



Open Society Justice Initiative

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# GLOBAL HUMAN RIGHTS LITIGATION REPORT

**The Open Society Justice Initiative** uses strategic litigation and other forms of legal advocacy to empower communities, defend the rule of law, and advance human rights. This report describes some of the highlights of our litigation work, through a review of seven thematic areas where we have sought to use the law to bring about change.

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# WHY STRATEGIC LITIGATION MATTERS



**James A. Goldston**

EXECUTIVE DIRECTOR

**At a time when “illiberalism” has become a badge of honor for some, it may seem perverse that the Open Society Foundations would dedicate precious human and financial resources to the long, uncertain, often frustrating project of litigating in courts of law.**

**AFTER ALL, THE IDEALS UPON WHICH LITIGATION IS PREMISED**—including respect for the rule of law, impartial fact-finding and the principle of legal accountability—are increasingly disparaged as unnecessary hindrances to the popular will. Moreover, one need hardly join the campaign against liberal values to recognize that, as practiced, legal action to advance human rights has promised more than it has achieved.

And yet, the Open Society Justice Initiative pursues litigation precisely because of our commitment to the vital, if limited, role of law in furthering open societies. In a world of increasing political intolerance, courts are often among the few spaces where power may be challenged, dissent voiced and independent scrutiny applied.

While all interactions with official actors and institutions test society’s commitment to the rule of law to some degree, litigation is special. The process of articulating claims, and securing rulings, framed in the language of legal entitlement and legal obligation, invokes, reaffirms and, at times, alters society’s most considered and explicit promises to itself. Court proceedings are formal affairs imbued with the full authority of the state. Judicial decisions derive their legitimacy, in part, because they are grounded in evidence and transparent reasoning, not simply ideology or political preference. And while legislation speaks in the general language of policy, it is through litigation—the crucible of a concrete “case or controversy”—that the implications of legal provisions are critically examined as they are manifested in the practicalities of real life.

At the same time, litigation, for all its flaws, can have real and positive impacts along a spectrum from the material to the emotional. At one end, courts can order more schools or books for children, reparations for victims of torture or criminal prosecution of perpetrators. At another, a judgment may offer complainants the satisfaction of having officially confirmed a personal narrative of events that has been long denied. And in between, lawsuits can lead to enhanced recognition of rights, new institutions to enforce them and the adoption or reform of legislation.

This report draws on more than 100 cases in which we have been involved since 2003, and highlights the work of the Justice Initiative in seven important thematic areas where we believe litigation has made a difference. For almost a decade, our work was led by Rupert Skilbeck, who left us in 2018 to become executive director of Redress, the British legal human rights group. We are deeply indebted to Rupert for presiding over the global evolution of this work.

Litigation is not a panacea and there is room for improvement and continued learning in considering whether, when and how it is deployed. At the Open Society Justice Initiative, we are investing in new ways to enhance the power of litigation as one in a mosaic of advocacy tools for change. This work takes different forms, from collaborating closely with affected communities, to refining the contributions of third party amicus submissions, to leveraging political will to implement court judgments.

Our own experience, coupled with sustained reflection about a growing field of practice, has yielded a number of insights.

- **Litigation can generate negative as well as positive results**, from unexpected jurisprudential reversals to political backlash. Even victims who prevail in court may be subjected to retaliation, criticism and re-traumatization. While some lawyers become heroes, others are excoriated.
- **Strategic litigation aimed at promoting human rights is generally not a single intervention**, but part of a conscious process of working through advocacy objectives and the means to accomplish them, of which litigation is often but one. Since that process typically takes years, if not generations, to play out, strategies for change that include litigation should be flexible and regularly re-evaluated as part of a continuous cost-benefit analysis. Ideally, such a process involves lawyers and many other actors, considers the political and social context within which litigation takes place, and deploys the full range of tools available. Such an approach can create value regardless of the judicial outcome, in part because it may include the option not to litigate at all

- **Litigation that is strategic is not necessarily impactful.** While having a strategy is often necessary to secure impact, it alone is not sufficient. Many exogenous variables beyond the legal merits of a case influence court decisions, as well as the various effects such decisions can have. These may include the personal values and capacity of the judge(s) assigned to a case, the sophistication of advocates in combining litigation with other tools, relationships with social movements, changes in political climate and sheer serendipity. At the same time, many cases never intended to be strategic produce significant impacts. Some cases generate broad impact while maintaining limited aims. Others become strategic over the course of litigation, as aims change and a more conscious effort to utilize other tools evolves.
- **Although lawyers are critical actors,** strategic litigation is, and should increasingly be considered, an activity carried out by, for and about persons other than lawyers. To be sure, the range of appropriate roles for lawyers to play is broad. Nonetheless, our research and experience consistently show the value of listening to and learning from clients and their communities, and the need for humility about the modest but essential contribution of lawyers to the struggle for social change.

All that said, the extent to which some have gone to criticize, short-circuit or shut down rights litigation may, inadvertently, suggest its potential value. It is precisely because legal action can annoy or embarrass, constrain decision making, compel compensation, or modify policy or practice, that regional or international human rights courts, as well as national courts addressing rights issues, have come under withering attack from those in power.

**Rights litigation has many shortcomings, but irrelevance is not one of them. Indeed, in the eyes of some of its most prominent opponents, litigation may be unwelcome precisely because it cannot be ignored.**



# EXPOSING EUROPEAN COLLUSION IN EXTRAORDINARY RENDITION



**Amrit Singh**

*Amrit Singh* conducts strategic litigation, documentation and advocacy on a range of human rights issues relating to counterterrorism measures such as counter-radicalization, freedom of expression restraints, drone killings, rendition, torture, and arbitrary detention.

Following the attacks on the United States of September 11, 2001, the Central Intelligence Agency (CIA) embarked on a highly classified program of secret detention and extraordinary rendition of terrorist suspects. The program was designed to place detainee interrogations beyond the reach of law.

**SUSPECTED TERRORISTS WERE SEIZED** and secretly flown across national borders to be interrogated by foreign governments that used torture, or by the CIA itself in clandestine “black sites” using torture techniques.

