



LITIGATING TORTURE IN KENYA AND CAMEROON

Litigation Workshop Report

Nairobi, Kenya 28-29 August 2019

Introduction

This is a report of a Litigation Workshop that took place in Nairobi on 28-29 August 2019 involving lawyers and medical professionals from Kenya and Cameroon and the Gambia, led by REDRESS with the involvement of Trauma Centre International, the Independent-Medico-Legal Unit, the Human Rights Implementation Centre within the Law School of the University of Bristol, and Three Crowns. The workshop was designed to look in particular at the strategies and tactics for implementing judgments, and utilizing a collaborative approach between medical and legal professionals to seek justice for victims of torture. This report summarises the main conclusions of the workshop.

The workshop brought together twelve practitioners, including lawyers and medical professionals from Kenya, Cameroon, and The Gambia to share their experience in litigating human rights cases in their respective countries and before the African Commission on Human and Peoples' Rights, at the regional level. The workshop focused on sharing knowledge on the holistic care of survivors of torture which ensures that survivors of human rights violations obtain the necessary medical and psychosocial care to heal and are better able to participate in the legal process that seeks justice for the violation of their rights.

One of the goals of the workshop was to build and strengthen the capacity of lawyers, activists and medical professionals to facilitate holistic strategic litigation against torture. The workshop was also able to strengthen partnerships with key NGOs, create new opportunities, and nurture the development of a community of practice amongst professionals working in this field to ensure that survivors can obtain the necessary medical and psychosocial services while seeking redress for their violations.

1. LITIGATING TORTURE USING PUBLIC INTEREST LITIGATION

Through strategic litigation, human rights lawyers seek to challenge both the individual act of torture and the policies and practices that enabled the torture to take place. Through this approach you can obtain accountability for the torture, and campaign for policy and legal reform to make it more difficult for the torture to be repeated. In addition to bringing legal cases, strategic litigation will also use other civil society techniques to campaign for change, such as advocacy (national, regional, international), activism, and engaging the media.

Securing justice for torture enhances the rehabilitation and well-being of torture victims. However, the litigation process itself can often trigger the psychological effects of the trauma experienced, distorting and fragmenting memories, heightening emotions or leading to shut down. To avoid this, lawyers and activists must adopt a holistic approach, where all the needs of the survivor are provided for, and they have a central role in the litigation and the strategy. This means ensuring that they have proper psycho-social support through the process, that they are provided with other forms of social support, and that they are accompanied throughout. This form of human rights litigation has a cause beyond the case, and a community behind the client.



2. HOLISTIC STRATEGIC LITIGATION AGAINST TORTURE IN CAMEROON AND KENYA

Cameroon

In last few years, Cameroonian security forces and military have, in the context of increasing violence, resorted to the use of torture and enforced disappearances to silence the population of the English-speaking part of Cameroon. These recent violations of human rights, including torture, are not rare in Cameroon. President Paul Biya, who has been in power for over 30 years, has frequently employed torture and inhuman treatment to stay in power and silence the persons emphasizing with or belonging to the separatist group from the English speaking part of Cameroon (see *Human Rights Watch*, "Cameroon: Detainees Tortured, abuse, incommunicado detention at Yaounde Prison; Enforced Disappearances", August 2019). The Cameroonian human rights groups have been reporting and documenting serious human rights abuses in the country, including deaths in custody, arbitrary arrests, arson attacks, and torture of detainees. There is particular concern over the treatment of suspected separatist insurgents and other activists. Investigations of crimes committed by security forces has not been systematic or transparent.

Efforts made by victims of human rights abuses to seek justice have often been frustrated by a perceived reluctance on the part of the Cameroonian government to engage with redress mechanisms, whether at local, regional, or international level. The United Nations Human Rights Committee has made recommendations in eight cases brought by individuals in relation to human rights abuses, but it appears that in only one of these cases has Cameroon fully complied with the recommendations made. These difficulties emphasise the importance of the role of national practitioners in supporting the victims – often traumatised by their experiences – by providing a holistic response to the

abuses they have suffered, alongside continuing efforts to achieve a resolution of their cases.

Kenya

Kenya, despite being a signatory to United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Punishment (UNCAT) and other human rights treaties, continues to struggle to address the high prevalence of torture and ill treatment and provide reparations for the victims. Security, military forces, and police are often accused of torture and ill treatment in the context of security operations and other counter terrorism measures and post-election violence or in detentions.

