made visible to the public through individual cases such as *Bedii Tan* and *Siddik Bilgin*, which exposed not only the torture practices but the lies and misinformation proffered by the state.<sup>539</sup> Over time, this ignited increased public awareness. As one account noted, “In the beginning when police said that a terrorist organization was found, the press believed that. When we explained the real situation, it went to the opposite direction.”<sup>540</sup>

In Kenya, coverage has increased over time. It has been suggested that “litigation has over time contributed to candid national discussions on Kenya’s legacy of torture and contributed to the aspirations of truth, healing and reconciliation for victims and survivors.”<sup>541</sup> There was a dynamic between lodging the Nyayo House cases and the creation of the TJRC, and between the courts’ official recognition of torture and the TJRC’s efforts to pursue truth and reconciliation.<sup>542</sup>

## Mobilization

### ***Strengthening Civil Society***

An important ripple effect stemming from the litigation discussed in this report has been the strengthening and mobilization of civil society, and its engagement in litigation and in the human rights struggle more broadly. Litigation has been both a shared goal and a mobilizing force in all three states.

Litigation has led to the establishment or strengthening of survivor groups and networks such as the National Victims and Survivors Networks (NVSN) and the Mau Mau War Veterans Association (MMWVA) in Kenya. The cases formed a central concern for various civil society groups to coalesce around. In Argentina, the struggle against impunity has defined the human rights movement and contributed to its development.

It is noteworthy that many torture victims and relatives of victims involved in litigation have subsequently become political actors and human rights advocates. This is true of some members of the *Madres* and *Abuelas* groups in Argentina. In Turkey and Kenya, examples also arose of victims, such as was Nebahat Akkoç<sup>543</sup> or Wachira Waheire,<sup>544</sup> who became rights activists and lawyers dealing with torture claims.

### ***Catalyzing Others and Restoring Faith in the Rule of Law***

One important function of strategic litigation is to catalyze further complaints and litigation. This was mapped out most clearly in the discussion of the collective *habeas corpus* claims (*Verbitsky* and *Mendoza* cases), but similar accounts emerged from interviewees in Kenya and Turkey. The Nyayo House claims have led to further claims, and, until recent events stemmed the flow, Turkish ECtHR cases led to more approaches to the European Court. A Turkish journalist reported that as the number of convictions for torture offenses increased, and following the *Manisan Youth* case specifically, more people litigated torture (and the judiciary in turn became more wary and sensitive about torture offenses).<sup>545</sup> Ms. Akkoc states that her and a few others' pioneer applications encouraged other people to bring their cases before the ECtHR.<sup>546</sup>

Given low levels of reporting in torture and ill-treatment cases, the value of litigation in catalyzing complaints may itself be significant. Its broader importance is closely linked to the broader societal impact of litigation as a rule of law enforcer. Productive litigation has in several cases been described as at least giving hope to those whose rights have been violated, and enhancing resort to—and sometimes respect for—the judicial system. In this way, litigation can, over time, contribute to enhancing the rule of law and consolidating democracy.<sup>547</sup>

# Conclusion

The study has elucidated a vast array of ways in which litigation has had an impact, positive and negative, direct and indirect, immediate and generational. In each state, there are many examples of direct, material impact; legal, judicial, and policy impact; and non-material impact.

Most straightforward is the diverse range of material impacts associated with the litigation of torture in detention in the three states. Compensatory damages, administrative sanctions, convictions, sentences, the closure or reform of detention facilities, and the erection of monuments are among the concrete changes that have flowed, often directly, from the cases explored.

Legal, judicial, and policy impacts are also readily apparent on multiple levels. From the direct legislative or jurisprudential changes to rules on statutes of limitations for example, which took place in all three states through litigation, to the broader normative shifts on duties to investigate and prosecute, an indisputable impact has been felt on legal standards nationally and internationally. The transformation of judicial practice, attributed quite directly to the processes in all three states, is also remarkable. Specific rules on proof and participation, the creation of new remedies or novel approaches to reparation, and the broader acceptance of international standards as part of the judicial arsenal, have the potential to leave a deep and lasting influence on human rights protection.

The contribution of litigation to the adoption of wide-reaching policies, of accountability or reparation for torture victims, or in the assertion of “zero tolerance” policies, leaves little doubt policy has responded to litigation.

More difficult to discern perhaps, but at least as important, are what have been categorized as the non-material impacts of litigation. Many of these are immeasurable, and this study has not sought to provide such measurement. But interlocutors from among victims groups, authorities, or civil society suggest an evolution in the way people feel, think, and behave that is closely linked to the role that litigation has played. For victims, this has taken the form of declaratory relief, participation and empowerment, and feelings of vindication that influence individual and collective processes. Changes in awareness of torture—its existence, nature, victims, and effects—on part of the public, judiciary, and political actors has been an area of clear impact, made possible by the exposing power of litigation. Litigation has influenced the terms of the conversation, informed perceptions, and shaken some the myths and prejudices on which torture depends. Significant non-material side effects include the energizing of civil society and expansion of the ranks and broadening of constituencies, to continue the anti-torture struggle.

Whether or how profoundly attitudes and behavior have changed is a matter of some debate. But across the three countries, interviewees suggested that, at a minimum, the absolute nature of the prohibition was clarified and that some chilling effect on behavior within relevant institutions was perceptible. Torture was no longer normal, government explanations no longer taken as fact, and impunity of perpetrators no longer absolutely guaranteed.



# Conclusion

To describe the litigation of torture and ill-treatment in Argentina, Kenya, and Turkey as challenging for victims and human rights advocates is an understatement. The repercussions of the litigation discussed in this report have included direct reprisals involving death, further torture, and arbitrary detention; public vilification as traitors and liars; criminal action for “propagandizing for terrorism;” and sometimes simply the heartbreak of seeing justice, once again, denied. Legal, political, and practical obstacles to effective litigation emerge recurrently across the three states. Poor statistical data, limited access to detainees and evidence, low reporting rates, “exceptional” legal frameworks, judiciaries that lack independence or capacity, and entrenched cultures of impunity, are among the many impediments that have had to be overcome.

Perhaps most remarkable in this context is the consistency and tenacity with which victims, survivors, lawyers, and activists have continued to seek recourse from the courts. In doing so, they have ducked obstacles, confronted challenges, and seized opportunities, leading to an impressive panorama of human rights litigation in the three states in recent decades.

This report highlights myriad ways in which this body of practice has brought about change. It has had an often transformative effect on legal frameworks, whether through contributing to constitutional or legislative reform, or by shaping a body of internationally focused, rights-receptive jurisprudence, or by promoting the consolidation of international standards. It has effectively created new domestic remedies, and altered rules and procedures of litigation in a generally more victim-friendly manner. It has been an invaluable source of information, exposing facts concerning violations, and the myths and fallacies that have been used to justify torture. It has given a voice and sought to restore dignity to persons dehumanized by their suffering. It has broadened

civic space, adding participants to the conversation and helping reframe its terms. It has at times strengthened and increased the reputation and influence of civil society and mobilized action against torture within broader constituencies. It has helped contribute to the legal, moral, and political condemnation of torture, consolidating the sense that, while torture may not be eradicated, it can never be accepted.

While the ultimate contribution of litigation to the prevention of torture and ill-treatment is particularly difficult to assess, research suggested that litigation has had a discernable impact on the practice. By limiting incommunicado detention or puncturing the shroud of impunity, it has changed the enabling environments within which torture has thrived in these states and the world over.

The three types of impact identified in the preceding section are overlapping, interconnected, and fluid. Rarely have they been ends in themselves; more often, they are stepping stones towards other levels of impact. Each gain provides a tool—legal, symbolic, discursive, or informational—that can be leveraged towards further impact. The report thus demonstrates the need to see impact through various lenses and perspectives. Some short-term litigation gains, or even losses and setbacks, look more like slow contributors to positive change if assessed through a suitably longer timeframe. The report also shows that litigation has rarely achieved its goals in isolation. Successive litigation in stages over time has contributed to progress that no single case could have achieved, and the interplay of litigation and other processes reveals an impact that goes far beyond litigation itself.

Of course, one wishes that litigation could have done more. Torture remains pervasive, albeit less systematic and overt than during some of the historic low points explored here. While torture may be openly and publicly condemned, political commitment to eradication, and public opprobrium, appear somewhat variable and wavering. Tellingly, the extent of public concern, if any, may depend to some degree on the question who tortures whom, and why. Impunity has been eroded through litigation, but in almost all contexts, individual accountability remains exceptional. While legal, social, and political progress has been real and multi-dimensional, it has also been erratic and inconsistent, with strides forward and steps back. The fragility of gains underlines the importance of consistent ongoing work through litigation and other action to achieve impact and to sustain it.

Given the diversity embraced by this study, it is difficult to reach clear, generalized conclusions on litigation impact, still less on the myriad factors, causes, and contributors that influenced that impact in these diverse contexts. The research does however indicate certain tentative conclusions, based on comparative experience, regarding factors or conditions that influence the nature and degree of impact. Some of these may be beyond the control of advocates, but others may be relevant to the development of litigation strategies and practices for the future.

## Sustained Strategic Litigation and Follow Up

The research suggests that impact is greatest, in terms of legal, political, or social change, where litigation is sustained and incremental. The cumulative impact of clusters or lines of litigation has been illustrated throughout this report. By generating and maintaining a level of attention on the part of politicians, the judiciary, and the public that single cases cannot, and by building on gains, filling gaps, and responding to counter attacks, successive litigation has been a formidable force for change.

The Argentinian litigation of torture in dictatorship is the clearest example of incremental litigation involving diverse litigation tools and strategies. Each of its dimensions, from unsuccessful (but exposing) legal action domestically, to alternative truth trials, to the intervention of the Inter-American system and foreign courts, to constitutional challenges against the amnesty laws, built on and adjusted to the opportunities created by what went before. The impact was ultimately extraordinary, as modest impact at each stage moved towards the unprecedented level of accountability and wide-reaching social and political impacts identified in this report.

Perhaps the most striking legal shifts seen in this report, the incremental changes to Turkish legal standards on torture, also illustrate this point. Successive ECtHR cases filled gaps left by previous case law, or responded to legislative reactions, nudging forward law reform and consolidating positive jurisprudence of international relevance. The collective *habeas corpus* litigation on treatment in Argentinian prisons was creative and powerful, and attention was sustained longer than may normally be the case due to the protracted procedure of implementation, which ensured follow-up negotiations and accounting before a judge, critical to the impact of those cases. However, when the procedure of the case was closed, and no follow up was possible, the issue could more easily be set aside as having been “resolved,” and progress receded.

In Kenya, it was their sheer volume that made the Nyayo House cases politically significant, forced the judicial system to adjust and reform, and prodded the media to pay attention. The litigation was somewhat more monolithic than its Argentinian counterpart, though, as a series of individual cases all seeking damages, rather than diverse litigation that challenged the problem from different angles and built on what had gone before.<sup>548</sup>

## The Role of Civil Society

The importance of follow up and sustained action is closely linked to a second factor shaping impact: the role of relevant actors, including civil society. The importance of civil society’s role is a leitmotif of this study. It is linked to the development of broader

goals and strategy, to coordination, and to ensuring the complementarity of litigation with broad political and social advocacy, capacity building, awareness raising, and other measures not naturally within the reach of litigators. Litigation has arguably been most effective when it has been actively supported by—and used to support—civil society, allies, and partners.

For a host of reasons, civil society's role is most pronounced in the Argentinian dictatorship cases. It has also been key in Turkish cases at the international level, and is present but less instrumental in the Kenyan experience. In all states, interviewees described civil society as central to the impact that has been achieved. Conversely, attacks on civil society, or a degree of fracturing of civil society, have at other times hampered the full effect of litigation. In the Kenyan processes for example, it was emphasized that an important initial catalyst for the Nyayo House cases was the coordination and organization of victims and potential claimants. At the same time, perhaps because the litigation was made up of many individually-lodged claims, they did not involve organized Kenyan civil society in a primary role from the outset, which influenced the strategic development and impact of the cases. When civil society engaged in a more concerted way in later cases and external donors lent support, it was described as one of the critical factors in relaunching the dormant Nyayo House cases.

The development of civil society in Turkey, and networks of support from outside the country, have been described as important in enabling the ECtHR litigation to go forward, though reprisals and repression of civil society have impeded domestic impact. In Argentina, civil society was closely connected to the litigation of torture under dictatorship as driving actors, supporters, and facilitators. In relation to torture under democracy however, their engagement has been incremental, and it is noteworthy how the shift to more active engagement has been instrumental to recent progress in those cases, especially regarding victim impact, the political agenda, public debate, and accountability.

Even less central forms of civil society engagement, such as through the increased resort to *amicus curiae* third party interventions in torture litigation, have also enhanced impact, by drawing in comparative and international expertise, informing processes, rolling out legal gains across systems, and piquing judicial and media interest, for example.

## Linking Litigation and Advocacy

This report makes clear how the dynamic interplay between litigation and other forms of legal action contributes to change. None of the litigation experiences in this report support the view that litigation must, or perhaps even can, unfold pursuant to a fixed,

long-term strategic litigation plan. Argentinian groups working on dictatorship-era torture coalesced around shared priorities and evolving goals, but interviewees openly acknowledged how little of what happened they had, or could have, anticipated or planned. Their strength lay in part in their flexibility to respond to needs and opportunities and to develop continually evolving strategies.

The importance of the symbiotic relationship between litigation and non-legal advocacy is clear. For groups engaged in advocacy, international outreach, public demonstrations, and media campaigns, litigation has often been a useful advocacy tool; while for litigators, advocacy has conversely been a useful tool in myriad ways, including regarding implementation. There are many illustrations of how harnessing litigation to broader strategies, and employing it in conjunction with other tools, has contributed to impact that litigation alone could not aspire to. The fact that the litigation unfolded as part of evolving mobilization by affected communities and involved civil society actors—alongside allies within government, the legislature, national and international bodies, and others—transformed the value and impact of the Argentinian litigation. The importance of law working alongside discourse is clear from the powerful symbolism of the headscarves worn by the *Madres* and *Abuelas* of the disappeared, as well as the Saturday Mothers movement in Turkey. This may have been less true of the Kenyan experience, where one criticism was that while the Nyayo House litigation was important, undue focus on what happened inside the courtroom rather than strategies beyond its walls limited its potential impact.

The media's role as a vehicle for shaping national and international public opinion was a factor of obvious importance to the impact of the litigation studied. In the lengthy Argentinian quest for justice, the sustained interest of the media was key. The media's relative lack of interest in the cause of torture and ill-treatment in Argentinian prisons today is a major hindrance to advancing debate and policy change. Impediments to free press have been identified as among the factors hindering the full impact of Turkish litigation. Securing engaged media attention emerges clearly as both challenging and essential to maximize the impact of litigation in the contexts in which torture and ill-treatment continue to emerge today. The importance of media interest is closely related to the importance of high-profile interveners and supporters of cases, such as the political interventions of Colin Powell in Turkey and the Elders group in Kenya.

The impact of litigation has also been enhanced by the dynamic interaction with other human rights bodies, whereby reports of CAT, CPT, and Special Rapporteurs have been used to establish facts or legal standards. The impact of litigation has been multiplied through its use by those bodies as authoritative binding determinations of responsibility, clarifications of legal obligations, or as catalyst to further monitoring or pressure.<sup>549</sup>

Given the ambitious and challenging nature of strategic human rights litigation, it follows that sustained long term and multi-faceted investment by a range of actors, including committed and stably-funded civil society, is essential.