The Open Society Justice Initiative litigated before the European Court of Human Rights to challenge European government complicity in the CIA’s torture and rendition program. This litigation was intended to obtain justice for the victims, hold wrongdoers accountable, and deter such violations in the future, while exposing the facts, and developing applicable legal standards. The work of the Justice Initiative was part of a broad effort of civil society groups around the world to expose rendition and seek justice for the victims.

The Justice Initiative litigation includes three separate cases brought against the governments of Macedonia, Poland and Romania. The Justice Initiative also published the report “Globalizing Torture: CIA secret detention and extraordinary rendition”, that comprehensively documents reported foreign government participation in CIA torture and abuse. This work was accompanied by advocacy to relevant European institutions, and public education on the global network of governments that made the CIA torture program possible.

In *El-Masri v. Macedonia*, the Grand Chamber of the European Court held that Macedonia’s participation in the rendition of Khaled el-Masri violated the European Convention on multiple counts, and also concluded that he had been tortured by the CIA. In *Al-Nashiri v. Poland*, the Court held that Poland’s hosting of a secret prison where Abd-al-Rahim al-Nashiri was tortured also violated the European Convention. These judgments are extremely valuable for their fact-finding as well as their declarative value, i.e., for finding that the relevant events under the CIA program occurred beyond reasonable doubt, as well as for underscoring that governments must respect human rights and the rule of law even in cases that that implicate national security.

Significantly, in the face of recent news reports that the Trump administration was resurrecting CIA secret detention sites, Polish Prime Minister Beata Szydło stated that Poland would not host secret prisons on its territory.

The governments of Macedonia and Poland paid damages as ordered by the Court. With input from the Justice Initiative, the Committee of Ministers of the Council of Europe is pushing them to conduct effective investigations into their role in the CIA’s operations. The case against Romania is still pending before the Court.

The Justice Initiative has also used litigation to challenge counter-terrorism detention policies in North Africa (*El-Sharkawi v. Egypt*), attempts to derogate from human rights standards in counter-terrorism situations (*Al-Waheed v. Ministry of Defence*) and the use of mass surveillance (*Big Brother Watch v. UK*).

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## El-Masri v. Macedonia (2012)

GRAND CHAMBER, EUROPEAN COURT OF HUMAN RIGHTS (CO-COUNSEL)

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### **EXTRAORDINARY RENDITIONS: THE RIGHT TO THE TRUTH**

**MACEDONIAN AGENTS SEIZED KHALED EL-MASRI** from a bus and held him without charge for 23 days, accusing him of being a member of al-Qaida. They then drove him to Skopje airport and handed him to a CIA rendition team who



flew el-Masri to Kabul as part of the U.S. “Extraordinary Rendition” program, where he was detained for four months. The Grand Chamber of the European Court of Human Rights found that his treatment amounted to torture, and that he had been effectively disappeared by the US and Macedonian authorities. In its most extensive discussion of the issue to date, the Court referred to “the right to truth” in finding that Macedonia had failed adequately to investigate credible allegations of torture. In doing so, the Court underlined “the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.” The Court also concluded that the investigation by the Macedonian authorities was insufficient. The Court ordered that Macedonia pay el-Masri €60,000.

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## Al-Nashiri v. Poland (2014)

EUROPEAN COURT OF HUMAN RIGHTS (CO-COUNSEL)

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### **POLAND COMPLICIT IN RENDITION, DETENTION, AND TORTURE AT CIA BLACK-SITE PRISON**

**IN 2002 AND 2003, POLAND HOSTED A SECRET CIA PRISON** at a military intelligence training base in Stare Kiejkuty where Abd al-Rahim al-Nashiri was held incommunicado and tortured. Poland also assisted in al-Nashiri’s transfer from Poland despite the risk of him being subjected to further torture, incommunicado detention, a flagrant denial of justice through trial by U.S. military commission, and the death penalty. Since 2006, al-Nashiri has been held at Guantánamo Bay, facing the prospect of an unfair trial by a military commission and ultimately, the death penalty. On July 24, 2014, the European Court of Human Rights delivered a historic judgment confirming that Poland had hosted the secret CIA prison, and holding that Poland had violated the European Convention by enabling al-Nashiri’s secret detention and torture in Poland; by enabling his transfer from Poland despite the real risk that his rights would be further violated; by failing to conduct an effective investigation into the violation of his rights; and by failing to comply with the Court’s evidential requests. The Court ordered Poland to seek diplomatic assurances from the US that it would not subject al-Nashiri to the death penalty and to pay al-Nashiri €100,000 in damages.

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# Al-Nashiri v. Romania

EUROPEAN COURT OF HUMAN RIGHTS (CO-COUNSEL)

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## **ROMANIA PARTICIPATED IN RENDITION, SECRET DETENTION, AND ILL-TREATMENT AT CIA “BLACK-SITE” PRISON**

Sometime between 6 June 2003 and 6 September 2006, Romania hosted a secret CIA prison code-named “Bright Light” in the basement of a government building in Bucharest where Abd al-Rahim al-Nashiri was held incommunicado and ill-treated before being rendered out of the country. Al-Nashiri continues to be held at Guantánamo Bay, where he now faces the prospect of an unfair trial by a military commission and if convicted, the death penalty. The case is currently pending before the Court.

# CONFRONTING ETHNIC PROFILING IN FRANCE



**Lanna Hollo**

*Lanna Hollo works on issues of racial discrimination in Europe and has been involved in developing litigation and related advocacy and mobilization in France.*

Ethnic profiling is a pervasive problem in French policing. In 2009, the Justice Initiative, together with the *Centre National de la Recherche Scientifique*, published *Profiling Minorities: A Study of Stop-and-Search Practices in Paris*, a landmark study that highlighted evident racial bias in police behavior. A national survey published by the Human Rights Defender's Office in January 2017 confirmed that men between 18 – 25 years old perceived as black or Arab are 20 times more likely to be checked than the rest of the population.

**FRENCH POLICE ARE NOT REQUIRED TO PROVIDE REASONS** for stopping an individual, or keep a record of the stop, much less provide any record to the individual concerned. Only when judicial or administrative proceedings follow a stop is any record made. France does not collect statistics on ethnicity that can show unequal treatment, so the authorities do not know the extent of police discrimination.