Kenya has struggled to address the past abuses of torture and ill treatment from the Moi era and others through a political process. The Truth and Justice Reconciliation Report, which calls on the Kenyan government to provide reparations for victims of serious human rights violations, has yet to be discussed in the Parliament. In 2015, President Uhuru Kenyatta in its State of the Nation address publicly apologized for the atrocities committed and called for the creation of a Victims Trust Fund to provide assistance to the victims of human rights violations. However, four years later the Victims Trust Fund has yet to be established and many victims continue to suffer.

Given the lack of political will to push for real accountability for torture, the Courts in Kenya remain often the only hope for the victims to get justice and redress. The Kenyan courts have experience addressing cases of torture and delivering justice for the victims, but the implementation of these judgments is often not carried out.

3. WORKING WITH VICTIMS OF TORTURE



Photo credit: REDRESS. Ebenezer Ackwanga is a Cameroonian activist and a client of Redress who was arrested in 1997 and tortured for campaigning peacefully for the rights of the people of Southern Cameroon

Our minds tend to operate in three general “systems”: the drive, the soothing, and the threat system. When working with torture victims, the aim of providing psychological support is to help them navigate out of the threat system into the soothing or drive system. Because of how trauma memory operates there may be elements of the traumatic episode that survivors do not remember, these memories may not be linear. Similarly, aspects of any memory are likely to contain discrepancies, particularly when redescribing an event multiple times.

A robust body of research has demonstrated that discrepancies and inconsistencies are normal and expected with people recounting traumatic events irrespective of whether or not they have PTSD arising from that event. People with PTSD are less able to describe details of the event. In accordance with the threat system, survivors may appear numb or disconnected, which in turn may make it appear as if they are lying.

CASE STUDY:

KENNEDY MWANGI MURITHI V. ATTORNEY GENERAL

Kennedy Mwangi Murithi is a victim of inhumane and degrading treatment at the hands of prison officers. Kennedy was a convicted felon and sentenced to death. During transfer to a different prison, which Kennedy refused as he was worried that his appeal would be jeopardized due to the move, the warders beat him till he was unconscious. When he woke up, he was unable to move his lower limbs. He continued to have limited or no access to medical facilities. The brutal beatings left Kennedy paralyzed from the waist down and unable to hear well on his left side as a result of a torn ear drum. The paralysis has severely impacted Kennedy's ability to find employment. Following his release from prison, he had to register with the National Council for Persons

with Disabilities and due to his status is unable to care for himself and get a gainful employment. In the lawsuit against the Attorney General and the Commissioner of Prisons, Civil Petition No. 3 of 2015, Kennedy successfully argued that his fundamental rights were violated. He also sought damages for the permanent disability and punitive damages to punish the perpetrators. The Court awarded Kennedy KSH1,500,000 for general and aggravated damages and KSH100,000 for punitive damages.

In addition to physical injuries, Kennedy exhibited symptoms of depression and anxiety, often displayed anger and dissatisfaction. Even though he was receiving psychosocial assistance, that assistance was limited in time and scope. However, the collaboration between the therapy provider and lawyers yielded positive benefits as the lawyers were better able to understand the behaviour of the client and prepare accordingly.

Lawyers should think strategically about how to deal with these issues when preparing written witness statements, as well as oral testimony. In moments of disconnection, when witnesses appear to mentally relive their trauma, it is important to, in a soothing manner, reassure them of their safety and bring them back to the present by "grounding" them.

While it is important that the client receives effective psychosocial services, it is also essential to realize what are

the roles of the therapist and the lawyer in the process of seeking justice and life of a client in general. In countries where clients are poor, the roles of lawyers and therapists may expand beyond the professional obligations. It is therefore essential that clear boundaries are established between the client and the professionals. Should the client require additional help or services, referral may be a good option to ensure the recovery of the client, including referrals to an ongoing therapy service provider who can advise on economic opportunities and other matters.

4. ENHANCING IMPACT

Strategic Litigation can have impact beyond just one client. Having a clear idea of the desired impact of the case is one of the essential considerations when designing a litigation strategy. There are three major categories of impact: material, non-material, and instrumental impact. Material changes are the most well-known impacts of strategic litigation as they produce direct benefits for the enjoyment of the rights of individuals and communities. They include truth, (finding out what happened), justice (courts holding individuals responsible for violations of person's right), and redress (providing financial compensation or community reparations).

Non-material impacts include changes to attitudes, relationships, and the empowerment of communities. Public interest litigation can produce such changes by generating information about the violations of the rights, allowing for a public recognition of the abuses as well as raising and identifying the actual violations and its prevalence. A grassroots movement can be created as a result of litigation that continues to shape the attitudes and perception of society long after the decision has been made. Litigation can shape the attitudes of the society at large and introduce new ideas that shape the behaviour of people.