## Litigation, Politics, and Timing

Litigation impact has been particularly powerful where it has run in dynamic relationship with political processes, and taken advantage of political moments of opportunity. The report clearly shows the close interconnection between litigation and politics on the national and international level. The waves of litigation in all three states have accompanied and interacted with important political transformations, which have contributed to impact. The Turkish EU accession process was the wind in the sails of the ECtHR litigation, while that litigation determined the direction and result of legislative reform.

Argentina's was a long voyage wherein litigation has confronted and accompanied state policy at various stages, often adjusting course, dodging obstacles, and seizing opportunities on a path that eventually led to wide-ranging social and judicial responses. Many of the key decisions, such as overturning amnesties or setting up reparations schemes, were ultimately political decisions, but they were impelled and influenced by litigation. The litigation of torture is perceived as having contributed to the transition to, and consolidation of, democracy in Argentina. In Kenya, the role of the Nyayo House litigation is closely connected to the political and constitutional changes and the process of recognizing torture during colonialism and post-independence.

At the same time, litigation has made important contributions in unfavorable political contexts. In fact, litigation is often essential precisely when it has gone against the political tide, creating pressure, forcing acknowledgment and change, and seeking to influence political opportunities and secure justice when there was no political will. But it is also true that the ability of those processes to achieve certain levels of impact—such as the comprehensive legislative and institutional changes in Turkey or Kenya—are undoubtedly influenced by the political context.

## The Courts and Judicial Processes

Inevitably, a key factor influencing the impact of the judicial process in all three countries has been the judiciary itself. Much of the litigation under review has been hampered by a lack of judicial independence and capacity. The three countries saw some improvements in this respect, possibly influenced by litigation's contribution to judicial

education and strengthening—which may suggest a more positive role for domestic courts in the future.

The willingness of the judiciary to participate in long-term “jurisprudential evaluation”<sup>550</sup> clearly was a crucial influence on the normative impact of the litigation process. The increasingly outward-looking judicial tendencies perceptible across all states emerged as a significant factor in enhancing the potential impact of domestic litigation.

In turn, the nature of the litigation processes—the extent to which they are open to media and public engagement, and to victim participation and support—are further factors that emerge as strongly influencing the extent of the impact. In this respect, the involvement of international bodies has had most impact when they have generated hearings, allowed for the direct involvement of victims and witnesses, and generated press interest. Regrettably, on-site visits and hearings have become less commonly a feature of supranational human rights processes, due to resource constraints and concern about overburdening, which may jeopardize the potential impact of those bodies for the future

## Judicial Shadows from Abroad

The existence of supranational adjudicative human rights bodies, as a potential vehicle to hold the state to account in some form, has played a significant role in influencing domestic impacts. Much depends on the international political climate, and how much the state seeks to maintain international support from rights-friendly states and assert democratic or human rights credentials globally. The report points to regional supervision by the IACtHR or European Commission as important in creating pressure, generating policy, shaping domestic remedies, and influencing judicial processes. In Kenya, the African regional system has not been engaged in litigation to the same extent.

Beyond international and regional human rights bodies, the transnational processes in foreign courts were also factors at key junctures in catalyzing certain levels of impact. The universal jurisdiction cases against the accused of the Argentinian dictatorship generated information and evidence, but also pressure, praise, and a polemic that influenced judges, politicians, and the discourse around accountability within Argentina. Transnational civil/administrative action against the UK government in the Mau Mau case played a role in prompting self-reflection and recognition in Kenya of torture and ill-treatment, post-independence.

## The Facts of the Cases

The report has underlined the challenges of impunity across all three states as a major obstacle to combating torture, and an area where litigation impact has remained limited. Today, impunity for torture remains absolute in Kenya, and widespread in Turkey and Argentina. Only in exceptional cases and under exceptional circumstances has impunity been pierced. This includes rare cases where evidence was clear and conclusive, often due to the presence of witnesses could not be bought or pressured, such as family members. These rare successes have tended to involve the most extreme cases, such as deaths in custody that could not feasibly be covered up. Also significant is the nature of the victim. Often the cases that have generated most interest and positive impact are those involving sympathetic victims: people whose stories, when told, exposed the myths around state justifications for torture.

## The Nature of Litigation and Remedies Sought

It goes without saying that different forms of litigation have different purposes, functions, processes and, as the research suggested, outcomes and impacts. In particular, several interviewees spoke to the importance of the criminal process in cases involving torture, which of course constitutes a crime under national and international law. The expressive role of criminal prosecution has been noted as recognizing the gravity of the violations and embodying accountability within a rule of law framework. The chilling effect of prosecutions (however rare) on practices of torture was emphasized. Criminal cases, generally brought against low-level perpetrators, have led to confessions and revelations that incriminate other, often higher-level, individuals or the system more broadly. Criminal cases brought unparalleled levels of media attention, due to interest in the human story of the particular perpetrators and victims.

Civil remedies have the advantage of being more victim-driven and victim-focused, at least in theory, than criminal cases. They generally carry the potential to hear, recognize, and respond to the needs of those affected in a different way than most criminal procedures.<sup>551</sup> Beyond any compensatory or reparatory impact on victims, orders to pay damages can also have declaratory or symbolic significance, though some questioned whether processes whereby individuals responsible do not pay personally weaken the impact on those responsible. When the government is ordered to pay meagre amounts, or fails to pay at all through delays and non-enforcement, the impact of civil awards is seriously undermined.

Moreover, the focus by lawyers and courts on a narrow conception of remedies—whether in terms of compensation to individual victims or the impact on individual

perpetrators—may limit the impact of litigation. Where alternative symbolic measures have been sought and granted, such as recognition and apology or construction of monuments to memory, there was greater social impact.

Individually focused cases (civil or criminal) have generally had less traction in exposing and impelling solutions for the structural underpinnings of torture. In this sense, the collective *habeas* action brought in Argentina stands apart as a relatively rare attempt to use litigation to directly expose systemic practices. In turn, international cases may have less direct impact on individuals, but more impact on state policy, focusing on state failure to prevent torture in a way that criminal cases may not.

The rich experience of litigation in the three states points to the diverse, overlapping impacts that may emerge from the different litigation tools, used in conjunction with one another, alongside a broader range of legal and advocacy methods. The way we use these tools going forward may be informed by the experiences this report has sought to share. There are many questions to continue to grapple with as we seek to develop strategic approaches to human rights litigation in this challenging field. Can prevention and non-repetition be positioned more at the forefront of litigation goals or strategies? Can we use the courts to advance a more comprehensive approach to reparation? How can the imperative of institutional reform and the persistence of impunity best be addressed? Is there greater scope going forward to use a complementary mix of criminal, civil, administrative, disciplinary, national, and transnational litigation in a mutually reinforcing way? How can litigation, advocacy, and public discourse be more effectively linked?

In confronting the persistence of torture, there is inspiration to be gained from the resourcefulness and commitment of the victims, lawyers, NGOs, and others who have taken this work forward in the three states explored in this study. They have changed the human rights landscape within which the struggle to combat torture and ill-treatment continues.



# Appendix: Research Questionnaire

While obviously subject to modification for different interviewees, the study pursued the following normative lines of inquiry in its primary research.

## General Questions on Litigation and Context

- What in your view were the key clusters of litigation, or cases, in your country on torture or ill-treatment in detention?
- What form of litigation has been pursued and why (e.g. criminal, administrative, *habeas corpus*, actions to force the state to act such as mandamus, civil actions for damages, challenging the lawfulness of government action nationally and internationally)? What were the remedies sought through the litigation, why and to what effect?
- Who brought and who supported the cases? Where did the decision to litigate come from: was it civil society-led or victim-led or other (e.g. prosecutorial decision)? Was there support from civil society or others, before, during and/or after the litigation? What form did it take and how did it influence the process or outcomes?
- What were the objectives or strategies pursued by the different actors involved? If their goals were different was this addressed before hand and if so how? Were there opponents to the cases, and if so what was their nature and influence, what strategies did they employ and to what effect?
- What sort of strategies were pursued and tactics employed?

# Identifying Impact

- In general, how would you assess the impact of those cases? What are the main types of impact, and indicators of that impact? What factors contributed to that impact?
- Has litigation also had negative consequences, and if so, what form did they take and what were the factors that contributed? Have there been areas where the impact has been notably limited? Were the risks in bringing this litigation perceived at the outcome and what steps were taken to minimize them?

More specific questions will explore whether there are indicators of the following levels of impact; if so, when they arose (e.g. at the time the cases were filed, following judgment, and today?) and what factors influenced them.

1. Impacts on applicants, victims, their next of kin, or communities?
  - a. *What happened to the applicants who filed formal complaints against torture or other ill-treatment and took their cases to court? Did they e.g. receive legal redress (whether in form of monetary compensation, authoritative judicial finding, overturning a wrongful lower court decision, etc.)?*
  - b. *What did they get from the process? How do they describe its importance or limitations? What level of involvement in decision-making, and participation did they have? Were they supported?*
  - c. *How does this compare with what they expected from the litigation?*
  - d. *How do they perceive the litigation today, and what impact has it had subjectively on them? Has it influenced their views or behavior more broadly; e.g. their views of the law, judicial process, and its impact? Would they do it again, and/or do it differently?*
2. Impacts on groups at risk of torture or other ill-treatment, and on Practice?  
*Where relevant, what impact did litigation have on persons in on-going detention? Has torture and ill-treatment increased or decreased? To the extent that this can be meaningfully assessed, what indicators are there of the influence of litigation? Has it empowered, or made vulnerable, those in detention and why?*
3. Legal Impact:  
*What changes are detectable in legislation/regulations on torture and other ill-treatment (and prosecution thereof) since the litigation at issue was launched? What impact did*

*the litigation have on jurisprudence? To what extent were judgments implemented? If so, did this happen automatically or after follow up, or follow on litigation?*

4. Social Impact: Attitudes and awareness

- a. *To what extent has litigation raised awareness and shaped attitudes: considering awareness of rights, of violations and their nature, of the role of the courts in providing redress or accountability, of the prohibition of torture and inhuman and degrading treatment for persons at risk?*
- b. *Has litigation of torture historically translate into rejection of torture today; if not, why not?*
- c. *To what extent were these cases covered in local and national media, and why? When mentioned, what was the focus, and the principle messages conveyed?*

5. Institutional impact

- a. *What indications are there of the impact on the institutions and individuals responsible for torture or ill-treatment? For example the armed forces, intelligence, penitentiary system or law-enforcement officials?*
- b. *What impact has the litigation had on the judiciary, and judicial practice? Have references to regional or international human rights judgments and standards increased, procedures been influenced or remedies changed for example? Have these cases influenced international mechanisms?*

6. Political impact and policymakers

*How was litigation shaped by, and how (if at all) did it influence the political context at the time it was brought? What changes in policy, if any, do you associate with court proceedings, judgments, and implementation or lack thereof, and why? Have they been sustainable? Have cases impacted policymakers' understanding, and behavior, with regard to torture and other ill-treatment and why? How did this reveal itself e.g. speeches, public reporting, media interviews, etc.?*

7. Accountability?

*Has accountability increased, and what form has accountability taken in your state? Has e.g. the number of cases decided at domestic level on issue of torture and other ill-treatment increased? Have individuals been held to account with more regularity?*

8. Organized Civil Society

*What was the impact, if any, of the litigation on organized civil society, the anti-torture or human rights movements, or on lawyers who brought the cases? Did it contribute to or detract from other forms of anti-torture work? Did litigation experience inform their approach in subsequent cases? What would they have changed in their approach in retrospect?*

# Endnotes

1. The causes of impunity in Kenya are of course much broader, just as the civil society role in contributing to criminal litigation is not limited to situations where victims or NGOs can lead or participate in the case independently of the state, but these are among many factors that contribute to cases happening, and to their impact.
2. As will be discussed, compensation claims have not always been fully appreciated or supported by civil society; see the Victim Impact section of Ch. 4.
3. Amnesty International, *Torture in 2014: 30 Years of Broken Promises*, available at: <https://www.amnestyusa.org/files/act400042014en.pdf>.
4. “Anti-torture activists protest on Dick Cheney’s front porch, 2 arrested,” RT.com, Jan. 11, 2015, available at: <https://www.rt.com/usa/221511-cheney-torture-guantanamo-terrorism/>.
5. As the study looks back on litigation over time it makes only brief reference to the on-going allegations of contemporary torture, including in the aftermath of the 2016 coup.
6. National Commission on the Disappearance of Persons (CONADEP) Report, 1984.
7. Ibid. CONADEP 1984; see also Catalina Smulovitz, “I can’t get no satisfaction’: Accountability and Justice for Past Human Rights Violations in Argentina,” in V. Popovski and M. Serrano (ed.), *Transitional Justice and Democratic Consolidation: Comparing the Effectiveness of the Accountability Mechanisms in Eastern Europe and Latin America*, United Nations University (2009); NGOs have estimated as many as 30,000 may have been disappeared.
8. Smulovitz, 2009.
9. Calveiro, 2011.
10. Ibid. In 1984, CONADEP recorded the disappearance of 8,960 people but made clear that far more had disappeared; indeed, thousands of cases emerged thereafter. Other human rights organizations have maintained more recently that the victim level reached 30,000. See Sumolitz, 2009.

11. Maria Jose Guembe, “Economic Reparations for Grave Human Rights Violations: The Argentinian Experience,” in P. de Greiff (ed.), *The Handbook of Reparations*, Oxford, OUP (2006), 21–54.

12. See María José Oliveira Sarrabayrouse Oliveira, *Poder judicial y dictadura. El caso de la morgue judicial*, Buenos Aires, Ediciones Del Puerto (2011).

13. Basualdo, 2011; Lorena Balardini, “The Long Struggle for Accountability in Argentina: The Role of Civil Society’s Activism and State Actors,” 2014 Congress of the Latin American Studies Association (Chicago, 2014); see e.g.: Amnesty International, Report on an Amnesty International Mission to Argentina November 6–15, 1976 (1977), available at: <https://www.amnesty.org/en/documents/amri13/083/1977/en/>; and Report, NY Bar Association’s Mission to Argentina, chaired by Orville Schell and J. Marvin Frankel (1978).

14. The Inter American Commission on Human Rights made an *in loco* visit to Argentina. For more information see: Report on the Situation of Human Rights in Argentina, OEA/ Ser.L/V/II.49, doc. 19 corr.1 (April 11, 1980).

15. See “Memoria Abierta,” available at: [http://www.memoriaabierta.org.ar/materiales/documentos\\_historicos.html](http://www.memoriaabierta.org.ar/materiales/documentos_historicos.html).

16. E.g.: Human Rights Watch report on the “Final document on the struggle against subversion and terrorism,” Volume 4, Issue 11 (October 23, 1992), available at: <https://www.hrw.org/reports/1992/southafrica/3.htm>; Juan Méndez, “Reluctant Partner, The Argentine Government’s Failure to Back Trials of Human Rights Violators,” Americas/Human Rights Watch, Volume 53, Issue 5(B) (December 2001), p.10, available at: [https://www.hrw.org/reports/2001/argentina/argen1201-04.htm#P218\\_57995](https://www.hrw.org/reports/2001/argentina/argen1201-04.htm#P218_57995).

17. Smulovitz, 2009; this included commissions of inquiry, domestic and extraterritorial criminal trials, international human rights cases, public apologies by individuals and institutional actors, reparation schemes and monetary damages, lustration, public commemoration, and the establishment of commemorative monuments, spaces, and dates.