The Justice Initiative has supported litigation in France to try to end ethnic profiling, seeking to obtain justice for those stopped by the police, and to reform Article 78 of the Code of Criminal Procedure (CCP) which permits identity checks without reasonable suspicion, bringing it into line with human rights standards.

A collective case was brought before the civil courts on behalf of 13 young French men of North African or sub-Saharan origin who were stopped by police. They included students, the aide to an elected official, and a high level football player. The checks all took place while the men were carrying out routine activities, such as walking in the street, sitting at a restaurant terrace, or chatting with friends in the city centre. None of the checks resulted in any legal action against the individuals. In November 2016, the *Cour de Cassation* ruled in five of the cases that non-discrimination law applies to cases of ethnic profiling and that discriminatory identity checks are illegal.

However, in other cases, the *Cour de Cassation* accepted vague justifications for checks, such as wearing a hoody and walking briskly on a November day, being in a neighborhood considered to be particularly affected by crime, and on the basis of a vague description that two black men had committed a theft. Six of the rejected applicants subsequently filed a case to the European Court.

The litigation was combined with media communication, social mobilizing, and advocacy. Each phase of the proceedings involved significant media efforts, including a case blog, cartoon strip, press conferences at the Court, articles and press releases. The case catalysed social mobilizing by a wide range of NGOs, local community leaders, political actors, artists, and committed individuals. Each hearing attracted widespread publicity, and each positive decision energized the campaign. Advocacy by national groups targeted decision-makers, using the litigation to pressure for reform. Since the litigation started, French authorities have shifted from denial to accepting that ethnic profiling is a serious problem that needs to be addressed.

Justice Initiative lawyers have also brought legal challenges to other forms of discrimination in Europe, such as access to services (*Nikolova v. CEZ Electricity*), school segregation (*DH v Czech Republic, Y, T, and A v. Berlin Education Authority*), religious clothing (*SAS v. France, German Headscarves Ban*), and discrimination against Roma (*Bagdonavichius v. Russia, EC v Italy*).

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## Seydi and Others v. France

EUROPEAN COURT OF HUMAN RIGHTS (CO-COUNSEL)

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### CHALLENGING DISCRIMINATION BY POLICE

**YOUNG PEOPLE FROM ETHNIC MINORITIES IN FRANCE** are regularly singled out by the police for identity checks and searches. The unequal focus on these groups is only possible because of the broad stop and search powers that

police enjoy under the criminal procedure code, and the lack of documentation and supervision of those checks. Research over the years has demonstrated that these provisions allow too much scope for the police to stop people arbitrarily, allowing for discriminatory checks—ethnic profiling—which stigmatizes migrant and other visible minority communities, perpetuates stereotypes, and is an ineffective and counterproductive policing method.

## RELATED CASES

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### Zeshan Muhammad v. Spain

EUROPEAN COURT OF HUMAN RIGHTS

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#### **ETHNIC PROFILING IN SPAIN**

**ETHNIC PROFILING BY LAW ENFORCEMENT OFFICERS** continues to be a persistent and pervasive practice throughout Spain, particularly in the context of immigration control. In 2009, the UN Human Rights Committee rejected this practice as unlawful discrimination in the *Rosalind Williams v. Spain* case. Despite this, it appears that the Spanish Constitutional Court’s discriminatory assumption that Spanish nationals could only be white, made in the 2001 decision leading to the UN case, remains the official doctrine. While Spain has increasingly become a multi-ethnic country, national and international human rights bodies and civil society organizations have repeatedly reported Spanish police forces’ use of racial or ethnic features as the sole basis to decide whether to conduct identity checks in order to detect undocumented migrants, which amounts to discrimination.

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### Ethnic Profiling in Gyöngyöspata (2017)

SUPREME COURT, HUNGARY (THIRD PARTY INTERVENTION)

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#### **CHALLENGING UNEQUAL TREATMENT BY POLICE**

**VIGILANTE GROUPS DESCENDED ON THE HUNGARIAN VILLAGE OF Gyöngyöspata** for two months in 2011, forming “patrols” and harassing local Roma inhabitants. Rather than intervening to protect the villagers, the police started imposing fines on Roma for very minor offences, apparently

singling Roma out for this treatment. At first instance, the court agreed with the Hungarian Civil Liberties Union and the Justice Initiative that policing on the basis of ethnicity amounts to ethnic profiling, a prohibited form of discrimination. It held that the police use of petty offense fines amounted to direct discrimination against members of the Roma community in Gyöngyöspata. On appeal, a second-instance court reversed this ruling for lack of evidence, a view which the Supreme Court of Hungary upheld, holding the Hungarian Civil Liberties Union did not establish a *prima facie* case of discrimination with regard to the ethnic profiling allegations. The Supreme Court agreed with the petitioner on the other aspect of the case, finding that the police harassed the Roma by failing to protect them from the vigilantes.

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## Williams v. Spain (2009)

UN HUMAN RIGHTS COMMITTEE (CO-COUNSEL)

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### **RACIAL PROFILING IS DISCRIMINATION**

**ROSALIND WILLIAMS WAS STOPPED BY A POLICE OFFICER** on the platform of the station in Valladolid, Spain, and told to produce her identity documents. When asked why she was the only person stopped, the police officer told her “It’s because you’re black.” Williams complained of her treatment to the Human Rights Committee of the United Nations, which found that it was unlawful discrimination.

# CHALLENGING TORTURE IN CENTRAL ASIA



**Masha Lisitsyna**

*Masha Lisitsyna specializes in the area of prevention and accountability for torture, and has developed and led anti-torture litigation before domestic courts and international human rights bodies.*

**Police torture is widespread in Central Asia. For over a decade, the Open Society Justice Initiative has used strategic litigation before national courts and the UN Committee against Torture and UN Human Rights Committee as a tool to bring about policy changes that prevent the use of torture, and to obtain remedies for the victims. This effort, combined with advocacy work by the Justice Initiative and other NGOs, has increasingly led governments in the region to recognize both the problem and the need for reform.**

**AS A RESULT OF THE LITIGATION,** some state actors have accepted the importance of decisions of the UN Treaty Bodies, and the necessity of individual remedies. The campaign also led to the first convictions of the police for torture, and contributed towards the creation of national anti-torture preventive mechanisms.

