Litigating Torture in Central Asia:
Lessons Learned from Kyrgyzstan and Kazakhstan

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Even in countries with limited respect for the rule of law, the decision of a UN treaty body can make a difference. Such is the case in Kazakhstan and Kyrgyzstan, where NGOs, lawyers, survivors of torture and the families of those who died in custody have used creative legal strategies to obtain reparations based on UN treaty bodies' decisions in individual cases. In this post, we share the journey to seek justice for Alexander Gerasimov, a torture survivor from Kazakhstan who won the first ever lawsuit in Central Asia for compensation based on a decision of UN Committee Against Torture (UNCAT), and the stories of several families of victims of police killings in Kyrgyzstan.

Kyrgyzstan and Kazakhstan have vibrant civil societies, but it is not easy to seek accountability for the abuses of law enforcement. Similar to other countries in Central Asia, both lack judicial independence and are not within the jurisdiction of the European Court of Human Rights. UN treaty bodies effectively remain the only international avenue for individual complaints. NGOs in both countries have engaged in multi-year advocacy and domestic litigation to make UN committees' decisions matter domestically. These include Youth Human Rights Group (today the Legal Prosperity Foundation, which Masha co-founded and led from 1995-2007) and the Kazakhstan International Bureau on Human Rights - KIBHR (where Anastassiya led strategic litigation practice from 2006-2018). In 2004, the Open Society Justice Initiative (OSJI) joined forces with the local NGO coalitions to support their work. Together, lawyers filed complaints on behalf of survivors of torture and the families of victims to the UN Human Rights Committee (UNHRC) and to UNCAT, and were active in efforts to force the governments to implement the decisions of those bodies.

Kazakhstan: The Case of Alexander Gerasimov

Our client, Alexander Gerasimov, was the first plaintiff in Kazakhstan to ask a local court for reparations based on a UN committee decision. In March 2007, Gerasimov was then a 38-year old construction worker who went to the local police station in Kostanay (Northern Kazakhstan) to ask about his arrested stepson. Instead of giving him answers, the police arbitrarily detained and tortured Gerasimov in an attempt to get a confession of murder, threatening him with sexual violence, tying his hands to the floor, and suffocating him. After 24 hours, they released him without charge. Gerasimov spent two weeks in the hospital. Local authorities argued that his injuries were not sufficiently serious for them to investigate the case.

In 2010, OSJI and KIBHR filed a complaint on his behalf to UNCAT. After the committee communicated Gerasimov's complaint to the government, the local police department reopened a criminal case against its officers but it brought no results, only re-traumatization for our client. In 2012, the Committee concluded that Kazakhstan had failed to comply with a number of obligations under the UN Convention against Torture. The committee urged Kazakhstan to conduct a proper investigation to hold those responsible for Gerasimov's torture accountable, to take effective measures to ensure that he and his family were protected from intimidation, and to

provide him with adequate reparation for the suffering inflicted, including compensation and rehabilitation, and to prevent similar violations in the future.

The government did not provide Gerasimov with any reparations, and there was no law about implementing UN committees' decisions that we could rely on. Despite the low likelihood of success, together with Gerasimov we decided to turn to the domestic courts. We developed our arguments based on existing legislation and focused on compensation as it was a "known territory" for judges. Gerasimov, represented by Anastassiya and co-counsel Snezhanna Kim, filed a civil complaint against the police on the basis of civil and civil procedure codes. It was important to require the police, as an institution, responsible for torture to at least pay compensation. Based on our previous negative experience, we did not ask for the criminal case to be reopened.

Compensation, in addition to being inadequate in amount, does not constitute a holistic reparation. But in bringing a case that had never before been considered by the country's judiciary, without clear existing legal procedure, against powerful state actors, we felt that we had to be realistic about what we were asking judges to do.

We argued that UNCAT had established that the torture took place and that the investigation was not effective, and asked the court to order compensation. Because public attention is an important aspect of strategic litigation, Gerasimov and the legal team gave interviews and journalists observed the court hearings. A psychologist provided support to Gerasimov before and throughout the legal proceedings. We also submitted as evidence a report by a specialized psychologist on the trauma caused by torture based on international documentation standards found in the Istanbul Protocol. In November 2013, Gerasimov won in the Kosntanai city court. The following year, the appeals court and the Supreme Court both denied the Ministry of Interior request to overturn the decision.