18. *Nunca mas* mean “never again,” the title of the CONADEP truth commission report referred to above. Mónica Pinto, “The Role of the Inter-American Commission and Court of Human Rights in the Protection of Human Rights: Achievements and Contemporary Challenges,” Human Rights Brief 20, no. 2 (2013): 34–38, available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1840&context=hrbrief>.

19. Its mandate was focused on investigation and documentation of disappearances, but in practice embraced a broader range of torture and ill-treatment.

20. Filippini (2011); Americas Watch, “Truth and Partial Justice in Argentina” (1987) and “Truth and Partial Justice in Argentina: An Update” (1991): commenting on the later amnesties and pardons.

21. Torture was criminalized for the first time in 1958 in the Penal Code. It has been noted that “the trials also demonstrated the capacity of the judicial system to administer justice in the context of political conflict, and its autonomy from political power.” Smulovitz, (2002); Filippini, (2011).

22. Smulovitz, 2002.

23. Orlando Agosti, four years and six months in prison; Roberto Viola, 17 years; Armando Lambruschini, eight years; Omar Graffigna and the members of the third junta—Leopoldo Galtieri, Jorge Anaya, and Basilio Lami Dozo—were acquitted.

24. Filippini (2011), e.g., describes the conviction of those bearing most responsibility for human rights violations as unprecedented and marking a turning point in worldwide efforts toward transitional justice. Both the trials and the *Nunca Mas report helped consolidate the rule of law in Argentina and, at the same time, gave weight and credibility to the claims of victims and their families.*

25. The Full Stop Law established a time limit to file criminal complaints and the Due Obedience Law established an irrefutable legal presumption that lower ranking officers were not punishable because they were following orders.

26. Filippini, 2011.

27. Report No. 28/92, available at <https://www.cidh.oas.org/annualrep/92span/Argentina10.147.htm>.

28. Interview with Daniel Rafecas.

29. CELS, "Making Justice," 2011.

30. E.g. Procuraduría de Crímenes Contra la Humanidad (a Special Unit on Crimes Against Humanity which coordinated and supported prosecutors); the Program for Truth and Justice within the Ministry of Human Rights (which focused on action within the Executive Branch); and a bicameral Commission for the Identification of Economic and Financial Complicities during the dictatorship established within Congress. <http://www.jus.gob.ar/la-justicia-argentina/programa-verdad-y-justicia.aspx>.

31. Human rights obligations have preeminence over statutes by virtue of the 1994 constitutional reform.

32. Another 261 suspects have been questioned and charges against them remain unresolved. In addition, charges against 155 defendants were declared without merit, 44 cases were dismissed, 47 are fugitives, and 362 died (as of August 1, 2015). For updated statistics, see Prosecutor of Crimes against Humanity of the Attorney General's Office, 2016, "Informe sobre detenciones. Datos de la Procuraduría de Lesa Humanidad." [http://www.fiscales.gob.ar/wp-content/uploads/2016/09/Lesa\\_Informe\\_detenciones.pdf](http://www.fiscales.gob.ar/wp-content/uploads/2016/09/Lesa_Informe_detenciones.pdf).

33. "[G]iven the specific characteristics of these judicial actions, the complexity in the production of evidence, the number of witnesses and victims, and the historical and reparation value of its public hearings, not only for direct victims but for society a whole, its programming and development has required unprecedented coordination between State powers ... the Public Ministry, and the Supreme Court. In addition, the realization of the goal of imparting justice for serious past crimes in Argentina, as part of a State policy, has been decidedly accompanied by civil society organizations who have also contributed to the consideration of the most suited means for achieving this goal" (CELS, 2011, Preface).

34. Statement of the Honorable House of Representatives, 57-P-2010. See *Página12*, "Diputados declare 'Política de Estado' a los juicios por los crímenes de lesa humanidad," May 12, 2010, available: <http://www.pagina12.com.ar/diario/ultimas/20-145567-2010-05-12.html>.

35. E.g. "Blaming the Victims, Dictatorship Denialism on the Rise in Argentina," *The Guardian*, Aug. 8, 2016, <https://www.theguardian.com/world/2016/aug/29/argentina-denial-dirty-war-genocide-mauricio-macri>. See also <http://www.cels.org.ar/web/publicaciones/informe-sobre-el-proceso-de-memoria-verdad-y-justicia-en-la-argentina/>.

36. This was somewhat borne out when in 2015 one of the first statements of Mauricio Macri's government announced that the trials would continue, although later statements by the regime were deemed to undermine that support.

37. "El silencio de los intelectuales Kirchneristas," Roberto Gargarella, *La Nacion*, July 26, 2016. Available at <http://www.lanacion.com.ar/1921757-el-silencio-de-los-intelectuales-kirchneristas> suggesting the issue is beyond partisanship.

38. Filippini, 2011; Smulovitz, 2009; CELS, 2015.

39. See Ruth Diamint, "El control civil de los militares en Argentina," available at <http://nuso.org/articulo/el-control-civil-de-los-militares-en-argentina/>. See also Marcelo Fabián Saín, "Las Fuerzas Armadas frente a las nuevas amenazas (1990-2001)," *Seminario Internacional*; "Brasil e Argentina frente às novas ameaças," Universidade Estadual de Campinas, Campinas, Brasil, August 1, 2001.

40. National Ministry of Justice and Human Rights, 2015.

41. Interview with Sofía Tiscornia and María Victoria Pita, "Las víctimas crearon otra forma de Justicia," p. 12, May 21, 2006. Available <http://www.pagina12.com.ar/diario/sociedad/3-67166-2006-05-21.html>.

42. Interview with Rodrigo Borda; some torture methods learned during dictatorship have been employed during democracy.

43. Interview with Rodrigo Borda.

44. CELS, 2015; CPM, 2015; interview with Rodrigo Borda.

45. See DGN, 2012; PPN, 2014; CELS, 2015; CPM, 2015 and NGO reports by e.g. Xumec (Mendoza), Comisión Provincial por la Memoria de Córdoba, Comité de la tortura de Chaco, Observatorio de Derechos Humanos de Río Negro, Zainuco (Nequén), ANDHES (Tucumán and Jujuy), among others. One recent study of Latin American prisons even went so far as to suggest, controversially, that Argentine prisons have the highest violence rates in the region ("Condiciones de vida en la cárcel: Resultados de la encuesta de detenidos condenados," Capítulo Argentina, CELIV Dec. 2015), speaking to the acute nature of the problem.

46. Internationally, UN entities have indicated an "abundance" of information about "frequent torture": "Expresa preocupación por la ola de muertes y violencia en las cárceles," available at <http://acnudh.org/2012/02/la-oficina-regional-para-america-del-sur-de-naciones-unidas-derechos-humanos-expresa-preocupacion-por-la-reciente-ola-de-muertes-y-violencia-en-las-carceles>. See also e.g. Special Rapporteur on the Rights of Persons Deprived of Liberty, of the Inter-American Commission on Human Rights (IACHR) IACHR 64/10 "Rapporteurship confirms grave detention conditions in Buenos Aires Province," <http://www.cidh.oas.org/Comunicados/English/2010/64-10eng.htm>; Committee Against Torture, "Conclusions & recommendations, Argentina," U.N. Doc. CAT/C/CR/33/1 (2004).

47. Committee Against Torture, "Conclusions & recommendations, Argentina," U.N. Doc. CAT/C/CR/33/1 (2004).

48. "While these data do not allow a clear affirmation of the general increase of torture and ill-treatment in federal prisons, because this rise could also be the result of a better capacity to detect these crimes...." See PPN, Annual Report 2014.

49. PPN affirms that violence exists in all prisons spaces, affecting everything from bathroom access to medical care (PPN, 2014).

50. E.g. “initiation rituals” within the Prison Service involve cruel and degrading treatment: see IACHR 64/10 “Rapporteurship confirms grave detention conditions in Buenos Aires Province,” <http://www.cidh.oas.org/Comunicados/English/2010/64-10eng.htm>.

51. See e.g. PPN, 2014; CELS, 2015; CPM, 2015 on violence as a structural problem to “govern” detainees.

52. See e.g. PPN Annual Report 2014: “Executive power, particularly the head of Servicio Penitenciario Federal, didn’t include the torture problem in the political agenda.” See also CELS Annual report 2009 “La agenda de derechos humanos, sin lugar para las personas privadas de libertad” (“The human rights agenda doesn’t have a place for people deprived of liberty”), available at [www.cels.org.ar](http://www.cels.org.ar). PPN, 2014; CELS, 2009; CPM, 2015.

53. Máximo Sozzo: “Populismo punitivo, proyecto normalizador y prisión-depósito en Argentina,” *Nueva Doctrina Penal*, 2007B, Editores del Puerto, Buenos Aires, 527–578. (ISSN 1850-9118).

54. For example, see the recent work of CELS and Comisión Provincial por la Memoria (CPM). In 2002, CPM created a Provincial Committee Against Violence to combat prison violence and CELS extended its work on torture in dictatorship to include violence in democracy during the 1990s with a program focusing on police violence and, more recently, violence in prisons.

55. PPN pointed out the lack of public policy against prison overcrowding (PPN, 2014).

56. As noted above, they have referred to the “frequent” torture by state officials in police stations and prisons and the entrenched impunity that surrounds it. See e.g. Concluding observations by the Human Rights Committee in 2014: CCPR/C/ARG/CO/4; [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/ARG/CO/4&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/ARG/CO/4&Lang=En). See also reports of the Special Rapporteur on the Rights of Persons Deprived of Liberty, of the Inter-American Commission on Human Rights, *supra*.

57. Walter Bulacio was detained by the police in April, 1991. He died one week later, as a result of being beaten by police officers. The Inter American Court of Human Rights found the state responsible. See [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_100\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_100_esp.pdf).

58. For example, the Special Rapporteur visited Argentina on June 7, 2010.

59. See Martín Sigal, Julieta Rossi, Diego Morales, “Derechos sociales y procesos colectivos: (algunas) variables asociadas al cumplimiento de sentencias,” *Cuaderno de Trabajo N° 3*, Centro de Justicia y Derechos Humanos, Universidad Nacional de Lanús, forthcoming.

60. Coverage has occasionally cast victims of prison brutality as “criminals,” inspiring little empathy or support.

61. For example, videos of torture in Salta prison in July 2012 (<https://www.youtube.com/watch?v=Z7Rl6yJwl28>) and in Mendoza prison in March 2011 (<https://www.youtube.com/watch?v=ZoriCQI9A58>) gained significant public attention.

62. These organizations have struggled to find funding for their work, and occasionally to gain recognition from some engaged in work on torture under dictatorship.

63. See e.g., PPN Website: [www.ppn.gov.ar](http://www.ppn.gov.ar). See also the National Mechanism Against Torture, regarding OPCAT. Monitoring has significantly increased at least in some parts of the country: see e.g. PPN, 2014; RNT, 2014; CELS, 2015; CPM, 2015.

64. In 2014 there were more than 69,000 people deprived of liberty in Argentinian prisons (for example, in the SPF and the Buenos Aires Penitentiary Service (SPB) which account for more than 60% of the population behind bars countrywide). See for example, the “Registro Nacional de Casos de Tortura” (National Register of torture cases). Available at <http://gespydhiigg.sociales.uba.ar/rnct/> PPN, 2014 also on “the priority given by the PPN to the investigation, prevention and denouncing of prison violence.”

65. E.g. through access to places of detention, requiring that functioning cameras were placed in detention sites, or that detainees be registered, for example. See PPN Annual Report 2014 and CPM Annual Report 2015; Fillipini, Peer Consultation Istanbul.

66. Interview with Juan Mendez for this study.

67. Ibid.

68. CELS, *Making Justice*, 2008.

69. Former director of CELS Martín Abregú writing in Human Rights Watch Report, 2001. Available at <https://www.hrw.org/reports/2001/argentina/argen1201-04.htm>.

70. Human Rights Watch Report, 2001. Available at <https://www.hrw.org/reports/2001/argentina/argen1201-04.htm>.

71. CELS, *La lucha por el derecho*, Siglo XXI Editores, Buenos Aires, 2008.

72. Human Rights Watch Report, 2001. Available <https://www.hrw.org/reports/2001/argentina/argen1201-04.htm>.

73. The Grandmothers of Plaza de Mayo, APDH, CELS, CEJIL, Mothers of Plaza de Mayo, Relatives of Detainees-disappeared, LADH, MEDH and Serpaj.

74. Smulovitz, 2009.

75. There is no clear data regarding their extent, but they are reported as having taken place in La Plata, Bahía Blanca, Neuquén, Rosario, Cordoba, Mar del Plata Salta, Jujuy, and Mendoza.

76. Smulovitz, 2009.

77. For more information, see H. Cattani, “La llamada ‘búsqueda de la verdad’ por los tribunales federales de la Ciudad Autónoma de Buenos Aires,” *Revista de Derecho Penal y Procesal Penal* 8, LexisNexis, Buenos Aires, 2007, pp. 1461–1470, and E. Mignone, “Editorial: El derecho a la verdad,” *CELS Newsletter*, vol. 10, issue 42, July–August of 1998.

78. Smulovitz, 2009.

79. Cattani, *supra*.

80. Chicha Mariani, Madre de Plaza de Mayo, in “Memoria Abierta, Juicios por la verdad,” audio-visual archive: <https://www.youtube.com/watch?v=F96sD7IMhog>. María Esther Behrensquien, who testified in the truth trials, stated, “you knew they are searching for something positive, the path to justice. You began to readjust, acting with others with the right intentions. To be able to tell, to say the truth... that others should know the truth, it was liberating.” Memoria Abierta, Juicios por la verdad, Audio-visual archive: <https://www.youtube.com/watch?v=F96sD7IMhog>.

81. He was also tried *in absentia* in Sweden for his role in the disappearance of Swedish citizen Dagmar Hagelin.

82. Such trials are permitted in many, but not all, civil law systems and allow for trial without the presence of the defendant, when he is a fugitive or a resident of another country and extradition is not possible.

83. Judge Baltasar Garzón issued international arrest warrants for 48 of them in Dec 1999 and in September 2001 he continued the pressure by issuing 18 new arrest warrants for Argentine military officers and civilians.

84. This included the practice of drugging victims and dropping them from aircraft over the Rio de la Plata and Atlantic Ocean.

85. It considered crimes against humanity, murder and unlawful detention at the School of Naval Mechanics (*Escuela Superior de Mecánica de la Armada*—ESMA).

86. Interview with Carolina Varsky.

87. Interview with Daniel Rafecas.

88. Carla Artes, who was detained with her mother at 9 months old then transferred to another family; she was a witness in the *Scilingo* case. See [http://www.redress.org/Universal\\_Jurisdiction\\_Nov2010.pdf](http://www.redress.org/Universal_Jurisdiction_Nov2010.pdf).

89. The child's parents were kidnapped in November 1978 and sent to the clandestine detention center "El Olimpo."

90. Smulovitz, 2009.

91. Data current as of August 2016. Another 261 suspects have been questioned and charged but their cases remain unresolved. In addition, charges against 155 defendants were declared without merit; 44 cases were dismissed; 47 are fugitives and 362 died. For updated statistics see Prosecutor of Crimes against Humanity of the Attorney General's Office, 2016, "Informe sobre detenciones. Datos de la Procuraduría de Lesa Humanidad," available at [http://www.fiscales.gob.ar/wp-content/uploads/2016/09/Lesa\\_Informe\\_detenciones.pdf](http://www.fiscales.gob.ar/wp-content/uploads/2016/09/Lesa_Informe_detenciones.pdf).