In order to create an undeniable record of torture, and to prevent the authorities from describing the cases as isolated incidents, the litigation strategy involved developing multiple cases. While bringing eight cases to the UN Treaty Bodies as co-counsel, the Justice Initiative also supported national NGOs to document more than two hundred cases for litigation. This required training and legal advice, and the development of a toolkit for filing cases to the UN, using the Justice Initiative's cases as examples for national NGOs and

lawyers in their own litigation. This supporting role led to a greater number of cases, and expanded the civil society community working against torture. By promoting local ownership of the cases, it was much easier to publicize decisions, and to obtain greater momentum for compliance with them.

The decisions in torture cases have a direct impact on survivors of torture, their families, and the families of those who died after ill-treatment. These individuals demonstrate immense courage and resilience in sustaining litigation that may last over a decade, and face threats and retaliation. Many survivors speak about the importance of receiving a judgment from the United Nations that brings to light the abuses they suffered and which calls for accountability. When appropriate, the Justice Initiative was able to involve survivors in advocacy efforts, such as speaking to the U.N. Committee against Torture on the implementation of their decisions.

To achieve impact beyond the individual cases, the Justice Initiative worked with national civil society coalitions against torture, connecting litigation efforts to national and international advocacy for legal and institutional reforms. This involved supporting NGO submissions to international bodies as well as developing specific proposals for change nationally, such as the introduction of safeguards against torture and procedures to hold perpetrators of torture accountable.

Advocacy was key to press for national implementation of decisions of international tribunals. Importantly, Supreme Court rulings in both Kazakhstan and Kyrgyzstan established that the decisions of UN treaty bodies must be implemented as they arise from binding treaty obligations. Both courts also confirmed that victims should be awarded compensation.

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## Moidunov v Kyrgyzstan (2011)

UN HUMAN RIGHTS COMMITTEE (CO-COUNSEL)

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### **NO JUSTICE FOR DEATH IN POLICE CUSTODY**

**TASHKENBAJ MOIDUNOV DIED AN HOUR AFTER BEING TAKEN** into police custody in Bazar-Korgon, Kyrgyzstan. A doctor's examination found finger marks around his neck, suggesting he had been strangled. The police first stated that he had a heart attack, then changed their story to say he hung himself. No proper investigation was ever conducted into his death. In July 2011, the UN Human Rights Committee (UN HRC) found that he had been killed in custody, and called for a full investigation, prosecution and compensation. In January 2017, The Supreme Court of Kyrgyzstan ordered payment of compensation to relatives of Moidunov, citing state obligations under Optional Protocol to the International



Covenant on Civil and Political Rights. This was the first case in Kyrgyzstan to secure a compensation decision based on a decision of the UN HRC.

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## Gerasimov v. Kazakhstan (2012)

UN COMMITTEE AGAINST TORTURE (CO-COUNSEL)

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### POLICE BEATING TO FORCE CONFESSION

**ALEXANDER GERASIMOV WENT TO MAKE INQUIRIES** about his son's arrest at a police station in March 2007. Police arrested Gerasimov and beat him for 24 hours, before releasing him without charge. He required 13 days of hospital treatment, and was diagnosed with PTSD. Despite this, local authorities claimed that his injuries did not warrant further investigation. In May 2012, the UN Committee against Torture (UN CAT) found that Kazakhstan had tortured Alexander Gerasimov, failed to prevent that torture, and failed to investigate effectively. The Committee urged Kazakhstan to provide him with remedies, including compensation. In April 2014, the Supreme Court of Kazakhstan ordered the authorities to pay compensation based on the UN CAT decision, which the Court found was binding, given that the state had recognized the competence of the Committee to give authoritative decisions. The compensation was paid in May 2014.

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## Ernazarov v. Kyrgyzstan (2015)

UN HUMAN RIGHTS COMMITTEE (CO-COUNSEL)

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### FAILURE TO INVESTIGATE POLICE CELL KILLING

**RAHMONBERDI ERNAZAROV WAS ARRESTED** in November 2005 and charged with a serious sexual offense. Despite an order to transfer him to a pre-trial detention facility, he was held in a police cell with six other men who subjected him to constant abuse. The police did nothing to protect him. Two weeks later he was found in the cell with missing teeth and cuts on his neck, bleeding to death. He died shortly afterwards. The police claim that the death was a suicide. The authorities failed to protect a vulnerable prisoner, and failed to investigate the cause of death. In 2015, the UN Human Rights Committee concluded that Kyrgyzstan failed to secure Ernazarov from torture and ill-treatment while he was in custody and obliged the state to provide Ernazarov's brother with an effective remedy.

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## Akmatov v. Kyrgyzstan (2015)

UN HUMAN RIGHTS COMMITTEE (CO-COUNSEL).

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### BEATEN TO DEATH BY POLICE

**IN MAY 2005, TURDUBEK AKMATOV WAS TAKEN** to the local police station in Mirza-Aki Village, Kyrgyzstan and detained for ten hours, interrogated and beaten, before being released without charge. Akmatov returned home, barely able to walk. He told his family that six policemen had beaten him in custody and named several. Shortly afterwards, Akmatov cried out and fell to the ground, bleeding copiously from his mouth, ears, and nose. He died a few hours later from severe internal injuries. The authorities repeatedly stalled the criminal investigation of the case. In October 2015, the UN Human Rights Committee found Kyrgyzstan responsible for his torture and for violating his right to life. The Committee instructed the government to pay reparations, conduct a proper investigation, and to prosecute those responsible.