The decision of the city court – as affirmed by the higher courts – included most of our arguments. Chief amongst them was that international treaties ratified by Kazakhstan have priority over national legislation and that decisions of the UN committees are binding. Articles 26-27 of the Vienna Convention on the Law of Treaties provide that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith," and "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Kazakhstan's law on international treaties has similar provisions. According to the national legislation, the Ministry of Foreign Affairs monitors implementation of international treaties but, in fact, it never replied to the 2012 UNCAT decision nor took any action to afford reparations to Gerasimov. The courts, on the other hand, cited the decision and granted an equivalent of 13,000 USD compensation for moral damages from torture and arbitrary detention.

Because Kazakhstan does not have a system of legal precedent, subsequent decisions from the same court could be different. For instance, we referred to the Gerasimov decision in the next case on behalf of Rasim Bayramov and received a similar ruling, though with significantly lower compensation. In other cases, however, the courts disputed the fact of torture, despite the UNCAT finding otherwise, and refused to grant any reparations. The fact that Gerasimov himself was not charged with any crime likely helped the Kosntanai city judge to decide in his favor, though that should hardly be relevant for awarding reparations to a torture survivor.

"I wish my father were here to see that the justice exists," Gerasimov said after winning his case. His father, a retired police officer, had died five years prior. It was his father who had submitted on his son's behalf the first complaint about torture to the local authorities when Alexander was still in the hospital; he told him to never give up. The mere fact that the UN and the judiciary "ratified" his story was as important to Gerasimov as receiving the compensation.

Kyrgyzstan: The Cases of Tashkenbai Moidunov and Azimjan Askarov

We followed a similar litigation approach as the one pursued in Kazakhstan but, in light of Kyrgyz legislation, we sought compensation from the Ministry of Finance as the agency responsible for the state budget. This was an important tactical decision as it allowed the cases to be heard in the capital instead of local courts, where judges could be intimidated by the police involved in torture.

In October 2004, 46-year old Tashkenbai Moidunov was arrested in southern Kyrgyzstan after an argument on the street with his wife; a few hours after being detained in police custody, he was found dead. Despite this atrocity, only one police officer received a short, suspended sentence for negligence in Moidunov's death. Almost 13 years later, however, domestic courts in Kyrgyzstan, relying on legal arguments similar to those we raised in Gerasimov's case, recognized the obligation of the government to implement a UNHRC decision requiring that compensation be paid to Moidunov's family.

To achieve this result, we organized a psychological evaluation of the mother and sister of Moidunov to help calculate the requested amount of compensation. Sadly, Moidunov's mother died before his case could be decided but his sister continued on. In January 2017, the Supreme Court of Kyrgyzstan denied an appeal from the Ministry of Finance, making the decision final. It was an extremely low amount of compensation ($3,000 USD), hardly commensurate with the gravity of the violation. But the family saw it as at least some measure of justice.

In other cases – like those of Turdubek Akmatov and Rahmanberdi Enazarov - no perpetrators were convicted, but courts still supported our claims for reparation. In both cases, the government argued that a criminal conviction of policemen was necessary for considering a request for compensation, but the court supported our argument that, "it is necessary to follow the Views of the Human Rights Committee that indicate that persons, those rights were violated, have the right to recover moral damages regardless of any related criminal proceedings." To support these arguments, Sardor Abdukholilov, counsel for Akmatov and Enazarov both, asked the Polish Helsinki Foundation for Human Rights and the Kazakhstan NGO Coalition against Torture to submit amicus briefs, which is unusual in Kyrgyzstan. The amici supported the obligation to implement the decisions of the UN HRC citing, among others, the *Gerasimov* case and a 2018 decision by the Supreme Court of Spain on the binding nature of a decision issued by the UN Committee on the Elimination of all Forms of Discrimination against Women.

NGOs also tirelessly advocated for legislation in support of the implementation of UN treaty bodies' decisions in Kyrgyzstan. The biggest breakthrough came during constitutional reforms that were ushered in after a change of power, following popular protests in 2005 and 2010. The

Constitutional Assemblies developing proposals for amendments at the time included civil society members, who were seeking a constitutional level of protection for the right of individuals to appeal to international bodies and a state obligation to implement those decisions. After 2010, Article 41(2) of the Constitution stated that where such international human rights bodies recognize a violation of rights and freedoms, the government must take measures for their restoration and/or redress.