92. In this case, the traditional barriers to the advancement of sexual violence cases were overcome: the sexist character of the judiciary, the lack of sensitivity on the part of judicial officials, and issues linked to the production of proof. In addition, it was possible to overcome the tendency of judicial operators to subsume the crime of rape to the use of torture (Balardini, 2014, Sobredo, Oberlin, 2011).

93. It cited the International Criminal Tribunals for Rwanda and Yugoslavia on sexual violence crimes, notably the *Akayesu* and *Foča* cases.

94. Molina's case was recognized by the Gender Justice Observatory of Women's Link Worldwide (a Colombian NGO), and selected as gold gavel winner. See [http://www2.womenslinkworldwide.org/wlw/new.php?modo=observatorio&id\\_decision=350&lang=en](http://www2.womenslinkworldwide.org/wlw/new.php?modo=observatorio&id_decision=350&lang=en).

95. Balardini (2014) notes that at earlier stages (such as the Juntas trials), the overall goal of proving illegal repression overshadowed individual experiences.

96. Balardini, Sobredo, Oberlin, 2011.

97. Linked to the improved monitoring and reporting, victim support, and institution strengthening noted above.

98. The IACHR asked for information, while the OHCHR's regional representative for South America issued a statement <http://www.un.org/apps/news/story.asp?NewsID=41189#.VwucyKTh-Chc>.

99. Several articles were published in mainstream national media, including *Clarín* (10 stories on the case), *La Nación* (8 stories), and *Página 12* (at least 21 related stories).

100. Detailed practical issues emerged from the litigation on the lack of infrastructure, vehicles, and prison guards, among other issues.

101. Interview with Paula Urbandt.

102. Interview with the applicant's sister, Lorena Cisneros Barros.

103. Ibid.

104. PPN, 2014.

105. Interview with Nicolás Laino.

106. Interview with Nicolás Laino.

107. Even once under house arrest, threats of reprisals continued and a policeman was stationed at his door for protection.

108. Tribunal Oral Criminal 27 from Federal Capital. September 16, 2015.

109. *Página 12* (13 items), *Clarín* (10), and *La Nación* (11)—which generally described the torture and the court case.

110. NGOs pressed for the psychological dimension of torture to be recognized, and referred to the Istanbul Protocol. The judge did not apply the protocol as such, but was receptive to its content.

111. Interview with Rodrigo Borda.

112. Alternative and independent media covered the case from the time Luciano disappeared to the present, documenting the judicial process and the various public demonstrations of the families, creating a record of the process through a large number of news stories. Meanwhile, large media outlets that were at first reluctant to cover the case later engaged to focus on the disappearance. Over time, the torture issue has also been given greater attention.

113. Interview with Rosa Díaz Jimenez.

114. Video interview with Vanesa Orieta, available at <https://www.youtube.com/watch?v=2p2joQVIQZ8>.

115. See "The decision of the Federal Supreme Court of Justice in the collective habeas corpus petition on custody conditions in prisons and police stations of the Buenos Aires Province," available at [http://www.cels.org.ar/common/documentos/english\\_summary.pdf](http://www.cels.org.ar/common/documentos/english_summary.pdf).

116. David Baigún, president of *Instituto de Estudios Comparados en Ciencias Penales y Sociales* (Institute for Comparative Studies on Criminal and Social Sciences, INECIP); Marcos Salt, assistant professor of the Criminal Law Department of the School of Law, Universidad de Buenos Aires; Fabián Salvioli, director of Human Rights at the School of Law, Universidad Nacional de La Plata;

Emilio García Méndez, lawyer, expert in childhood topics; M. Inés Franco, president of Foro Vecinal de Seguridad Sección 8º, La Plata; Sergio Martínez Pintos and Néstor Bernava, members of Foro Vecinal de Seguridad Sección 4º, La Plata; Juan Miguel Scatolini president of Interforos, La Plata; María E. Galíndez, president of Foro Vecinal de Seguridad Sección 2º, La Plata; and Livio Roncarolo, president of the Foro Vecinal de Seguridad Sección 7º, La Plata, expressly endorsed the terms of the action as complainants.

117. Decision of the Federal Supreme Court, May 3, 2005, *supra*.

118. It upheld the lower court's decision that the case would involve the court usurping the role of judges in the relevant jurisdictions. On June 14, 2002, CELS submitted an appeal before the Federal Supreme Court.

119. The International Commission of Jurists, Human Rights Watch, the World Organization Against Torture, Argentine Asociación por los Derechos Civiles (ADC), Clínica Jurídica de Interés Público, Asociación Civil El Ágora, Asociación Civil Casa del Liberado, Asociación Civil Centro de Comunicación Popular, and Centro de Comunicación Popular y Asesoramiento Legal (Cecopal).

120. The judgment is available at [http://www.cels.org.ar/common/documentos/fallo\\_csjn\\_comisarias\\_bonaerenses.pdf](http://www.cels.org.ar/common/documentos/fallo_csjn_comisarias_bonaerenses.pdf). They committed to strengthening of the Patronato de Liberados (an official agency dedicated to the social rehabilitation of people released from prisons).

121. They noted that in some cases those conditions may per se involve cruel, inhuman, and degrading treatment, while in cases concerning the presence of vulnerable groups, including adolescents and the ill, this was the case. See CELS, "The decision of the Federal Supreme Court of Justice in the collective habeas corpus petition on custody conditions in prisons and police stations of the Buenos Aires Province," available at [http://www.cels.org.ar/common/documentos/english\\_summary.pdf](http://www.cels.org.ar/common/documentos/english_summary.pdf).

122. The case also catalyzed constitutional debate on the respective roles of the judiciary and the executive in cases of this nature, and strengthened the role of judges and advocates as guarantors of detainee rights.

123. Law 13.449, approved by the Buenos Aires provincial legislature in March 2006.

124. See CELS, Annual Report 2011, Siglo XXI, Buenos Aires, 2011. Available at [http://www.cels.org.ar/common/documentos/cels\\_final\\_2011.pdf](http://www.cels.org.ar/common/documentos/cels_final_2011.pdf).

125. *Ibid.*

126. One case was brought by CELS that successfully prevented a 2014 executive resolution that would have again allowed detainees to be held in police stations. Likewise, when the Public Defense Council of the Province of Buenos Aires challenged an increase in detainees in the province, including in police stations, it cited the *Verbitsky* ruling.

127. See CELS, Annual Report 2011, Siglo XXI, Buenos Aires, 2011. Available at [http://www.cels.org.ar/common/documentos/cels\\_final\\_2011.pdf](http://www.cels.org.ar/common/documentos/cels_final_2011.pdf).

128. When a group challenged the increase in detainees held in police custody, citing the judgment and claiming that the facts were even worse now than when the case was filed, the court dismissed it on the basis that the judgment "had already been executed." See CELS, Annual Report 2015.

129. Pablo Salinas, "La aplicación de la tortura en Argentina. Realidad social y regulación jurídica," editores del Puerto, Buenos Aires, 2010.

130. "Unlike what happened with CELS when their proposals were initially rejected outright, the judges accepted measures that the government did not comply with." Interview with Pablo Salinas.

131. Inter-American Commission on Human Rights, Precautionary Measures, No. 923-04, *Penitentiaries of Mendoza*, August 3, 2004 available at: <http://www.derechos.org/nizkor/arg/doc/carcjul4.html>.

132. The other aspects of the complaint proceeded as a petition. IACHR Report N° 70/05 Petition 1231/04.

133. Procuración Penitenciaria de la Nación, "Comunicado de la Procuración Penitenciaria sobre los graves hechos de tortura en la cárcel de Mendoza," accessed August 3, 2015, available at <http://www.ppn.gov.ar/?q=node/1134>.

134. Inter-American Court, Argentina's Supreme Court, provincial courts.

135. The international nature of the litigation meant the federal government was drawn into issues concerning ill-treatment in prisons in the province, creating political pressure for change.

136. For example, it contributed to the reform of the Organic Law of the Prison Service on November 18, 2008, and to the ratification of the Optional Protocol to the Convention Against Torture.

137. Pablo Salinas, 2010.

138. A separate source indicates a drop from 36 inmates' deaths registered in 2004, to 19 deaths in 2009, *Diario Los Andes*, July 27, 2009.

139. In October 2014, Amnesty International submitted a note to the government of the province of Mendoza about their concern in this regard. See also, *La Nación*, "Echaron a los guardiacárceles denunciados por torturas," February 3, 2011, available at <http://www.lanacion.com.ar/1346951-mendoza-echaron-a-los-guardiacarceles-denunciados-por-torturas>; *La Nación*, "Motín y toma de rehenes en un penal de Mendoza," June 5, 2011, available at <http://www.lanacion.com.ar/1379201-motin-y-toma-de-rehenes-en-un-penal-en-mendoza>; *La Nación*, "Asesinaron a un recluso durante un motín en Mendoza," April 10, 2010, available at <http://www.lanacion.com.ar/1258030-asesinaron-a-un-recluso-durante-un-motin-en-mendoza>.

140. The case was brought by the CPM (Provincial Commission for Memory) and CELS in relation to units 46, 47, and 48 where knives, drugs, the inactivity of guards, provocation of inter-detainee violence, and overcrowding, allegedly resulted in torture and the deaths of at least four detainees.

141. MC 104/12—*Servicio Penitenciario Bonaerense, Provincia de Buenos Aires, Argentina*. For more information see <http://www.oas.org/en/iachr/decisions/precautionary.asp>.

142. Set up by the Secretaría de Derechos Humanos de la Nación (National Secretariat for Human Rights).

143. It involved the prison service, the human rights secretariat, the legislative branch, the Supreme Court of the Province of Buenos Aires, the Public Defender's Office, and the Attorney General.

144. Some were developed in conjunction with civil society organizations and the government.

145. The collective complaints have provided frameworks for engagement, within which civil society and government have then worked together towards addressing the problem.

146. "Understanding Torture in Kenya: An Empirical Assessment," a report by the Independent Medico Legal Unit, August, 2007.

147. Many of these techniques were used in the other states; see e.g. the infamous techniques condemned by the ECtHR in *Ireland v U.K.* (1978).

148. David M. Anderson, "British Abuse and Torture in Kenya's Counter-Insurgency, 1952–1960," in *Small Wars and Insurgencies*, Vol. 23, 2012.

149. Kenya Human Rights Commission, the Mau Mau War Veterans Associations, and Leigh Day and Co. Solicitors, "Particulars of Claims to the Foreign and Commonwealth Office in U.K., 2009."

150. Truth, Justice and Reconciliation Commission of Kenya, *Report of the Truth, Justice and Reconciliation Commission of Kenya Volume 2A*, pp. 590–707.

151. Constitution of Kenya Review Commission, *Final report of the CKRC*, pp. 29–34. The CKRC was responsible for the comprehensive and participatory constitutional review effort that culminated in a national referendum in 2005. The referendum result was however a rejection of the proposed constitution; hence a continuation of the effort by the Committee of Experts (CoE) up to 2010.

152. Constitution of Kenya Amendment Act No. 16 of 1965. The timeline for the executive to report to parliament after declaring an emergency was extended from 7 days to 28 days.

153. Constitution of Kenya Amendment Act No. 28 of 1964.

154. By 1966, the Police Service Commission had been eliminated and security of tenure removed for the inspector general of police, arguably contributing to the politicization of the police and their complicity in acts of torture while suppressing political dissident.

155. TJRC Report, *supra*.

156. TJRC Report, paragraph 50, p. 604.

157. See KHRC report on the context of the massacres of marginalized communities. Notorious examples include attacks on marginalized communities in northern Kenya in the mid 1980s.

158. Most of those targeted were initially detained and interrogated elsewhere then transferred to Nyayo House. Turkoman Carpet House (then a base for intelligence operatives monitoring Nairobi University) and Nyati House were also notorious sites. See *Surviving after Torture: A case digest on the struggle for justice by torture survivors in Kenya* (2009).

159. TJRC Report, *ibid*.

160. Accounts can be found in e.g. the TJRC report and e.g. "We Lived to Tell: The Nyayo House Story," in which ex-prisoners detail conditions in the torture chambers.

161. Nganga Thiongo, a Nairobi lawyer, described his torture at Nyayo House: "My screams did not help as they continued brutalizing me. They were insisting that I confess all that I knew or they would kill me. After collapsing due to exhaustion, I was returned to the basement cells. The guards were instructed to continue with the beatings." *Surviving after Torture: A cases digest on the struggle for justice by torture survivors in Kenya*.

162. *Surviving After Torture*, ibid.

163. Ibid.

164. See <http://www.iupui.edu/~anthkb/a104/kenya/justice%20under%20siege.htm>.

165. See Drew Days III et al., *Justice Enjoined: the State of the Judiciary in Kenya*, R.F. Kennedy Memorial Center for Human Rights (1992).

166. *David Gitau Njau & 9 others v Attorney General* [2013] eKLR.

167. The United Nations Trust Fund for the Victims of Torture was particularly useful in providing support to the victims on litigation.

168. They were subsequently closed, and their use for storage has been criticized by victim groups.

169. Including the former chief justice of Kenya, Willy Mutunga, himself a detainee who was tortured.

170. In *The Politics of Betrayal: Diary of a Kenyan Legislator*, Joe Khamisi cites Maku Matua, chairman of taskforce considering the TJRC: “Kenyans do not want to set a precedent in which the former president is as it were undressed in public,” p. 117.

171. See the Supremacy clause of the Constitution (2010) Article 2(5). Courts must also adopt the interpretation that most favors the enforcement of a right or fundamental freedom.

172. Ibid, Article 25.

173. Ibid, Article 20.

174. Whereby a person can now act on behalf of a group or class of persons or in the public interest. Ibid, Article 22. Rule changes affected e.g. entertaining informal documentation, prohibiting fees charged for commencing proceedings, limiting restrictions on *amicus*, and not having proceeding hindered by procedural technicalities.

175. The procedure for appointment and dismissal of judges had increased transparency and expanded participation with the establishment of the Judicial Service Commission (JSC). The Kenya National Commission on Human Rights (KNCHR), the Police Service Commission (PSC), and the Office of the Ombudsman were established.

176. The National Police Service Act, 2011 includes a definition of torture derived from the UN Convention Against Torture.

177. The Independent Policing Oversight Authority Act, 2011 establishes civilian oversight of the police service and carries out the function of investigating disciplinary and criminal offenses committed by the members of the National Police Service.

178. The Victim Protection Act, 2014 provides for protection of victims of crime and abuse of power, including access to information, support services, and to provide for reparation, and compensation to victims. The Act enhances the role of the complainant/victim in criminal trials by making it a requirement to seek their views during the trial. Article 50(9) of the constitution required the adoption of legislation on protection.

179. Kenya ratified in 1997. The Prevention of Torture Bill remains pending. In its 2013 Concluding Observations on the second report of Kenya, the Committee against Torture stated that it “remain[ed] deeply concerned that the draft Prevention of Torture Bill (2011) has still not been enacted.”

180. Judicial independence was strengthened in the post-2010 constitution but remains a problem in practice. A lawyer interviewed noted torture cases were treated as ordinary civil suits and lumped together with all the other cases, including employment disputes. The judges would select cases to handle and torture cases were the least favored, as they were regarded as anti-government.

181. See for example, Human Rights Watch, *World Report 2014: Events of 2013, 2014*, pp. 130–131; Kenya National Human Rights Commission, *11th Annual Report: 2013/2014*, para 2.3.4.