Strategic litigation can also shape laws, jurisprudence, policies, and institutions. Setting a precedent can be a powerful tool to end discrimination and human rights violations. Successful litigation can shape jurisprudence beyond a domestic court, also influencing regional and international legal communities. Strategic litigation can also bring about the necessary governance changes to end the human rights abuses entrenched in certain aspects of the society, i.e. police forces or military.

While the impact of strategic litigation can be wide-reaching and positive, one must also carefully think about negative impact of strategic litigation. How could the negative outcome impact those whose rights were violated but did not receive justice. Could they face physical or verbal backlash as a result? Could the verdict create a movement that would push for a repeal of the decision? Could the verdict set the advancement of the rights several years backward?

CASE STUDY 2:

PETITION 150 & 234 OF 2016

In May 2019, in Petition 150 & 234 of 2016, the Kenyan High Court upheld the law that criminalizes homosexual acts between adults. The petition was brought by the National Gay and Lesbian Human Rights Commission, the Gay and Lesbian Coalition of Kenya, and the Nyanza, Rift Valley and Western Kenya Network and several individual petitioners challenging laws dating back to colonial times.

The petitioners argued that these laws violated constitutional protections, including a right to freedom and security of person that encompass the right not be subject to torture in any manner or not be treated or punished in a cruel or degrading manner. However, the Court rejected the arguments, noting that the sections of the law do not discriminate against any particular group of people of particular sexual orientation. Further, judges in dismissing the case, argued that homosexual relations are inconsistent with the traditional values of the Kenyan society and those enshrined in the Kenyan Constitution.

The decision, that is being appealed, has had several negative impacts on the rights of gay and lesbians and transgendered people in Kenya. The verdict ensures that

same sex relationships will remain criminalized potentially exposing same-sex couples to prosecution, facing a sentence of 14 years in prison. Further, the negative verdict likely set the advancement of human rights for the LGBTQ community back few years if not a decade. Finally, following the verdict some members of LGBTQ reported being physically and verbally attacked or fear retaliation following the verdict.

The case, however, offers important lessons to consider when deciding whether the matter should be pursued through a public interest litigation, including: (a) Is litigation the best avenue to use to advance the right or end the discrimination of a particular group? (b) Are the political climate and social values conducive to accepting the decisions or what impact may they play on the court's ruling? (c) Litigation must be carried out in conjunction with other activities, including advocacy – what strategy should be used?

Effective advocacy at domestic, regional, and international level is essential to raise awareness about the human rights violations and their impact on the victims and their families. (d) Selecting good partners is a must. Partners who have different strengths and expertise can positively and negatively influence the case.

5. BUILDING EVIDENCE

Evidence can make or break a case. It is essential when building evidence that professionals consider the required elements to prove offences under the relevant laws and the variety of sources available to build that evidence. The sources of evidence include victim statements, statements from witnesses, expert reports, documents, video or audio recordings, medical reports and secondary sources. When collecting evidence, professionals should focus and rely on all sources of evidence and ensure that testimonies are backed up by relevant corroborating evidence. Further, the statements should not be taken several times but rather completed in one or two sittings to avoid inconsistencies.

As a matter of best practice, statements should reflect the voice of the witness to ensure that the written evidence is consistent with how the victim may appear in court. Inconsistencies between statements impact the reliability and persuasiveness of the evidence and credibility of the witness. The witness statement should present a narrative account of events (although not necessarily chronological), which tells the best, true and most complete story possible. Such evidence should avoid sweeping statements and overly partial comments. Headings and signposting are also very helpful for guiding the reader through the statements.

It is important that statements from victims of torture or human rights violations in general include the following: the identity of the victims and perpetrators, the events leading up to the torture incident(s), including arrests and transportation, and the location and conditions of detention. To the extent possible, the facts should try to gather even the most minute and seemingly unrelated details, as these may prove helpful in meeting the requirements of the relevant law and/or expanding the scope of reparation.

6. MEDICAL LEGAL REPORTS

A psychologist can assist in providing legal assistance in several ways, including providing an expert opinion or explaining evidential issues. An expert opinion can include a mental health diagnosis, as well as the impacts of the torture on the victims, such as victim's ability to function within relationships and professional groupings. In line with the Istanbul Protocol, psychologists can express an opinion on the consistency between psychological presentation of an individual and the events they allege took place.