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## Askarov v. Kyrgyzstan (2016)

UN HUMAN RIGHTS COMMITTEE (CO-COUNSEL)

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### HUMAN RIGHTS DEFENDER TORTURED BY POLICE AND DENIED A FAIR TRIAL

**IN JUNE 2010, AZIMJAN ASKAROV, A WELL-KNOWN HUMAN RIGHTS DEFENDER** in Kyrgyzstan, was taken to the police station after a police officer was killed during an outburst of ethnic violence in the Bazar-Korgon region. Askarov, an ethnic Uzbek, was repeatedly beaten, abused, and denied medical treatment. His lawyer was only able to see him after a week of torture, and was attacked when he tried to visit. These attacks continued during the trial, when police beat Askarov and his co-defendants, and crowds shouted ethnic abuse at their lawyers and threatened potential defense witnesses. After this flagrantly unfair trial, Askarov was sentenced to life in prison, a sentence that was upheld during an appeal process marred by similar violations, and subsequently upheld by the Supreme Court. In March 2016, the UN Human Rights Committee found that Askarov had been tortured, was arbitrarily detained, had been denied a fair trial, and that he was not provided with adequate medical treatment. Among other remedies, the Committee urged Kyrgyzstan to release Askarov and quash his conviction, which Kyrgyzstan declined to do. Instead, the Supreme Court

ordered a retrial, and in January 2017 he was convicted for a second time in another process in which the defendant's rights were again summarily ignored. Askarov remains in prison today, where he continues to be denied medical treatment for the effects of his torture and other serious conditions.

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## Akunov v. Kyrgyzstan (2016)

UN HUMAN RIGHTS COMMITTEE (CO-COUNSEL)

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### **POLITICAL ACTIVIST KILLED IN POLICE CUSTODY**

**BEKTEMIR AKUNOV WAS AN OUTSPOKEN POLITICAL ACTIVIST.** In April 2007 he returned from protests in Bishkek, the capital, to his home town of Naryn, and requested a meeting with the Mayor. A few hours later, police officers arrested him, dragged him to a detention facility, and held him overnight without contacting his family or a lawyer. Nearby residents saw the police beating Akunov and heard him cry out for help throughout the night. The next day, Akunov was found dead in his cell. The police claimed that he had hung himself, but medical examinations revealed extensive injuries. Despite the evidence, the authorities failed to conduct an effective criminal investigation into his death in custody. In October 2016, the UN Human Rights Committee concluded that Kyrgyzstan was responsible for his torture and for violating his right to life, and that the authorities had failed to conduct an effective investigation into the highly suspicious circumstances of his death. The Committee instructed the state to provide reparations, conduct a proper investigation, and to prosecute those responsible.

# ACCESS TO INFORMATION AND THE RIGHT TO TRUTH IN LATIN AMERICA



**Mariana Mas and Mercedes Melon**



***Mariana Mas** focuses on freedom of information and expression issues at the Justice Initiative. **Mercedes Melon** has over two decades of experience as a human rights lawyer conducting litigation as well as advocacy and research.*

**In many countries in Latin America, available information on historic gross human rights violations has yet to be made public. While the authorities have documents proving what happened, these are withheld on the ground that they are confidential. Civil society groups have used right to truth litigation to challenge this, and encourage transparency and accountability.**

**THE OPEN SOCIETY JUSTICE INITIATIVE'S LITIGATION** in this field initially focused on working with national partners to establish access to information as a freestanding human right, and then on developing that right to include access to information about gross human rights violations. The judgment of the Inter-American Court in *Claude Reyes v. Chile* (see below), brought by environmental NGO *Fundación Terram* with the support of a third party intervention from the Justice Initiative and others, led to the adoption of right to information (RTI) laws throughout Latin America. Many of these new laws include a human rights "over-ride" clause stating that information concerning human rights violations, and/or investigations into such violations, may not be withheld on security and other generally legitimate grounds. This allowed for the development of the

collective aspect of the right to truth (RTT)—by which society as a whole has the right to know the truth about what occurred in the past. The Justice Initiative intervened in further cases at the Inter-American Court, including *Diario Miltar* and *Gomes Lund*, brought by the families of persons who had been tortured and disappeared, in which the RTT was clarified, and security-based restrictions on RTI in cases involving serious human rights violations were limited.

These international judgments were then re-litigated at the national level. A number of successful cases were brought with national partners in Colombia, Peru, Mexico and Guatemala, which brought more awareness of the right, improved RTI regimes, and opened up what had been a culture of secrecy. In Colombia, the Constitutional Court struck down problematic elements of a draft law on transparency. In Mexico, the Supreme Court ruled that RTI trumped the confidentiality of a criminal investigation into gross human rights violations, reasoning that disclosure of the names of the victims was a crucial step in the fight against impunity.

By using access to information to develop regional standards on the right to truth, communities impacted by gross human rights violations have been empowered to bring legal actions demanding accountability and redress.

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## Naming the Disappeared Cases (2017)

SUPREME COURT OF JUSTICE, MEXICO (ADVISOR TO COUNSEL)

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### DISCLOSURE OF VICTIMS' NAMES

**DURING THE “DIRTY WAR” IN MEXICO** from 1968 to 1982, more than 1,200 people were disappeared, usually those who were perceived by the State as a threat. Decades later, the authorities closed 134 criminal investigations into those disappearances, but refused to provide the names of the victims. The Justice Initiative filed a freedom of information request to obtain the names, which was refused on the basis that the information was part of a confidential criminal investigation and to protect the dignity of the victims. The Justice Initiative and Litiga Ole brought an *amparo* action challenging that decision. In February 2017, the Supreme Court of Justice ruled that the names should be made public. For the first time in Latin America, the Court established a new standard: that in cases of enforced disappearance the principle of maximum publicity must always override information that is deemed confidential, as well as classified information, due to the overwhelming interest of society as a whole to know the truth of what happened. The decision sets a new standard with which rights groups can require further information on the dirty war, and which will have impact far beyond Mexico.

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# Colombian Draft Law on Transparency

CONSTITUTIONAL COURT OF COLOMBIA (THIRD PARTY INTERVENTION)

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## **DRAFT LAW MUST SATISFY INTERNATIONAL OBLIGATIONS TO PROTECT THE RIGHT TO ACCESS INFORMATION**

**IN JUNE 2012, THE COLOMBIAN SENATE APPROVED** a Draft Law on Transparency and Right to National Public Information in order to give effect to Articles 20 and 74 of the Constitution guaranteeing the rights of expression and access to information. The Colombian draft law, unlike almost all other laws in the Americas, included a provision that substantially narrowed the scope of the law—excluding information related to defense and national security, public order, and international relations. The Constitutional Court, in its review, rejected this provision as unconstitutional.