182. Examples include the clampdown on the Mugiki sect in Kenya's Central Province or on residents of the Mount Elgon area with a view to extracting information regarding the existence of a militia, the Sabaot Land Defence Forces. Survivors recount that the military and police were responsible for torture reminiscent of the Moi era. See e.g. "The Cry of Blood: Report on Extra Judicial Killings and Disappearances," Nairobi: KNCHR, September 2008. Phillip Alston, "Report of the Special Rapporteur on Extra Judicial Summary or Arbitrary Executions," Geneva: Human Rights Council, 2009. See also *The Daily Nation*, "Accusations Fly over Torture," April 21, 2008.

183. *Omar Awadh Omar and 6 others v the Republic of Kenya*, EACJ 4 of 2011.

184. See [http://www2.ohchr.org/english/bodies/cat/docs/ngos/ICJ\\_Kenya\\_CAT50.pdf](http://www2.ohchr.org/english/bodies/cat/docs/ngos/ICJ_Kenya_CAT50.pdf). According to an ICJ report of 2014, the prison population is around 55,000 while official capacity is 22,000.

185. In 2014, CAT described overcrowding as "an alarming issue in Kenya," and noted that "children ended up in prison with their parents, where they were exposed to sexual and other forms of violence and exploitation." See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=13337#sthash.UfL1M9i3.dpuf>.

186. KHRP 2014 statement on International Day Against Torture.

187. Lawyers, judges, and victims' representatives interviewed suggest that the use of torture has gone underground as public officials have become more aware of potential litigation. However, they mention that state impunity has ensured that individual perpetrators are not prosecuted, leading to the culture of impunity.

188. Interview with Wachira Waheire, Nyayo House torture survivor and chair of the National Coalition on Survivors of Torture in Kenya. See Report of UN Special Rapporteur Philip Alston on extrajudicial killings in 2015: "Killings by the police in Kenya are systematic, widespread and carefully planned. They are committed at will and with utter impunity," available at <http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/464-international-day-in-support-of-victims-of-torture.html>; and Human Rights Watch database noting the rise of extrajudicial killings since 2015 (noting 262 killings since 2015; 21 Kenyans were killed by police in the first eight months of 2016, compared to 114 in the same period last year); see also <http://www.ibtimes.co.uk/kenyan-police-wield-power-life-death-over-civilians-through-extrajudicial-killings-158450>.

189. IMLU report, April 2008.

190. Preliminary Report of the Kenya National Commission on Human Rights (KNCHR) "Error of Fighting Terror with Terror," September 2015.

191. See allegations of torture by the new anti-terrorism police, and e.g. the killing of lawyer Willy Kimani in 2016.

192. It was noted that there seems less public concern when the person tortured may be an alleged terrorist for example.

193. This may include the TJRC or indeed the growing civil society reports since the opening of political space in 2003.

194. Reapplication by Muthoni Muriithi on behalf of Mwangi Stephen Muriithi, Misc. Criminal Application No. 88 of 1982, Nairobi Unreported.

195. R. v Willy Munywoki Mutunga Miscellaneous Criminal Application No 101 of 1982 High Court Unreported.

196. See <https://www.hrw.org/reports/2002/kenya2/Kenya1202-02.htm>.

197. Interview with Nyayo House lawyer Wachira Waheire.

198. One witness describes the only legal advice available as from other detainees; *ibid*.

199. *Ibid*.

200. Judgment of Omolo JJ.A.

201. Criminal Appeal No. 1 of 1989.

202. *Ibid*, CORAM: *Gachuhi, Gicheru & Cockar* Judges of Appeal.

203. High Court Civil Case No. 366 of 1995; see e.g. *Dr. Odhiambo Olel versus the Republic* where the appellant was arrested, tortured, and kept incommunicado without access to medical attention. The Court of Appeal quashed the decision of the High Court and relied on the *David Mbewwa Ndede* case.

204. *David Mbewwa Ndede vs the Attorney General*, Civil Suit No. 284 (1994), High Court of Kenya at Kisumu.

205. He was awarded Kshs.1,095,210 as special damages, obtained from aggregating the medical expenses incurred by the plaintiff as a result of injuries or ill-health suffered due to the ill-treatment he received after he was arrested on the September, 29, 1987.

206. Interview with lawyer Gitau Mwara; discussions Istanbul peer consultation.

207. According to Mwara, the attorney general at the time argued that the claims were stale or time-barred, and also that Nyayo House was not owned by the government.

208. Interview with Gitau Mwara.

209. The current chief justice was also a victim of torture and was instrumental in the early processes of mobilization of victims. At the peer consultation it was noted that activist judges also played a role, here as elsewhere.

210. These new rules provided that 45 days after service to the attorney general, the matter would be required to proceed to full hearing, to counter the challenge of frequent adjournments by the Attorney General's Office.

211. The fund provided support to over 100 new cases between 2008 and 2012. It was clear that the link to the UN trust fund was important in providing monetary support to them to begin the new tranche of litigation.

212. See e.g. <http://www.mwakilishi.com/content/articles/2012/04/08/koigi-wa-wamwere-awarded-sh25m-for-nyayo-house-torture.html>.

213. Interview with Gitau Mwara.

214. See *Dominic Arony* case.

215. Interview with a Nyayo House torture victim who is now a civil society activist.

216. Interview with the mother of torture victim.

217. According to the lawyer, the rhetoric by the government was “us against the victims or survivors of torture” and therefore any demands for compensation were directly attributed to the tax payer.

218. Wallace Gichere, a journalist tortured in Nyayo regime was widely known at the time because of the nature of the torture and the amount of compensation he applied for.

219. See case of Wallace Gichere (Case No. MiscAppli. 1235/2002).

220. Interview with Justice Isaac Lenaola, who presided over some of the Nyayo House and the Kenya Air Force cases.

221. According to a judge of the Constitutional Division of the High Court, the pleadings on torture cases did not sufficiently explore the question of rehabilitation of the victims, some of whom still had fear of the state.

222. See legislative reform through the Victim Protection Act.

223. Interview with Kwamchetsi Makokha. Significant media attention as well as public outcry on the use of torture enabled people to question the use of torture by the state at the time. Initially, torture was used and justified for persons deemed opposed to the Nyayo government.

224. Gitu Wa Kahengeri, victim of torture and representative of the Mau Mau petitioners.

225. The Mau Mau was banned in 1952, and considered a terrorist organization.

226. See Leigh Day statement that the 5,000 clients had been “vetted carefully and had been whittled down from a total of 50,000 possible claimants, to find only those individuals with the most credible cases.” <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/11171624/British-law-firm-inflated-Mau-Mau-compensation-costs-to-taxpayer.html>.

227. Judgement of October 5, 2012, Mr Justice McCombe.

228. *Mutua and Others versus Foreign Commonwealth Office* [2012] EWHC 2678 (QB) (October 5, 2012).

229. The Law Society of Kenya at one point reportedly claimed that some of the victims were fictitious, that Leigh Day represented claimants without authority, negotiated a settlement with the British Government without instructions and offered legal services “without being qualified.” It also alleged that the fee of £6.6 million was out of proportion to the compensation settlement reached for the victims. All claims were firmly denied by the firm. See <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/11171624/British-law-firm-inflated-Mau-Mau-compensation-costs-to-taxpayer.html>.

230. Before the High Court, NGOs Redress and others intervened on statutes of limitation, drawing in domestic and international law arguments.

231. The role of the expert historians Professor Caroline Elkins, Professor David Anderson and Dr. Huw Bennett in this case was also described as of critical importance.

232. The UN Special Rapporteur on Torture called on the British Government to fully investigate the allegations made and provide “full redress to the victims, including fair and adequate compensation, and as full rehabilitation as possible in accordance with international law.”

233. While settlement was being negotiated, on April 10, 2013, the British NGO Liberty, with the Kenyan Human Rights Commission, Amnesty International UK and UN Special Rapporteurs on Torture, past and present, wrote to the UK government to remind them of the UK’s duties to deal honorably with past victims of torture and that “its own breaches of human rights in Kenya undermines Britain’s moral authority in the world.” Letter of April 10, 2013.

234. Archbishop Desmond Tutu, Lakhdar Brahimi, and Graça Machel submitted a letter to Prime Minister David Cameron urging a fair resolution of the claims and expressed the concern cited above.

235. Statement of Moses Wetangula, Minister for Foreign Affairs 1<sup>st</sup> April 2010. Letter to David Cameron from then Kenyan Prime Minister Raila Odinga, in October 2012, urging him to resolve this issue which had become “a stain in our long and strong relationship” Britain has been a “vocal advocate of respect of human rights in Kenya.” He added: “The people of Kenya would like to see a similar approach by your government towards accusations of torture against its own officials.” To what extent the Kenyan government’s positive approach to civil litigation abroad increased the pressure on it to facilitate access to justice at home is unclear.

236. See <https://www.gov.uk/government/speeches/launch-of-the-mau-mau-memorial-in-kenya>.

237. See <http://www.theguardian.com/commentisfree/2013/jun/06/britain-maumau-empire-waiting>.

238. The government announced they are to benefit from the state’s cash-transfer program for the elderly; granting them healthcare services under the National Hospital Insurance Fund; and according them official sitting arrangement at every *Mashujaa* Day (Heroes’ Day) celebration.

239. See <http://www.bbc.com/news/uk-22790037>.

240. The claim notes that in the aftermath of the violence the police refused to document and investigate claims of sexual and gender-based violence, denied emergency medical services, care and compensation, and police lacked training and preparation.

241. It seeks specifically a finding that the state must investigate the sexual violence and prosecute those who are responsible, and to establish a special team with some international staff within the Department of Public Prosecutions to ensure that such investigations and prosecutions are credible and independent.

242. It has involved submissions on international criminal law as well as human rights, soft law standards on the prevention of and response to torture, and in relation to reparations.

243. Section 16 of the Evidence Act only allowed for confessions before a judicial officer and a police officer of the rank of an inspector.

244. Interview with journalist and lawyer George Morara.

245. Interview with journalist and lawyer George Morara: the use of torture has mutated to “safe spaces” and no longer at known places of detention.

246. Interview with Kwamchetsi Makokha, journalist, and Martin Pepela, lawyer for victims of torture in the present administration.

247. The research did not uncover information of private prosecutions being brought, nor of coordinated action to ensure public prosecutions for crimes of the past, though activists and NGOs refer to the problem of impunity.

248. For a detailed historical evaluation see Akçam, Tamer, *Siyasi Kültürüümüzde Zulüm ve İşkence* (Torture and Violence in Turkish Political Culture), İletişim, 1995.

249. Helsinki Citizens Assembly, “the Problem of Torture, Ill-treatment and other Cruel, Inhuman or Degrading Treatment or Punishment in Turkey and Solutions Proposed,” (Türkiye’de İşkence, Kötü Muamele ve diğer Zalimane, Gayri İnsansı veya Küçültücü Muamele veya Ceza Sorunu ve Çözüm Önerileri), [www.stramap.org/images/cust\\_files/080513134126.pdf](http://www.stramap.org/images/cust_files/080513134126.pdf).

250. Akçam, Tamer, *Siyasi Kültürüümüzde Zulüm ve İşkence*, p. 17.

251. Türkiye İnsan Hakkı Vakfı/THIV (Human Rights Foundation of Turkey), 1996. Torture File, People Died in Custody or Prison Between September 12, 1980–September 12, 1995. THIV. p. 49.

252. Interview with Hakan Tahmaz, a torture victim, journalist, founder of the Peace Foundation, May 11, 2015.

253. THIV, Torture File, p. 49.

254. Ankara, İstanbul, Diyarbakır and Kahramanmaraş police/military headquarters and Diyarbakır, Mamak (Ankara), Metris (İstanbul) and Erzurum military prisons were particularly grave.

255. Kısacık, Raşit, “İşkence ve Ölümün Adresi Diyarbakır Cezaevi” (Diyarbakır Prison the address of torture and death), Ozan Publication, İstanbul 2011, p. 13.

256. Threats included to rape, execute prisoners and family members, and to bring them into the torture room. Other methods cited included prolonged standing, immersion in sewage, forcing to eat sewage, deprivation of food, water, and sleep, squeezing/beating of the genitals/testicles, forcing to carry heavy weights, complete and prolonged isolation from the outside world and abysmal conditions of detention in very small, dark, dirty, airless cells without sanitation. See individual cases below and Yıldız Kerim, Piggot Frederick, “An Ongoing Practice: Torture in Turkey,” KHRP, pp. 26, 27.

257. *France, Norway, Denmark, Sweden, Netherlands v Turkey*, the European Commission of Human Rights, Admissibility Decision, App. Nos: 9940-9944/82,

[258. Görsev, G. Doğan. 2015. “12 Eylül Anıları 3 Yılda 6 Tutukevinde” \(12 September Memoirs 3 Years in 6 Detention Centers\). Yazılıma. p. 23, 24.](http://hudoc.echr.coe.int/eng?i=001-74161#{{<itemid>}:[<001-74161>]}}}, para. 19, 27, 28, 32.</a></p></div><div data-bbox=)

259. Interview with Hakan Tahmaz, May 11, 2015.

260. Request of December 1, 1989 by a captain of Lice Gendarmerie Company Commandership from a public prosecutor, cited in THIV, Torture File. p. 22.

261. Interviewees spoke of intimidation by the police and military, re-arresting and re-torturing trouble-makers.

262. Those who acted outside the orders given by the martial law command were often dismissed or punished. Mumcu, Uğur. 1987. “12 Eylül Adaleti” (Justice of 12 September). um:agVakfi Publi-

cations. (a book on an interview made with a former marital law military prosecutor Mr Nurettin Soyer) Mavioğlu, Ertuğrul. 2008. "Bir 12 Eylül Hesaplaşması/2, Apoletli Adalet" (A 12 September Settlement/2, Justice with Epaulet), Ithaki, pp. 37–48, 69–77, 107–115, 129–138.

263. Laws precluded challenging the emergency decrees before the Constitutional Court (Article 148(1) of the Constitution), judicial review of administrative action (Provisional Article 3 of the Law on Martial Law and Article 7 of the Decree on Establishment of the Governorship of State of Emergency or investigation) and Article 15 of the Coup Constitution.

264. *Milliyet*, Feb. 19, 1982. For other statistics see Amnesty International, "Turkey: Deaths in Custody" (1989).

265. E.g. one judgement of Criminal Court of First Instance which noted: "As for an act of beating to amount to torture a simple beating is not enough, a (medical) report indicating disability to work for around 10 or 15 days is required." (Judgement of Yenimahalle 1<sup>st</sup> Criminal Court of First Instance, 10.2.1987, 177 /47), cited in Erem, Faruk, "Torture," in *Union of Bar Associations Journal*, 1988/2:197–207.

266. Amnesty International, "Turkey: a Policy of Denial," 1995. Accessed August 10, 2015. See <https://www.amnesty.org/download/Documents/176000/eur440241995en.pdf>.

267. "These decisions and documents continuously being used against our country in relation to politics leave Turkey in a difficult situation at the international level." Önok, Murat. "Uluslararası Boyutu ile İşkence Suçu" p. 526, THIV, September 1998. 1996 Turkey Human Rights Report. Ankara. p. 23 on "the influence of radical and militant circles against Turkey."