Psychologists can also be helpful for dealing with evidential issues. They can help account for discrepancies in statements or explain the ability of the victim to remember or recall an event. Their evidence can also be useful for supporting reparations claims as they can comment on the capacity of victims to manage monetary awards or can ascertain the likely treatment costs for trauma as well as prognoses in this regard. They can comment on the capacity to give evidence and make recommendations on steps that would assist in gaining the best quality of testimony possible in a courtroom.

Core components of a good expert report will include references to the key literature in clinical psychology and cite academic research evidence that supports or refutes the expert's opinion. The reports will be clear about any uncertainty and should not appear partisan or biased. The expert opinion's report should also include the psychologist's CV to demonstrate their expertise. Further, the best expert will be familiar with the specific circumstances of the torture and can comment on "no touch torture" techniques, such as sleep deprivation, sensory deprivation (e.g. hooding, ear muffs), sensory overload (e.g. white noise, music), forced positions, exposure to elements and/or insects, mock executions, threatening of family, and others (including in combination).

7. IMPLEMENTATION

Since implementation comes only after successful litigation, lawyers often do not incorporate an implementation strategy into their initial thinking when discussing litigation strategies. This is essential to ensure that successful judgments are implemented.

The first step is to identify what recommendations the litigation is seeking and what bodies are responsible for the implementation of such decisions. While decisions from regional courts are delivered to the executive branch of the government, other government entities are responsible for its implementation. A roadmap of responsible government bodies as well as allies who can influence these bodies are a must to ensure that victims actually see the benefits of justice.

When drafting submissions, the lawyers should think about the asks or reparations and avoid any vague demands that may be difficult to implement. The more specific and realistic demands, the easier it may be to measure the government's compliance. It is advisable to provide specific deadlines for implementation and ask the court to require that the government returns to report on the implementation of the judgment within the proposed deadlines.

Effective advocacy is essential to ensuring that victories in courts are translated into actual justice for the victims. In regional context, the African Commission offers an opportunity to push governments to comply with decisions and recommendations issued by the Commission. NGOs can use the Commission as a platform to make statements during the sessions, set up good relationships with the Commissioners within whose mandate the respective cases fall, and push for engagement with states to implement decisions. NGOs can also provide shadow reports and the original documents to the Commission on state's non-compliance and discuss a referral of the case to the African Court on Human and Peoples' Rights.

The torture survivor should be at the forefront of the implementation process and, as during the litigation stages, lawyers should ensure that clients are made aware of the decisions, and that their needs are taken into consideration during the lengthy process of the implementation of human rights decisions.

8. REMEDIES AND REPARATION



Photo credit: UN/OCHA. A pregnant woman runs for her safety in Nairobi during the post-election violence.

While reparations come at the end of the litigation process, discussion of the forms of remedies sought should begin as early as possible, as they will impact on an approach to the case and the strategic goals of the case. Under international law, a victim has a right to remedy but the nature of that remedy is at least partly discretionary. The quality of evidence will be important to obtain effective reparations. To correctly assess and identify what remedies should be sought, a holistic victim-centered approach is best, that engages the victim community in the process, together with the use of strong legal arguments and expert evidence.

International law provides for five types of reparation: (1) restitution, returning the victim to the position they were in before the torture; (2) rehabilitation, remedying physical and/or mental suffering; (3) satisfaction, such as memorials to victims and public apologies; (4) guarantees of non-repetition, including structures the state can put in place to prevent recurrence; and (5) compensation, which considers monetary recovery for harms suffered.

For torture victims, particularly in the Kenyan context, financial compensation includes (1) general damages, (2) special damages, and (3) costs. General damages, a discretionary standard where judges determine what is fair and reasonable compensation for their ordeal, is the most common area of recovery for Kenyan torture victims. The actual quantum often depends on the evidence of harm presented to the court, and judges are often guided

by precedent from domestic, regional, and international jurisprudence. Special damages cover financial losses, including medical expenses, property damage, etc. The scope for recovery for special damages depends on establishing proof of the financial loss, and causation. Costs (and interest), while not typically claimed in torture cases, is another potential avenue for widening recovery for victims.

CASE STUDY 3: COVAW V. ATTORNEY GENERAL

In COVAW v. A.G case, four non-governmental organizations and eight victims of sexual and gender-based violence in Kenya during the 2007-2008 post-election violence filed a lawsuit in February 2013.

The petition alleges that the government of Kenya failed to protect them, effectively investigate and prosecute the perpetrators and provide reparations for the victims. The victims are seeking to obtain several remedies to address the suffering endured as a result of violations of their rights. The petition seeks general damages and compensation, including damages for pain and suffering and loss of amenities.