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# Executive Decree 1129

CONSTITUTIONAL COURT OF PERU (THIRD PARTY INTERVENTION)

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## **CHALLENGING BLANKET SECRECY**

### **WHAT ARE THE LIMITS OF THE PUBLIC'S ACCESS TO INFORMATION?**

Does the mere fact that information relates to national security prevent public access to it? With more people around the world now able to demand access to government data under freedom of information laws, the courts often decide where these boundaries should be set—especially as governments try to expand their definition of what should be kept secret. Peru's Constitutional Court is now reviewing these questions in response to a constitutional challenge of an executive decree classifying as secret all information related to security and national defense. The Justice Initiative argued in a legal analysis that the right of access to information is well-established in international law, and that blanket bans on the basis of national security are not permitted.

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## Gudiel Álvarez v. Guatemala (Diario Militar) (2012)

INTER-AMERICAN COURT OF HUMAN RIGHTS (THIRD PARTY INTERVENTION)

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### **ENFORCED DISAPPEARANCES IN GUATEMALA'S CIVIL WAR: THE RIGHT TO TRUTH**

**IN 1999, A LEAKED GUATEMALAN GOVERNMENT DEATH SQUAD** diary revealed details about the last moments of 183 purported political opponents of the former military regime who were executed between 1983 and 1985. The diary contained information on the structure of the intelligence archives, lists of human rights organizations, and the names, photos, and alleged affiliations of those killed. Nearly thirty years after their enforced disappearances and executions, there have been no prosecutions into their deaths and the military has denied family members, prosecutors, and Guatemalan society the truth about these human rights violations. The Justice Initiative jointly filed a third party intervention on the right to truth, and access to information concerning human rights violations. In November 2012, the Inter-American Court of Human Rights found that Guatemala was responsible for the disappearances and the failure to investigate them, violating the rights of the victims and their families, and a violation of the right to truth.

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## Gomez Lund v. Brazil (2010)

INTER-AMERICAN COURT OF HUMAN RIGHTS (THIRD PARTY INTERVENTION)

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### **CONFIRMING THE RIGHT TO TRUTH FOR GROSS HUMAN RIGHTS VIOLATIONS**

**IN 1972, A SMALL GUERRILLA MOVEMENT OF STUDENTS AND WORKERS** emerged from the region of the Araguaia River in Brazil, seeking to foment a popular uprising to overthrow the military dictatorship in power since 1964. For the next two years, the Brazilian Army brutally suppressed the movement, arresting and torturing guerrilla suspects. More than 60 were disappeared, their fate still unknown. For nearly 30 years the families of the victims have tried to expose the truth about what happened to their relatives, but have been prevented from doing so by amnesty laws. The Inter-American Court affirmed its earlier recognition of a right to the truth about gross human rights violations,

based on the duty to investigate grave violations and the requirement for judicial protection of rights, and connected to the right to seek and receive information. It also held that Brazil's amnesty law was "incompatible with the American Convention and void of any legal effects."

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## Claude Reyes v. Chile (2006)

INTER-AMERICAN COURT OF HUMAN RIGHTS (ADVISOR TO COUNSEL)

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### DEMOCRACY DEMANDS "MAXIMUM DISCLOSURE" OF INFORMATION

**FUNDACIÓN TERRAM IS AN ENVIRONMENTAL NGO** that filed a request for information with the government of Chile about a major logging contract. The Supreme Court denied the request and the denial was challenged before the Inter-American Court of Human Rights, which in 2006 held that Article 13 of the American Convention on Human Rights guaranteed the right to such information. The Justice Initiative, joined by four other groups, filed an *amicus curiae* brief providing international law and practice on the right to information. This decision has become a landmark ruling, the first time an international tribunal recognized a basic right of access to government information as an element of the right to freedom of expression.



# CHALLENGING IMPUNITY FOR INTERNATIONAL CRIMES



**Steve Kostas**

*Steve Kostas litigates cases across the Justice Initiative's areas of work, with a focus on cases seeking accountability for state crimes such as crimes against humanity and systematic torture.*

**Kenya's national elections in December 2007 were marked by significant ethnic violence, which continued from late December 2007 until March 2008, resulting in over 1,000 deaths and tens of thousands forcibly displaced nationwide. Women and children often were targeted for attack, and sexually assaulted in their homes and while seeking refuge in informal camps in schools, police stations and other public sites.**

**FOUR KENYANS FACED TRIAL AT THE INTERNATIONAL CRIMINAL COURT (ICC)** in The Hague for orchestrating crimes against humanity committed during the post-election violence, but the Kenyan government only prosecuted a handful of perpetrators domestically.

The Open Society Justice Initiative has supported Kenyan civil society groups to bring legal challenges in the High Court in Kenya to the failure to prosecute both sexual and gender-based crimes and police killings in the post-election violence. The litigation argues that the authorities failed to protect the victims, investigate and punish the perpetrators, or make reparations. The victims ask the Court to order the government to establish an independent body to investigate these crimes against humanity. The litigation aims to bring

some justice for the victims, and to require the government to face to up its constitutional and international obligations.

The litigation, which has been complemented by media outreach and advocacy before the Kenyan government, the African Union and the United Nations, has kept the issue of accountability on the public agenda. Local civil society groups have provided ongoing support to the victims.

The Justice Initiative is involved in litigation in other parts of the world to encourage domestic accountability for international crimes. We support Mexican NGO partners in their efforts to build cases for national prosecution of some of the thousands of disappearances, incidents of torture, and extrajudicial killings that have taken place over the past decade, including through workshops analyzing the law of crimes against humanity, and delineating the connections between grave crimes and corruption. The Justice Initiative worked with the South Asia Center for Legal Studies (SACLS) to advance the domestic documentation of grave crimes in Sri Lanka, to develop reports on incorporating international crimes into Sri Lankan law, as well as on witness and victim protection, fair trial rights in Sri Lanka, and options for a hybrid court in the country. The Justice Initiative has also provided legal advice to national NGOs submitting complaints to the ICC's Office of the Prosecutor (OTP).