268. The Constitutional Court, Application No 2013/2015, November 4, 2015, paras 25, 107.

269. Nalan Erkem, January 24, 2005. "Yine bir gözaltı, yine şüpheli bir ölüm, yine bir intihar iddiası" (An arrest again, a suspicious death again, an allegation of suicide again), an article for Sesonline.net, available at [http://www.sesonline.net/php/genel\\_sayfa.php?KartNo=24094](http://www.sesonline.net/php/genel_sayfa.php?KartNo=24094); İsmail Saymaz, March 4, 2016. 'Mehmet Ceren'i işkencede öldürüp intihar süsü verdik' (We killed Mehmet Ceren and made it look like a suicide), in <http://www.radikal.com.tr/turkiye/mehmet-cereni-iskencede-oldurup-intihar-etti-susu-verdik-1522061/> based on confessions of a police officer, Sedat Caner, who participated in torture of suspects in the 1980s.

270. Kısacık, Raşit. "İşkence ve Ölümün Adresi Diyarbakır Cezaevi" pp. 36–45.

271. *France, Norway, Denmark, Sweden, Netherlands v Turkey*, European Commission Admissibility Decision, App. Nos: 9940-9944/82; see litigation below.

272. Interview with Rıza Türmen, former ECtHR judge, politician, and columnist, on Nov. 20, 2015. Reports indicate torture and ill-treatment in Diyarbakır Military prison swelling the ranks of the PKK.

273. See e.g. [www.cpt.coe.int/documents/tur/1993-01-inf-eng.pdf](http://www.cpt.coe.int/documents/tur/1993-01-inf-eng.pdf).

274. In 1990, in total, 13 cities were under state of emergency rule.

275. Kerim Yıldız, Frederick Piggott, pp. 22, 23. It derogated from Articles 5, 6, 8, 10, 11 and 13.

276. *Aksoy v Turkey*, Application no. 21987/93 December 18, 1996. [http://hudoc.echr.coe.int/eng#{"itemid":\["001-58003"\]}](http://hudoc.echr.coe.int/eng#{) para 78: "Although ...the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold

a suspect for fourteen days without judicial intervention. ... Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable." See also *Nuray Şen v Turkey* para 28 finding detention without trial "not strictly required by the crisis relied on by the Government."

277. See *Aksoy v Turkey*, *infra*, para 33.

278. This followed ECHR decisions (and international criticism) discussed in the section below.

279. The rights to a lawyer, doctor, or family notification, while enshrined in the ordinary criminal procedure code, were read as subject to "restrictions" if the authorities believed that "prejudicial harm" or "risks" would result.

280. CPT report on Turkey visit of November 22–December 3, 1992.

281. Allegations of interference include attempted murder of the president of IHD Akin Birdal in 1998, the recent detention of president of THIV, Prof. Sebnem Korur Fincancı, in June 2016, and the power given to the administrative authorities to close the associations said to be related to terrorist organizations.

282. It was formed in 1992 in London, far from the dangerous terrain of human rights activism within Turkish borders and was instrumental in much of the ECtHR litigation during this period.

283. See <http://daccess-ods.un.org/TMP/8501300.81176758.html> paras 102 and 104.

284. For example, in 1997 the CPT conducted a visit to Turkey following the ECtHR judgment finding Article 3 violation in *Aydın v Turkey*. The court relied on CPT reports to refer to the widespread and characteristic use of torture in police custody and improper medical examination of detainees in *Akkoc v Turkey*, among other cases.

285. Composed of the democratic Left Part, the Motherland Party, and Nationalist Movement Party.

286. The Copenhagen criteria state that new members must have achieved "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." For Turkey, compliance with ECHR judgments was a prime source for measuring this in practice. As noted below, this process significantly affected Turkey's domestic law and practice as a number of progressive reforms related to human rights were made between late 1990s and early 2000s to meet with Copenhagen criteria.

287. AKP won the general elections, headed by Prime Minister Recep Tayyip Erdoğan who continued the pro- European and anti-torture discourse at this point.

288. See e.g. figures disclosed by the Ministry of Justice on conviction rates as a reply to an official question put by an MP.

289. An amendment of the Turkish Criminal Code. Previously it referred only to "obtaining confession" and subsequently to "any other reason."

290. Law 4744, 2002.

291. Law 4923, 2003.

292. CCP reform, 2005.

293. On May 7, 2004, Law No. 5170 added a new sentence to Article 90(5) of the Constitution reading as follows: “(I)n the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”

294. This impedes, in particular, the ability to report on torture or other issues that in practice affect persons associated with banned organizations.

295. THIV, Torture File, pp. 49, 50. It was noted that the number of people who died as a result of torture in detention decreased between 1986 and 1990 with 81 victims. It was 252 victims between 1980 and 1985.

296. Cited in Michael D. Goldhaber, *A People's History of the European Court of Human Rights*, p. 130.

297. Carver and Handley, Turkey chapter.

298. The study indicates a possible increase after 2010, while events of 2016 have raised international concern.

299. “*Türkiye'de işkence konusunda bir devrim yaşanmıştır*”, Tahir Elçi, Peer Consultation, Nov 19., 2015.

300. Interview with a former chief of police, Jan. 12, 2016.

301. And until the entry into force of Protocol 11, the Court's predecessor, the European Commission on Human Rights.

302. Interview with Rıza Türmen, Nov. 20, 2015.

303. Amnesty International, “Has the Human Rights Situation in Turkey Changed?,” April 1999, p 1. Carver and Handley.

304. Interview with Basak Cali.

305. The UN Special Rapporteur on Torture, 1999 report on Turkey <http://daccess-ods.un.org/TMP/445277.504622936.html> para 14; Yıldız, Piggot 27.

306. Interview with Kerem Altiparmak, Nov. 20, 2015.

307. Although law 4778 reform made it possible to bring a case against the state officials, the law still criminalizes “falsely accusing officials,” which has been used against lawyers bringing torture allegations.

308. See <https://www2.tbmm.gov.tr/d23/7/7-10991sgc.pdf>. Other official statistics reveal that between 2000 and 2005, of 11,173 cases, only 2,771 resulted in sentencing of the accused who were found guilty, around 3/4 of the accused left without punishment: either acquitted or the charges were dropped for procedural grounds such as statute of limitation.

309. Ministry of Justice revealed the figures as a reply to an official question put by an MP.

310. Interview with Kerem Altiparmak, Nov. 20, 2015.

311. Interview with Rıza Türmen, Nov. 20, 2015.

312. In the June 7, 2015 elections, the AKP did not receive enough votes to shape the government on its own, while HDP, known as a pro-Kurdish party, passed the 10% electoral threshold for the first time. No genuine effort was made to facilitate a coalition government and a re-election allowed the AKP to establish a one-party government.

313. Massive street protests and the Gezi Park movement has made the opposition more visible since mid-2013.

314. Hundreds of civilians were killed in the Daesh-linked suicide attacks in Ankara, Suruc, Istanbul's Sultanahmet, Taksim and Ataturk Airport areas. The collapse of peace talks and long lasting ceasefire between PKK and Turkish armed forces lead to stricter security and grave violations in the southeast.

315. Interview with Hakan Tahmaz, Nov. 5, 2015.

316. Even before the 2016 coup, see e.g. statements by the former Prime Minister Ahmet Davutoğlu, stating that the cars used to unlawfully arrest, torture, and extra-judicially kill the opponents by JİTEM (white Toros cars), may return if AKP could not reach the necessary number to govern the country on its own in the 2015 elections.

317. See recent speeches from the government and president indicate that becoming a member to the EU is not a priority for Turkey, based on the EU's lack of willingness to engage genuinely and to accept it. He referred to alternative partnerships with Russia, China or Middle-Eastern countries.

318. A June 2016 CAT report highlights various concerns. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/109/81/PDF/G1610981.pdf?OpenElement>. The UN Special Rapporteur's trip was cancelled. Many judges were dismissed following the coup attempt, raising these concerns in 2016. <http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4c12eee3-bfid-47cc-9080-9e4464d4bb85> (IBAHRI) <https://www.hrw.org/news/2016/08/03/government-response-turkeys-coup-affront-democracy> (HRW) <http://www.icj.org/turkey-icj-condemns-purge-of-judiciary/> (ICJ). For post-coup analysis see e.g. <https://www.amnesty.org/en/latest/news/2016/07/turkey-independent-monitors-must-be-allowed-to-access-detainees-amid-torture-allegations/>.

319. Law No 6332 adopted on June 21, 2012.

320. There have reportedly been no visits to detention centers by the Institution between 2012 and April 2016. Interview with Ozturk Turkdogan, and Turkey's Universal Periodic Review 27.01.2015 <http://daccess-ods.un.org/TMP/4402832.38887787.html>.

321. See e.g. in the Paris Principles. The criticism holds true for the plurality of national level mechanisms now in existence. In addition to those mentioned above, under a new law adopted on April 6, 2016 (Law on Human Rights and Equality Institution), the HRI was abolished and a new institution named as "the Human Rights and Equality Institution" (HREI) was established. The HREI has no sign of activity since its establishment.

322. See e.g. Carver study, and Amnesty International report <https://amnesty.org.tr/icerik/8/1518/turkiye-insan-haklari-kurumu-kanunu>.

323. See below under litigation on the chilling impact this has on ECtHR applications and admissibility. Interview with Rıza Türmen, Nov. 20, 2015.

324. Interview with Tahir Elçi.

325. In the early 1990s, the administrative courts did start to deliver judgments granting compensation but were limited by the Council of State.

326. The law does not require the criminal case be closed for an administrative claim to be made, but in practice claims are left pending resolution of a criminal matter or cannot be established absent a criminal conviction.

327. A judicial principle of non enrichment for non-pecuniary damage contributes, and requires the courts to take into account the financial situation of the plaintiff which should not be dramatically changed.

328. Article 129(5) of the Constitution.

329. As one peer consultation participant put it, the state simply pays the compensation and the cases are closed without further action or apparent effect.

330. Interview with Hakan Tahmaz, Nov. 5, 2015.

331. Detained on Sept. 12; on October 8 he was transferred with 5 other detainees to Dede Korkut Educational Institute, and never returned home.

332. Inspired by the Argentinian Madres and Abuelas groups, the Turkish Saturday Mothers group began holding weekly protests in 1995.

333. Saymaz, İsmail. 2012. "Öğlumu Öldürdünüz Arz Ederim 12 Eylül'ün Beş Öyküsü" (You Killed my Son, Yours Sincerely, 5 Stories of 12 September). Postacı pp. 59–164.

334. See <http://www.cumhuriyetarsivi.com/katalog/192/sayfa/1990/11/7/20.xhtml>.

335. THIV, Turkey, 1994 Human Rights Report, p. 180.

336. *Nokta News Magazine*, "Confessions of a Torturer Police Officer," February 2, 1986.

337. Interview with Bedii Tan's son, Altan Tan, Dec. 18, 2015.

338. Kısacık, Raşit. "İşkence ve Ölümün Adresi Diyarbakır Cezaevi" pp. 61–63.

339. See <http://www.cumhuriyetarsivi.com/katalog/192/sayfa/1986/4/1/13.xhtml>.

340. See [http://gazetearsivi.milliyet.com.tr/GununYayinlari/V\\_x2B\\_p9upKUF7NorVct7vXkUg\\_x3D\\_x3D](http://gazetearsivi.milliyet.com.tr/GununYayinlari/V_x2B_p9upKUF7NorVct7vXkUg_x3D_x3D).

341. Judgment of June 18, 2014 by Ankara 10<sup>th</sup> Specialized Heavy Penal Court.

342. Interview with Bedii Tan's son, Altan Tan, Dec. 18, 2015.

343. *Abdullah Aydar* Judgement, App No 2013/64, available at <http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/64405246-79b4-4ada-98dc-5ffa79c6f4cc?highlightText=12%20eyl%C3%BCl&wordsOnly=False>.

344. Derin Araştırmalar Laboratuvarı/DAL.

345. See <http://www.radikal.com.tr/haber.php?haberno=216454>.

346. Ankara Administrative Court granted 30.000,00-TL for pecuniary damages and 50.000,00-TL for non-pecuniary damages.

347. The Council of State (Deliştey) reversed the decision in 2015 requesting the amount for non-pecuniary damage be increased to 100.000,00-TL. See <http://www.milliyet.com.tr/50-bin-lira-polisin-sucuna-gundem-2018996/>.

348. They applied to the administrative court for compensation from the Ministry of Home Affairs. With a judgment given in 2012, they were granted figures ranging from 10.000,00-TL to 25.000,00-TL.

349. Public interview in 2014: <http://bianet.org/bianet/insan-haklari/160989-manisali-gencler-bir-vekilin-mucadelesi-ve-iskenceye-mahkumiyet>.

350. The Court of Cassation upheld the judgment in relation to five suspects, while the sentence of the 6th was reduced to 1 year 8 months following the partial reversal of the Court of Cassation <http://www.cagdasses.com/guncel/31000/metin-goktepe-davasi-ve-detaylari>.

351. Press Statement of the Istanbul Bar Association, cited in 1999 THIV report, Human Rights in Turkey, p 116, see <http://tihv.org.tr/1999-turkiye-insan-haklari-raporu/>.

352. *Yeter v Turkey* Application no. January 13 2009, available at [http://hudoc.echr.coe.int/eng?i=001-90598#\[\"itemid\":\"001-90598\"\]](http://hudoc.echr.coe.int/eng?i=001-90598#[\); (*Erdogan*) *Yilmaz and others v Turkey* case available at <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-88842&filename=001-88842.pdf&TID=ihgdqbxnfi>.

353. *France, Norway, Denmark, Sweden, Netherlands v Turkey*, the European Commission of Human Rights, Admissibility Decision, App. Nos: 9940-9944/82 [http://hudoc.echr.coe.int/eng?i=001-74161#\[\"itemid\":\"001-74161\"\]](http://hudoc.echr.coe.int/eng?i=001-74161#[\). The period covered was September 12, 1980-July 1, 1982.

354. The fact-finding visit was carried out by a PACE delegation between January 7, 1982 and January 14, 1982.

355. Interview with Rıza Türmen, Nov. 20, 2015.

356. International Human Rights Committee of New York Bar Association, p. 13.

357. The periods were still very problematic and would later be further condemned and reduced.

358. See [http://hudoc.echr.coe.int/eng?i=001-58542#\[\"itemid\":\"001-58542"\]](http://hudoc.echr.coe.int/eng?i=001-58542#[\).

359. Ibid.

360. Interview with Rıza Türmen, former ECHR judge, politician, columnist, Nov. 20, 2015. He noted that Members of the Court of Cassation were very reluctant to be trained on the basis that senior judges they did not need training.

361. See [http://www.echr.coe.int/docs/stats\\_violations\\_1959\\_2016\\_ENG](http://www.echr.coe.int/docs/stats_violations_1959_2016_ENG) Pages/home.aspx?p=reports, violations by article and by state, 1959-2016.

362. Statistics on violations by articles and by states between 1959 and 2015, ECtHR, see <http://www.echr.coe.int/Pages/home.aspx?p=reports>.

363. Application no. 21987/93 December 18, 1996 [http://hudoc.echr.coe.int/eng#\[\"itemid\":\"001-58003"\]](http://hudoc.echr.coe.int/eng#[\).

364. Reportedly the torture went on at 2 hour intervals, exacerbated by water thrown on him during electrocution.

365. Goldhaber, ibid. Between 1994 and 2003 he was tortured 24 times.

366. Kerim Yıldız, Frederick Piggot, "An Ongoing Practice: Torture in Turkey," pp. 18, 19. Aksoy created a precedent for many individual cases on torture in detention against Turkey that would follow (including *Aydin*, *Tekin*, *Ilhan*, *Dikme*, etc.).