All the survivors have experienced medical and psychosocial issues whose impact continue to shape their lives. To address their medical needs, the petitions are seeking to obtain compensation for present and future medical costs.

Some of the survivors had gainful employment prior to their violations but since then many have been unable to keep employment and support their families. Two of the survivors had their school interrupted. As a result, the petitioners are seeking damages for loss of earnings and economic opportunities. In addition to compensation, the claim is seeking exemplary damages since the violations are so egregious and the defendant must be punished to prevent future violations.

9. CONCLUSIONS AND RECOMMENDATIONS

The main conclusions and recommendations of the workshop were:

- **Strategic litigation is an effective tool** that can be employed to challenge the individual act of torture as well as the policies and practices that enabled the torture to take place.
- **Victims must be at the centre of the holistic strategic litigation** to ensure that their views are heard and respected and that their well-being is addressed throughout the process, i.e. there must be access to psychosocial services and other forms of social support.
- **Victims of torture often suffer from mental disorders** that impact their behaviour and their ability to recall details of the torture. Lawyers should therefore think strategically before speaking with the victims as to how to best deal with these issues when preparing written witness statements, as well as oral testimony.
- **Evidence is the cornerstone of successful litigation.** The evidence should prove the required elements of torture. The sources of evidence include victim statements, statements from witnesses, expert reports, documents, video or audio recordings, medical reports and secondary sources and corroborative evidence.
- **Victims' statements are often the most important evidence.** They should therefore reflect the voice of the witness to ensure that the written evidence is consistent with how the victim may appear in court. The witness statement should present a narrative account of the violations and should avoid sweeping statements and overly partial comments.
- **A psychologist can assist not only in treating the victim and explaining the impact of mental disorder to the lawyers** but can also play an important role in providing legal assistance, such as by providing an expert opinion or explaining evidential issues.
- **Public interest litigation can have impact beyond the court room and a client.** Litigation can have three major impacts, including material, non-material and instrumental impact. Given that each impact has different implications, lawyers should carefully evaluate which impact they are seeking to achieve when designing a litigation strategy.
- **A successful judgment is only one step in delivering justice to victims.** The implementation process is as important an aspect of litigation. To ensure effective implementation of human rights decisions, lawyers should at the beginning of the litigation strategy create a road map for the implementation. This plan should identify bodies responsible for implementation at the national level, articulate more specific and realistic demands and finally create an effective advocacy strategy.
- **International law provides for five types of reparation:** (1) restitution (2) rehabilitation (3) satisfaction (4) guarantees of non-repetition and (5) compensation. It is essential to consult with the victims about the possible reparations options, discuss the viability of each option and revisit the discussion throughout the litigation and implementation stages to ensure that clients' wishes are still accounted for.

The participants evaluated the workshop, and they rated the most useful sessions to be (a) the formulation of an effective litigation strategy from the beginning of the litigation through until the implementation, (b) a better understanding of impact, and (c) practical skills training. Many expressed a desire for ongoing and more detailed workshops to ensure they obtain a more detailed understanding of holistic litigation, and working with medical professionals to provide effective medical and psychological support.

INFORMATION ON THE PROJECT PARTNERS

REDRESS is an international human rights organisation that represents victims of torture to obtain justice and reparations. We bring legal cases on behalf of individual survivors, and advocate for better laws to provide effective reparations.

Trauma Treatment International (TTI) provides psychological support for victims of trauma and are experts in effectively dealing with and mitigating additional trauma for torture victims who are seeking justice through strategic litigations.

Three Crowns LLP (3C) are a leading international law firm which provides strategic advice and representation for states and non-state entities before a range of international courts and tribunals.

Independent Medical Legal Unit (IMLU) is a Kenyan based NGO working to prevent and respond to torture by engaging state and non-state actors in rehabilitation, redress, research, advocacy and movement and capacity building to ensure world free from torture.

Managed by Advocates for International Development (A4ID), the Rule of Law Expertise Programme (ROLE UK) is funded by the UK Department for International Development. It works to strengthen the rule of law in developing countries by supporting peer-to-peer partnerships to provide high-quality pro bono legal and judicial expertise.

Established in 2009 within the Law School of the University of Bristol, the Human Rights Implementation Centre (HRIC) is a leading institution for the implementation of human rights. It works in collaboration with a number of stakeholders including international organisations, governments, NHRIs, parliamentarians, the judiciary, civil society, and others, at the international and national levels.

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US Army Africa (CC BY 2.0).

Cameroonian forces stand in formation.

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