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## Citizens against Violence v. Attorney General of Kenya

HIGH COURT, KENYA (ADVISOR TO COUNSEL)

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### **VICTIMS OF POLICE SHOOTINGS DEMAND ACCOUNTABILITY**

**MORE THAN 400 KENYANS WERE SHOT DEAD** by police during the post-election violence that brought chaos to many towns in Kenya in early 2008. Despite the willingness of the victims to press charges, no police have been prosecuted for carrying out the shootings or for failing to prevent them. A group of Kenyan civil society organizations and victims of police shootings have brought a class action constitutional case to the High Court of Kenya at Kisumu against four Kenyan government officials demanding accountability for the unlawful killings and maimings, seeking a judgment ordering the government to investigate and prosecute the perpetrators, and to provide reparations to the survivors and families of the deceased.

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# Coalition on Violence against Women v. Attorney General of Kenya

HIGH COURT, KENYA (ADVISOR TO COUNSEL)

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## VICTIMS OF SEXUAL AND GENDER BASED VIOLENCE DEMAND ACCOUNTABILITY

**DESPITE ALMOST 10 YEARS THAT HAVE PASSED SINCE KENYA** was gripped by widespread violence following the December 2007 national elections, the Kenyan government has only prosecuted a handful of the perpetrators of the more than a thousand rapes, sexual assaults, and other gender-based violence that occurred. In response to the government's failure to act, a group of Kenyan civil society organizations and victims of sexual and gender-based violence have brought a class action constitutional case to the Nairobi High Court against six Kenyan government officials demanding accountability for the crimes, including investigations and prosecutions of the perpetrators, and wide-ranging reparations for all victims of sexual and gender based violence during Kenya's post-election violence.

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# Jean-Claude Duvalier (2014)

COUR D'APPEL, HAITI (THIRD PARTY INTERVENTION)

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## FORMER HAITIAN DICTATOR EVADES DOMESTIC PROSECUTION

**IN JANUARY 2011, FORMER DICTATOR JEAN-CLAUDE DUVALIER** returned to Haiti after 25 years in exile. His 15-year regime was characterized by widespread violations of human rights. He was placed under investigation for offenses including corruption, attempted murder and sequestration. Despite domestic and international calls to address the systematic violation of human rights committed during Duvalier's rule, his defense lawyers publicly argued that he qualified for immunity from prosecution, and that he could not be tried for crimes against humanity in a Haitian court. The Justice Initiative submitted a brief to the investigators setting out relevant international standards that argued against any amnesty. The Court of Appeal concluded that Duvalier could be tried, but Duvalier died of a heart-attack in October 2014.

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## The Gaza Inquiry (2010)

UN HUMAN RIGHTS COUNCIL (THIRD PARTY INTERVENTION)

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### THE DUTY TO INVESTIGATE AND PROSECUTE WAR CRIMES

**THE GAZA CONFLICT OF DECEMBER 2008** led to allegations of violations of the law of war against both Israel and the Palestinian Authority. The official UN report into the conflict (the “Goldstone Report”) criticized both sides for failing to conduct adequate investigations into these allegations. The Israeli Defense Forces (IDF) rejected these criticisms, arguing that their system of unit-led investigations was the same as that used in other democracies. The UN Human Rights Council appointed a follow-up Committee of Experts to monitor subsequent investigations and their conformity with international standards. The Justice Initiative, on behalf of the Israeli Palestinian Adalah human rights group, analyzed the IDF’s investigation and provided a comparative review of the relevant legal standards. The Experts Committee’s final report, submitted in March 2011, concluded that the role of the Military Advocate General both to provide legal advice to the IDF and to conduct any prosecutions meant the system was not effective or independent.

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## Prosecutor v. Nahimana (2003)

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA  
(THIRD PARTY INTERVENTION)

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### WHEN DOES HATE SPEECH BECOME INCITEMENT TO GENOCIDE?

**THE TRIAL CHAMBER OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (ICTR) convicted the accused of direct and public incitement to commit genocide and persecution as a crime against humanity, but in so doing blurred the distinction between hate speech and international crimes. Following an intervention by the Justice Initiative, the Appeals Chamber clarified the international legal standards on the issue.

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# Anyaele v. Taylor (2005)

HIGH COURT, NIGERIA (THIRD PARTY INTERVENTION)

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## **CHALLENGE TO ASYLUM FOR INDICTED HEAD OF STATE**

**CHARLES TAYLOR, FORMER PRESIDENT OF LIBERIA**, was granted safe haven in Nigeria, despite having been indicted for war crimes and crimes against humanity by the Special Court for Sierra Leone. The Justice Initiative provided international legal arguments to support an application by two survivors of wartime atrocities before the Federal High Court in Abuja seeking to lift the asylum initially granted to Taylor by Nigeria's president. Taylor subsequently left Nigeria and was later surrendered to the Special Court for Sierra Leone, where he was convicted of war crimes and crimes against humanity.

# STRENGTHENING THE RIGHT TO CITIZENSHIP IN AFRICA



**Laura Bingham**

*Laura Bingham manages the equality and citizenship issue area of Justice Initiative.*

**Millions of people in Africa are at risk of statelessness due to unclear citizenship laws. This uncertain status leaves them in a precarious position, potentially unable to go to school, get jobs, access healthcare, own property, get married, travel, or vote. When applied to ethnic minorities, these restrictions exacerbate tensions.**

**THE JUSTICE INITIATIVE HAS USED LITIGATION** to strengthen the right to citizenship and to challenge statelessness in Africa for over a decade. Since 2011, the Justice Initiative has obtained several judgments from the African regional human rights institutions clarifying the law. The African Charter on Human and Peoples' Rights does not include a provision safeguarding the right to nationality, but litigation enabled the tribunals to articulate a right to nationality, primarily under Article 5 of the African Charter, which safeguards the right to legal status. The cases also raised general awareness of citizenship as a right, by describing the human impacts arising from lack of identity documents and clear legal status, issues that are common in many African states.