367. Interview, Serif Aksoy, father of Zeki Aksoy, in Goldhaber, ibid.

368. Application No. 23178/94, [http://hudoc.echr.coe.int/eng#\[\"appno\":\"23178/94\",\"itemid\":\"001-58371"\]](http://hudoc.echr.coe.int/eng#[\).

369. Mrs. Aydin alleges that the police beat her husband twice. The right of petition is guaranteed in art 25 ECHR.

370. The report verified Turkey's commitment to take measures to combat torture.

371. Application nos. 22947/93 and 22948/93, October 10, 2000 [http://hudoc.echr.coe.int/eng#{"appno":"22947/93","itemid":"001-58905"}](http://hudoc.echr.coe.int/eng#{).

372. It endorsed the UN Convention Against Torture's definition of torture. Aisling Reidy, "The prohibition of torture: a guide to the implementation of Article 3 of the European Convention of Human Rights," Council of Europe, 2002, pp. 11–12, accessed at: [http://www.echr.coe.int/Library-Docs/DG2/HRHAND/DG2-EN-HRHAND-06\(2003\).pdf](http://www.echr.coe.int/Library-Docs/DG2/HRHAND/DG2-EN-HRHAND-06(2003).pdf).

373. This reflected the CPT's reports on improper medical examinations referred to by the court; see also Committee of Minister' resolution on *Akkoc* at: [http://hudoc.echr.coe.int/eng#{"itemid":"001-69846"}](http://hudoc.echr.coe.int/eng#{).

374. Some of the many cases addressing torture and ill-treatment in detention have been *Kurt v Turkey*, *Satik v Turkey*, *Yeter v Turkey*, *Salman v Turkey*. Application no. 21986/93, June 27, 2000, [http://hudoc.echr.coe.int/eng# {"itemid":"001-58735"}](http://hudoc.echr.coe.int/eng#{).

375. *Elçi and Others v Turkey* Applications nos. 23145/93 and 25091/94, March 24, 2004, [http://hudoc.echr.coe.int/eng# {"itemid":"001-61442"}](http://hudoc.echr.coe.int/eng# {). Article 3 and Article 5 were violated in relation to incommunicado detention ranging from 7 days to 25 days.

376. See <http://communities.lawsociety.org.uk/human-rights/news-and-events/amicus-for-constitutional-court-turkey/5057590.fullarticle>.

377. See [http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=&StateCode=TUR&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=TUR&SectionCode=).

378. Interview with Bahri Bayram Belen, Nov. 3, 2015; interview with Öztürk Türkdoğan, lawyer, president of the Human Rights Association, Nov. 12, 2015; interview with the presiding judge of an Istanbul Heavy Penal Court, Nov. 16, 2015.

379. The basic concepts concerning burden of proof were developed in later cases, e.g. Council of Europe handbook on Article 3 references *Salman v Turkey* for the "heightened burden" to provide a satisfactory explanation, keep records and account.

380. Some linked it closely to the inability to find an adequate resolution to the Kurdish question.

381. Interview with Ismail Saymaz, journalist, Dec. 16, 2015.

382. See Basak Cali, "The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996–2006," *Law and Social Inquiry* (2010). See also recognition of the truth-telling value of those processes in Sezgin Tanrikulu, "ECHR as a Truth Telling Commission," in *50 Years of the ECHR Failure or Success*, Ankara Bar Association, pp. 122–230.

383. See <http://www.milliyet.com.tr/-canimin-acisina-fazla-dayanamadi/gundem/detay/1845813/default.htm>.

384. See e.g.. the UN's Basic Principles on the Right to a Remedy and Reparation, including restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition; CAT General Comment 3.

385. As a lawyer representing victims in Argentina noted: "We start with criminal actions because we [as legal representatives of victims] try to find who are those responsible for the torture. We seek

for the truth and for proper judicial investigation. Civil demands come after conviction, when it is possible to prove that someone was responsible for the crime. Currently, after the sentence, we are preparing the civil demand. Without a penal conviction it is very difficult to reach economic reparation.”

386. See e.g. comments on Nebahat Akkoç, the applicant of the *Akkoç v Turkey* case, or the experience of Rumba Kinuthia, a Kenyan lawyer, whose compensation enabled him to return to legal practice and represent other victims of Nyayo House torture.

387. Interview with Andrew Songa, on Argentinian awards and Nebahat Akkoç, the applicant of the *Akkoç v Turkey* case, on Turkish ECtHR awards.

388. Guembe, 2009.

389. We were told this is not strictly required in law, so is more a problem of legal practice than law.

390. E.g. in Turkey the linkage of awards to income has adversely affected those most in need.

391. The Mau Mau awards may have been a notable exception, though given the mass of applicants this too reduced to modest sums for each.

392. Interview with Rosa Díaz Jiménez.

393. Interview, *Akkoç*.

394. In all three states, research suggested that victim participation in proceedings has increased in recent years, influenced in part by the litigation under review.

395. See e.g. references to a sense of “fighting against the court” in Ch. 1.

396. Discussion with Tahir Elçi, peer consultation and interview with Baskın Oran, academic, columnist, former member of the IHDK, Nov. 13, 2015.

397. Chapters 2–4 highlight several cases of victims and family members turned advocates, e.g. Wachira Waheire, Nebahat Akkoc, Andrea Casamento, Madres, Abuelas, Saturday Mothers.

398. *Molina* and other cases, Ch. 1.

399. Jaime Malamud Goti, *Los Dilemas morales de la Justicia Internacional*, Ed. Miño y Davila, Buenos Aires, 2004, noting that trials serve to show that victims were not responsible for their own suffering.

400. See below Reprisals; e.g. *Sedat Caner* case who was declared to be member of a terrorist organization, and more recent cases of lawyers and supporters of litigation being criminally charged with such “propagandizing,” H. Duffy, “Crimes of Expression,” in Lazarus (ed.), *Security and Human Rights*, OUP 2017.

401. “CELS presence was very important. If we had had a common lawyer, even when we could have fought a lot, perhaps the result of judicial process would not have been the same” (Lorena Barros Cisneros, family member of victim of torture and ill-treatment in prison during democracy).

402. Interview with Şebnem Korur Fincancı, academic, medical practitioner, president of THIV, Nov. 20, 2015.

403. E.g. interviewees on the Kenyan process in the Nyayo House cases in Ch. 2.

404. She spoke of “stories that could be hardly spoken anywhere in the country” shared during these proceedings, which, in addition to the opportunity to talk about what happened, created an archive for other persons and processes. See also Sezgin Tanrikulu, “ECtHR as a Truth Telling Commission,” in *50 Years of the ECHR Failure or Success*, Ankara Bar Association, pp. 122–230, available at <http://www.ankarabarasu.org.tr/siteler/1940-2010/Kitaplar/pdf/a/aihm50.pdf>.

405. Though see as an exception, acknowledgment following the collective *habeas corpus* cases in Ch. 1.

406. Reflected in e.g. UN Basic Principles on the Right to a Remedy.

407. Interview with Andrew Songa.

408. *Ibid.*

409. Legislative changes reflect the need for greater measures to secure victims’ rights.

410. See a more progressive approach to reparation evolving over time noted under policy/jurisprudential impact below.

411. 118 have been located since 1983 in part through litigation but also broader efforts that pulled in the same direction.

412. In both Argentina and Turkey, the IACtHR and the IACtHR and the ECtHR, have issued precautionary, provisional or interim measures.

413. See below on reprisals and negative effect.

414. Ms Akkoç describes how the “hell” she suffered upon filing her European Commission application ceased completely after the on-site hearing; regrettably such hearings are rarely held by the ECtHR.

415. Interview with Nebahat Akkoç, the applicant of the *Akkoç v Turkey* case, president of KA-MER, Jan. 1, 2016.

416. Interview with Bahri Bayram Belen, lawyer, Nov. 3, 2015. In cases such as *Opuz v Turkey* the ECHR made clear the obligation to investigate arises *proprio motu* and should not depend on victim complaint, as had been the case in Turkey; in practice investigations rarely proceed without the victim driving it forward.

417. Interview with Şebnem Korur Fincancı, academic, medical practitioner, president of THIV, Nov. 20, 2015.

418. Interview with Öztürk Türkdoğan, lawyer, president of the Human Rights Association, Dec. 11, 2015.

419. While largely depends on expectations, advice and support given to victims.

420. Interview with Öztürk Türkdoğan, lawyer, president of the Human Rights Association, Dec. 11, 2015.

421. Interview with Leonardo Filippini.

422. APT study spent years doing this research in targeted countries, including Turkey.

423. An exception would be the high levels of reported torture in Turkey since the 2016 coup which unfolded as the report was being written and which had not yet given rise to litigation, so lay beyond this report.

424. E.g. torture and ill-treatment on the streets and in irregular centers, Chs 1-3.

425. E.g. allegations of the increase of lethal force/extra-judicial executions replacing torture in Kenya, Ch. 2.

426. While a broader phenomenon, an example is catalyzing violence between detainees in Argentinian prisons.

427. Interview with Paula Litvachky.

428. Interview with Luciano Hazan, Argentina.

429. Interview with Luciano Hazan, Argentina.

430. Interview with Andrew Songa on the Nyayo House cases.

431. The emphasis is on the larger scale legislative shifts, but there are examples of more specific regulations changing following litigation.

432. It was applicable only to criminal “suspects” tortured by state agents to obtain a “confession,” Article 243 on the offense of torture of Former Turkish Penal Code, Law No. 765 adopted in 1926, replaced by the Law No. 5237 (the new) Turkish Penal Code on 1 June 2005 and was subject to light penalties. E.g. a Heavy Penal Court decision sentencing a suspect to 10 months of imprisonment under Article 243/1 torture provision was reversed by the Court of Cassation in 1994 as there was insufficient evidence illustrating that the ill-treatment was used to have the suspects confess: the Assembly of the Penal Sections of the Court of Cassation, File No.: 1993/8-314 Decision No:1994/11.

433. With law no. 4449 of 1999 its scope, potential victims, perpetrators, and necessary aims were broadened.

434. Declaration by the Government of Turkey: “Within the last year, Articles 243, 245 and 354 of the Turkish Penal Code ... were amended to redefine and prevent torture and ill-treatment in accordance with international conventions and the penalty for such criminal acts [was] increased ...Finally, the Law on the Prosecution of Civil Servants and Other Officials, which was approved by Parliament on December 2, 1999 and entered into force, facilitates the initiation of investigations and prosecution of public officials.”

App No 34382/97, Judgment (Friendly Settlement), April 5, 2000, First Section, [http://hudoc.echr.coe.int/eng?i=001-58542#{"itemid": "001-58542"}](http://hudoc.echr.coe.int/eng?i=001-58542#{).

435. Law No 5237, in force since June 1, 2005, which provides for torture as a crime against humanity (under Article 77), and includes the potential responsibility officials and “non official accomplices” (Article 96) and removing the purpose requirement for ill-treatment.

436. E.g. case of *Engin Ceber*, discussed in Chapter 3, which was the first case where aggravated life imprisonment was imposed. though questions also arise as to human rights implications of life sentences, it sent an important and infrequent message about the gravity of the crime of torture and ill-treatment. See [www.ceza-bb.adalet.gov.tr/mevzuat/maddegerkce.doc](http://www.ceza-bb.adalet.gov.tr/mevzuat/maddegerkce.doc).

437. See <https://www.tbmm.gov.tr/sirasayi/donem21/yil01/ss141m.htm>.

438. Art. 95(4) Law of 2005.

439. See statement by the Attorney General of Kenya, “We are now more convinced than ever for the need of a Prevention of Torture Legislation.”

440. See AG's Statement, *ibid*.

441. Former Law on the Prosecution of Civil Servants adopted on February 24, 1913. This was replaced by Law No. 4483 on the Prosecution of Civil Servants and other Public Officials was enacted on December 4, 1999.

442. Helsinki report p. 31. Though in that case after no less than six years, at least the Provincial Administrative Board of Ankara authorized the prosecution of several police officers

443. To meet with the political aspects of the Copenhagen Criteria, Law No. 4778 added a new paragraph to Article 2(5) of the Law No. 4483.

444. Law No 6722 adopted in June 2016 amending a number of laws has brought the condition of superior permission back for all types of offenses committed under anti-terrorism operations including torture and killings by security forces.

445. Turkish amendment of April 11, 2013 to Article 94 of Penal Code. See also jurisprudence below.

446. Interview with Kerem Altiparmak, academic, Ankara University, Nov. 12, 2015.

447. *Aksoy v Turkey, Sakik and others v Turkey* where the ECHR found 14 and 12 days of incomunicado detention in violation of Article 5. CPT reports on Turkey of 1990, 1991, 1992 etc. Para 96 of the 1990 report: "As is recognised in the Explanatory Report accompanying the Bill drawn up by the Ministry of Justice on the length of custody (see Appendix III, paragraphs 38 to 41), the maximum possible length of police or gendarmerie custody in Turkey (up to 30 days; see above, paragraph 42) is considerably longer than in other Council of Europe member States. A reduction in the maximum possible periods of custody would make a significant contribution to the prevention of torture and inhuman or degrading treatment or punishment."

448. The amendments (06.03.997) were formally adopted only a few months after judgment of 18.12.97. Goldhaber suggests they were announced the day after judgment.

449. Law No. 3842, amending Article 128 of the former Criminal Procedure Code Law No. 1412, limited the maximum length for the ordinary individual crimes to 24 hours and for "collective crimes" (allegedly committed by three and more persons) to 4 days. The maximum length of detention in security related cases remained 15 days for persons appearing before the state security courts and 30 days for cases under the State of Emergency.

450. THİV, the Torture File, September 12, 1980–1995, p. 30.

451. *Aksoy v Turkey*, para 78.

452. Law No. 4229.

453. Law No. 4744.

454. *Keskin, Serap. Kişi Özgürliği ve Güvenliği Hakkına İlişkin Anayasal Değişiklikler* (Constitutional Amendments with Regard to Right to Liberty and Personal Security), İÜHFM C. LX, S. 1–2, 49–61, 2002, p. 55.

455. It was explicitly introduced to the law with an amendment made in Article 136 of the former Criminal Procedure Code in 1992, November 8, 1992, Law No. 3842.

456. THİV, the Torture File, September 12, 1980–1995, p. 30.

457. Law No. 4229 adopted on March 6, 1997: Article 16 of the Law No. 2845 on the Establishment of and the Proceeding before the State Security Courts.

458. Article 3(m) of the Decree no 668 adopted on July 25, 2016 gives the prosecutors the power to prevent lawyers' access to their clients for five days for the for the terrorism related offenses.

459. Application no: 36391/02.

460. See <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5968&lang=2> referring to developments in Dutch law.

461. Article 3(a) Decree no 668 adopted on July 25, 2016 by the Council of Ministers after declaration of the state of emergency stipulates that maximum length of police detention for the terrorism related offenses was 30 days.

462. These examples are only that, and there were other changes such as law reform on procedure and evidence not addressed here.

463. Law 13.449 2006 reformed the prisoner's release system of the Buenos Aires Criminal Procedure Code. After the implementation of this reform, certain crimes no longer lack the possibility of release. Partly as a result of this reform, incarceration rates declined in subsequent years.