In addition, human rights lawyers successfully proposed an amendment related to "new circumstances" in criminal cases in the country's criminal procedure code. Now, according to Article 442.4(3), "a sentence or a judicial decision may be revoked and the procedure may be resumed in cases ordered by a recognized international body based on the international treaties to which the Kyrgyz Republic is a party." In 2017, the government then adopted a regulation to guide the interaction between state entities and the UN treaty bodies. While far from perfect, this regulation created a procedural ground to rely on for implementation litigation, as it stated that the amount of compensation should be determined by a court.

Finally, in the midst of ethnic violence in southern Kyrgyzstan in 2010, a well-known human rights defender -- Azimjan Askarov -- was arrested after a police officer was allegedly killed during an outburst of violence close to Askarov's town. Askarov was tortured and blamed for the violence and sentenced to life imprisonment after an unfair trial. During each trial hearing, judges and lawyers involved in the case were threatened and intimidated. In 2016, the UN HRC issued a decision ordering a rare remedy: that Askarov's conviction be quashed and that he be immediately released. But during the 2017 constitutional referendum, among other regressive steps, the Kyrgyz government used Askarov's case to justify repealing the Article 41(2) constitutional guarantee that civil society had fought for. And although Askarov's case was reopened in accordance with the country's amended criminal procedure code, a report from the International Commission of Jurists concluded that the court's review was superficial and simply confirmed the earlier verdict. Unfortunately, in such "political" cases, facts or arguments do not matter unless the political situation changes. Askarov died in prison in July 2020, allegedly after contracting COVID-19.

Some Lessons Learned

The main lesson from our combined forty years of working in this area? UN treaty bodies alone will never get their decisions implemented. The committees can forward to the states the follow-up submissions of applicants, contact country missions in Geneva, and issue follow-up reports. But without the efforts of the applicants themselves and lawyers and NGOs representing them - and vigorous advocacy at the domestic level – the chances of compliance are slim.

Moreover, these victories – even partial victories -- come with a clear message: one needs to be prepared to support the applicants, the litigation and the advocacy for the long haul. Our experience is reasonably positive, as was the 2018 decision of Spain's Supreme Court. However, the risk of losing is always there. Not all of our cases in Kazakhstan were successful and domestic courts in Ukraine and Sri Lanka have also issued adverse decisions.

Reflecting on our experience of litigating these kinds of cases, we would also offer the following reflections to other practitioners and advocates working on strategic human rights litigation:

- No intervention by UN treaty bodies replaces persistent advocacy by civil society at the domestic level.

- The selection of initial cases is critical and political context matters. In most of these cases, you are going against "the system" and trying the unknown. A judge might be confused and concerned about the possible repercussions to them of these kinds of arguments. In "political" cases, they might be even more careful or anxious.

- Use creative legal arguments and be strategic in your requests. Even if the judiciary is not independent, take courts seriously and make clear arguments, reference earlier cases, and bring evidence and amici submissions. In the Central Asian context, we made a strategic decision to keep our cases in the "known territory" of compensation.

- The role and tenacity of the complainant(s) is crucial. For many survivors, having their "day in court" matters. Judges in civil and administrative cases, unlike criminal, might be more sensitive to the suffering of the victims of abuse by state agents. These proceedings might be particularly important for survivors to attend.

- Consider including several family members as plaintiffs. Family support for the plaintiffs in seeking justice helps to get through protracted proceedings, as does psychological support and ensuring swift reaction to any intimidation or acts of reprisal.

- In some countries, there will be an additional challenge that local legislation requires a criminal conviction of perpetrators before reparations can be afforded. Proactively argue in your lawsuit that such a requirement is itself a violation of a state's international obligations.

States rarely want to accept accountability for rights violations and advocates need to start somewhere, despite the odds. While leveraging international obligations requires advocates to commit to long litigation timelines, the growing use of the UN individual complaints mechanisms offers survivors and families of victims an opportunity to seek justice. In some cases, it can also force states to finally face facts and implement the change that is required of them.

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