464. See Kenya's Second Periodic Report to UN-CAT in 2012 at para. 117 and 118.

465. E.g. National Executive Power Enactment No. 70/91 10 Jan 1991 and the Law 24.043, November 27, 1991.

466. A collective reparation scheme was established for the internally displaced persons (damages to property rights) in relation to the ECHR's judgments of *Doğan and Others v Turkey*, *İçyer v Turkey*.

467. E.g. in Kenya, the repealing of Section 16 of the Evidence Act only allows for confessions before a judicial officer and a police officer of the rank of an Inspector. In Turkey, before 1992 the rules on the legal value of statements obtained through torture were unclear (see e.g. case no 982/160, 984/5, January 24, 1984), and courts would widely reject challenges to admissibility of evidence, until a legal amendment provided that statements taken under illegal interrogation must not be treated as evidence and cannot serve as basis for the decisions of courts. Implementation of the law remains problematic (see THIV 1993).

468. *Wachira Weheire v Attorney-General* [2010].

469. *Waheire*, ibid.

470. All the coup-era torture investigations initiated in early 2010s were dropped by the prosecutors, on the ground that they were time-barred. This was challenged before the Constitutional Court, where prosecutors argued that abolishing of the statute of limitation for torture offenses in 2013 (noted above) did not apply to prior events. The Constitutional Court rejected the applicants' claims in at last four cases. The court has found it was not competent to hear complaints on events took place before it was given competency to receive individual applications (which was on September 23, 2012). (See *Abdullah Aydar, Abdulsemet Aytek, Zeycan Yedigöl* judgments).

471. Interview Paula Litvachky noting that these cases and developments on standards and burden of proof "have had an impact on other cases."

472. Examples include the adaptation of rules of evidence in enforced disappearance cases then applied in other contexts.

473. *Law of the European Convention on Human Rights*, Harris, O’Boyle, Warbrick, Oxford, 2014, pp. 238, 239.

474. See e.g. Annual Report 2013, ECHR, pp. 46–47.

[https://www.google.com.tr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=r&cad=rja&uact=8&ved=oahUKEwi71ISr\\_djLAhUiM5oKHQUvBvMQFggaMAA&url=http%3A%2Fwww.echr.coe.int%2FDocuments%2FAnnual\\_report\\_2013\\_ENG.pdf&usg=AFQjCNFXkkBJzp4WZ-WHXEqno2aj38ZNmw&bvm=bv.117604692,d.bGs](https://www.google.com.tr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=r&cad=rja&uact=8&ved=oahUKEwi71ISr_djLAhUiM5oKHQUvBvMQFggaMAA&url=http%3A%2Fwww.echr.coe.int%2FDocuments%2FAnnual_report_2013_ENG.pdf&usg=AFQjCNFXkkBJzp4WZ-WHXEqno2aj38ZNmw&bvm=bv.117604692,d.bGs); or ICTY *Kunarac et al.* appeal judgment, §§ 184–85 citing *Aydin v Turkey* in determining rape as torture and crimes against humanity.

475. As part of the supremacy clause of the Constitution, treaties or conventions ratified by Kenya are deemed to form part of the law of Kenya: Constitution (2010) Article 2(5). On May 7, 2004, with Law No 5170 a new sentence was added to Article 90(5) of the Turkey’s Constitution reading as follows: “(I)n the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”

476. The Supreme Court was strongly influenced by IAHR Court rulings *Barrios Altos v Peru* and *Velazquez Rodriguez*.

477. Interview with Paula Litvachky.

478. E.g. through class actions regarding prison conditions, international standards on prison conditions and cruel, inhuman or degrading treatment have been incorporated to the local jurisprudence.

479. E.g. the obligation to investigate and its requirements in particular situations or crimes (*Molina*, the non-applicability of Statutory Limitations); the crime of torture and its scope (e.g. expanding dictatorship prosecutions; *Arruga*; *Barros Cisneros* and *Brian Nuñez* cases); the nature of reparation; standards of proof; and pretrial detention (*Verbitsky*’s habeas corpus), among others.

480. Courts have included international jurisprudence from the International Criminal Tribunals for Rwanda and Yugoslavia for sexual violence crimes, specifically the *Akayesu* and *Foča* cases.

481. Collective *habeas* cases.

482. *Wachira Weheire v Attorney-General* [2010] eKLR.

483. Colombian court jurisprudence follows closely that of Argentina in crucial decisions on impunity at the end of the armed conflict in that state.

484. *Verbitsky*’s habeas corpus, *Penitenciarías de Mendoza*, IACtHR cautionary measures for Buenos Aires prisons.

485. E.g. the Ombudsman for people deprived of liberty; National Public Defense; National Public Prosecutors’ Office, among others.

486. These include the decision that police stations would no longer be used as places of detention (which were evacuated following *Verbitsky*’s sentence) or the adoption of a policy of “alternative measures to pretrial detention” to reduce the prison overpopulation that had contributed to torture and ill-treatment (*Penitenciarías de Mendoza* and *Verbitsky* cases).

487. Concrete changes included ending police detention, the creation of greater oversight, construction of new prisons to ease overcrowding and sometimes quite specific measures, such as extending water systems to the San Martin zone which housed one of the prisons, among others.

488. Tahir Elçi, peer consultation. This was before the deteriorations of 2016.

489. Interview with Bahri Bayram Belen, lawyer, Nov. 3, 2015. One interviewee suggested that the condemnation was based on a very limited view of torture. Interview with Özтурk Türkdoğan, lawyer, president of the Human Rights Association, Dec. 11, 2015: the government's conceptualization of torture as only the most serious beatings during interrogation resulting in serious injuries. Interview with Hakan Tahmaz, a torture victim, journalist, founder of the Peace Foundation, Nov. 5, 2015.

490. Andrew Songa interview.

491. Ibid.

492. See *Daily Nation*, "Githu pledges to pay those tortured during Moi's regime." Available at: <http://www.nation.co.ke/news/Githu-pledges-to-pay-those-tortured-during-Mois-regime/-/1056/2868190/-/3fd8siz/-/index.html>.

493. This reflects some aspects of the policies of memory, truth, and justice in Argentina and contrasts with the lack of any such policy in Turkey.

494. Policy change on torture and ill-treatment was clearly influenced by evolving policies on other matters, notably security and counter-terrorism in all three states, or the Kurdish question and EU accession in Turkey specifically.

495. E.g. in 2016 when the Turkish government threatened reintroduction of measures long dispensed with (such as death penalty in post-coup Turkey in 2016), noted that the state has not and would not suggest torture and ill-treatment is permissible or tolerated.

496. Interview with Altan Tan, Bedii Tan's son, politician, MP from HDP, Dec. 18, 2015.

497. Interview with Ismail Saymaz, journalist, Dec. 16, 2015: Much depends on whether the shortcomings of these bodies can be addressed and functions made more effective, as well as the individuals appointed, some of whom have in the past harnessed imperfect institutions to increase the political profile of torture and ill-treatment in detention.

498. E.g. Truth and Justice Program, the victim's therapeutic center, the national and local witness protection programs, among others. Most of these programs were created inside the institutional structure of the National Ministry of Justice and HR, proposed by NGOs.

499. Procuraduría de Crímenes contra la Humanidad—Special Prosecutor office of Crimes against Humanity of the Attorney General's Office <https://www.mpf.gob.ar/lesa/>; and Special Unit for child appropriation during state terrorism, <https://www.mpf.gob.ar/lesa/unidad-especializada-para-casos-de-apropiacion-de-ninos-durante-el-terrorismo-de-estado/>.

500. See also "Program against Institutional Violence," the "Prison Commission," and the "Program for judicial assistance for people deprived of liberty," within the National Public Defenders Office; and PROCUVIN (Special Office against institutional Violence) within the Attorney General's Office.

501. The Procuraduría de Violencia Institucional—Special Prosecutor Office on Institutional Violence.

502. The Cámara Nacional de Casación visits prisons for discussions regarding different topics such as: isolation, transfers to different prisons, among others.

503. Interview with Luciano Hazan.

504. In Argentina following the transition to democracy, the reform of the armed forces—deemed principally responsible for dictatorship crimes—was profound. By contrast, reform of the police and penitentiary system was described to us as neglected and long overdue (despite the lesser role of these institutions in dictatorship crimes, the vestiges of which were reflected in on-going responsibility for torture and ill-treatment).

505. Interview with Andrew Songa.

506. *Republic v Amos Karuga Karatu* [2008] eKLR. Available at: [http://kenyalaw.org/Downloads\\_FreeCases/violation\\_of\\_rights\\_pdf.pdf](http://kenyalaw.org/Downloads_FreeCases/violation_of_rights_pdf.pdf).

507. Interview with Judge Turmen, Turkey and Judge Rafecas, Argentina.

508. Interview with Rıza Türmen, former ECHR judge, politician, columnist, Nov. 20, 2015. Trainings are cited in the context of implementation and accession negotiations.

509. Interview with two Istanbul prosecutors, Nov. 16, 2015.

510. In particular, *Barrios Altos vs Peru* and *Velazquez Rodriguez v Honduras*.

511. See references to Colombian courts in Ch. 1.

512. The Parliamentary Assembly of the Council of Europe paper of 8 January 2016 at <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5968&lang=2>.

513. The new protocols and procedures for research and for taking victim's testimonies, Acordada 1/12: See “Guía de Actuación para los Ministerios Pùblicos en la investigación penal de casos de violencia sexual perpetrados en el marco de crímenes internacionales, en particular de crímenes de lesa humanidad,” available at <http://www.fiscales.gob.ar/lesa-humanidad/wp-content/uploads/sites/4/2015/06/Gu%C3%A1da-Violencia-sexual.pdf>.

514. Interview with Carolina Varsky.

515. In the context of *Mignone*, requests by international NGOs to present *amicus curiae* briefs were accepted, paving the way to the use of such in many later cases, including regarding dictatorship crimes and prison conditions under democracy.

516. Interview with Carolina Varsky.

517. Philip Leach, Prof of Human Rights Law, Middle-Essex University, human rights lawyer, peer consultation, Nov. 18, 2015, referring specifically to the impact on subsequent Chechen cases.

518. References to “persecution” are seen most clearly in the Argentinian cases under democracy but emerged in discussions of Turkey too.

519. Interview with Hakan Tahmaz, a torture victim, journalist, founder of the Peace Foundation, Nov. 5, 2015.

520. Interview with Rıza Türmen, former ECHR judge, politician, columnist, Nov. 20, 2015.

521. Interview with Öztürk Türkdoğan, lawyer, president of the Human Rights Association, Nov. 12, 2015.

522. See the broader analysis of the phenomenon in e.g. From Judgment to Justice: Implementing International and Regional Human Rights Decisions, Open Society Foundations, 2013.

523. Interview with Victor Abramovich.

524. E.g. Turkish lawyers, peer consultation or *Barros Cisneros* case in Argentina where an administrative process led to five prison guards being dismissed.

525. See Ch. 1. on the “truth” trials. Note also a number of cases in democracy have sought information on numbers of detainees, registrations, prison capacity or videos of detention facilities.

526. Striking examples emerge from the criminal trials in Turkey, and to a lesser extent Argentina, in light of clearly implausible explanations and justifications put forward by the authorities.

527. Sezgin Tanrikulu, “ECHR as a Truth Telling Commission,” in *50 Years of the ECHR Failure or Success*, Ankara Bar Association, pp. 122–230, <http://www.ankarabarosu.org.tr/siteler/19402010/Kitaplar/pdf/a/aihm50.pdf>.

528. Interview with Basak Cali.

529. See Basak Cali, *The Logics of Supranational Human Rights Litigation*.

530. See “Statement to Parliament on settlement of Mau Mau claims,” available at: <https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims> as accessed on March 28, 2016.

531. See KHRC Memorial Narrative Booklet. Available on: <http://www.khrc.or.ke/publications/105-memorial-narrative-booklet/file.html> as accessed on March 28, 2016. It includes the memorial plaque on reconciliation.

532. Gitu Kahengeri statement at end of the litigation, Ch. 2.

533. Interview with Kerem Altiparmak, academic, Ankara University, Nov. 12, 2015.

534. Interview with Baskin Oran, academic, columnist, former member of the IHDK, Nov. 13, 2015.

535. Interview with ebnem Korur Fincancı, academic, medical practitioner, president of THIV, Nov. 20, 2015.

536. Shaking misperceptions as to the nature of those tortured has been an important litigation impact.

537. Interview with Baskin Oran, academic, columnist, former member of the IHDK, Nov. 13, 2015: “according to the state the detainees were dying through suicide or sickness, persons disappeared had left the country or joined the PKK, the bodies of the detainees were never disclosed and undeniable incidents were represented as isolated wrongdoings in exceptional cases.”

538. Interview with Andrew Finkel, journalist, Dec. 11, 2015, suggesting that the media often conveys official narrative uncritically and the public rarely sees the real picture behind the cases.

539. E.g. the assertion that Mehmet Siddik Bilgin had been shot dead because he had attempted to escape was contradicted when soldiers came forward stating otherwise.

540. See <http://bianet.org/bianet/insan-haklari/160989-manisali-gencler-bir-vekilin-mucadele-si-ve-iskenceye-mahkumiyet>.

541. Interview with Andrew Songa.

542. Ibid.

543. Akkoc who described how she became a womens' rights activist following her first arrest and set up KA-MER (Woman Center).

544. Wachira Waheire was a victim of the Nyayo House torture and also successfully sued the government of Kenya for torture in custody. He has since emerged as a leader of national coalition on survivors of victims of torture and uses this advocacy group to voice concerns of the other victims including the widows of victims who died of torture during the Nyayo era.

545. See <http://bianet.org/bianet/insan-haklari/160989-manisali-gencler-bir-vekilin-mucadelesi-ve-iskenceye-mahkumiyet>.

546. Interview with Nebahat Akkoç, the applicant of *Akkoç v Turkey*, president of KA-MER, Jan. 6, 2016.

547. See e.g. Fillipini on criminal processes as consolidating democracy in Argentina.

548. To the extent that cases coming through now build on progress and limitations of the past, greater impact may be achieved.

549. An example would be the 1997 CPT visit to Turkey following the ECHR judgments, and the court's reliance on the CPT reports to refer to the widespread and characteristic use of torture in police custody and improper medical examination of detainees.

550. Budlender and Ferreira, *Public Interest Litigation* (2014) pp. 109–126.

551. Exceptionally, some criminal processes may do this too—see developments towards a more victim-focused approach in the Argentinian reopened claims.

## Open Society Justice Initiative

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The prohibition of torture is one of the most widely known and thoroughly protected human rights. International law prohibits torture under all circumstances, everywhere, without exception. Yet at least 141 countries are still practicing torture today.

Strategic litigation is one of many tools being used increasingly by human rights advocates to bridge the gap between theory and reality and give practical effect to the protections promised by international law. These protections are especially important for people held in custody: prisons, police stations, and other detention facilities are often a breeding ground for torture.

Litigation has been a central response to torture in custody. This comparative study looks at how human rights activists in Argentina, Kenya, and Turkey have sought to use the courts to secure remedies for victims and survivors, bring those responsible to justice, and enforce and strengthen existing legal frameworks. Their experience shows that progress against torture is possible, but rarely straightforward. Litigators and their allies have won reparations for victims, secured accountability for perpetrators, and forced governments to acknowledge abuse. But they have also suffered retaliation, including being detained and tortured themselves.

This study—the fourth in a five-volume series examining the impacts of strategic litigation—considers the promise and peril of using litigation against torture in Argentina, Kenya, and Turkey. In so doing, it offers insights, grounded in experience, into the use of strategic litigation to combat torture in custody.