The litigation followed continental mapping projects supported by the Open Society Foundations, designed to capture legal trends and patterns in practical implementation of the right nationality in the region. This research, combined with litigation and advocacy, paved the way toward the currently high level of engagement by African Union institutions, leading to a Protocol on the Right to Nationality in Africa.

In Kenya, litigation on behalf of the Nubian minority community formed part of their generations-long struggle for belonging and recognition. Kenyan Nubians have asserted their entitlement to Kenyan citizenship and security of tenure in Kibera and other urban areas where they were originally settled by the British in the early 1900s when they were decommissioned from forced colonial military service. In 2015, the African Commission found Kenya had violated the Nubians' right to nationality and their right to property. A 2011 decision by the African Child Rights Committee found the same practices violated the African child rights charter, which contains specific guarantees to protect children's right to nationality and safeguards against childhood statelessness.

The Nubian community have led the steps to enforce these rights, including through a community-based paralegal project that provides direct support to individuals applying for identification cards, as well as mobile registration exercises, and community education through a weekly radio show, community meetings, information brochures, and a school debate competition on citizenship and statelessness.

In June 2017, Kenya's President issued a title deed to the community covering a portion of the land at issue. The Chairman of the Kenyan Nubian Council of Elders responded that the outcome "demonstrated how turning to the human rights institutions of the African Union can yield results, with sustained commitment by communities and a willingness on the part of the government to act."

The Justice Initiative litigates citizenship and statelessness cases globally, before regional institutions and national jurisdictions, with the purpose of establishing international precedent and empowering the effected communities. This litigation increasingly focuses on the negative impacts on the poor and marginalized where they are not able to prove their legal entitlement to citizenship, and the use of denationalization as a counterterrorism measure.

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## Nubian Community in Kenya v. Kenya (2015)

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (CO-COUNSEL)

**THE AFRICAN COMMISSION FOUND** that Kenya's arbitrary procedures that restrict access to identity documents based on an individuals' religious or ethnic identity violated the African Charter on Human and Peoples' Rights.

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## Children of Nubian Descent in Kenya v. Kenya (2011)

AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD (CO-COUNSEL)

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### **NUBIAN CHILDREN DENIED A FUTURE**

**THE AFRICAN COMMITTEE ON THE RIGHTS AND WELFARE** of the Child found that such discrimination leading to statelessness violates African human rights standards.

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## People v. Côte d'Ivoire (2015)

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (COUNSEL)

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### **THE RIGHT TO CITIZENSHIP FOR MINORITIES**

**CÔTE D'IVOIRE INTRODUCED NEW CITIZENSHIP POLICIES** based on the concept of "Ivoirité," which led to the denial of citizenship for minority groups, up to 30 percent of the country's population. Even though many were born in the country, they are denied the official documents essential for everyday life. The African Commission found that this treatment failed to respect the right to nationality, which requires the full integration of stateless minorities into Ivoirian society.



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## IHRDA v. Mauritania (2000)

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ADVISOR TO COUNSEL)

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### MAURITANIA EXPELS THOUSANDS OF CITIZENS

**IN THE LATE 1980S, THE MAURITANIAN GOVERNMENT INITIATED** a policy of “Arabization” and expelled some 70,000 non-Arab citizens. Civil servants were arbitrarily arrested and deported, and villagers were driven into neighboring Mali and Senegal to live in camps as stateless refugees. In 2000 the African Commission on Human and Peoples’ Rights found that their rights had been violated. For years, those expelled have sought the full implementation of that decision. The Justice Initiative is working with local NGOs, UNHCR, and the African Commission to ensure that their citizenship rights are recognized, including the provision of documentary proof of their identity and Mauritanian citizenship.

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## Anudo v. United Republic of Tanzania

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS (THIRD PARTY INTERVENTION)

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### DEPRIVATION OF NATIONALITY WITHOUT DUE PROCESS LEADS TO STATELESSNESS

**ANUDO OCHIENG ANUDO LIVED HIS ENTIRE LIFE AS A CITIZEN OF TANZANIA,** where he was born and held a national identity card and a passport. When he applied for a marriage license, the authorities accused Anudo of misrepresenting his identity, confiscated his personal documentation, and expelled him from Tanzania to Kenya, where he was promptly arrested and convicted of being in the country illegally. He could not bring a challenge to the courts in Tanzania, and Kenya does not recognize him as a citizen. Anudo challenged Tanzania’s actions under the African Charter on Human and Peoples’ Rights and international law, which prohibit arbitrary deprivation of nationality.

# PROSECUTING CORRUPTION



**Ken Hurwitz**

*Ken Hurwitz' legal work targets high-level corruption, particularly corruption fueled by trade in natural resources, using the law to challenge those who pay or receive bribes in exchange for illegal access to resource wealth, and those who assist by hiding the proceeds of corrupt dealing.*

**Crimes of corruption are among the hardest cases to prosecute, particularly when perpetrated by political leaders and their families or friends, by international business entities and business persons, and by the professionals and institutions that arrange the movement of corrupt funds in the global financial system. The hurdles include factual complexity, bank secrecy, the ability to move funds rapidly and repeatedly through endless networks of offshore vehicles, and the enormous political power and deep pockets of potential defendants.**

**CIVIL SOCIETY AND GOVERNMENTS INCREASINGLY RECOGNIZE THAT** kleptocracy and international bribery cannot be ignored, given the impact of corruption on the fundamental challenges of the 21st century, such as climate change, sustainable development, economic and social inequality, and other threats to open societies. The Justice Initiative has developed a limited number of high-profile cases where we seek to instigate national prosecutors to bring criminal charges, while supporting civil society groups to strengthen anti-corruption mechanisms. Much of this litigation must remain confidential.

These cases reveal the shocking nature and complexity of grand corruption while also demonstrating that national prosecutors have both the capacity and the obligation to pursue such crimes. Highly motivated, knowledgeable and energetic civil society actors can provide invaluable support for these efforts. While prosecutors have ultimate responsibility—and unique legal powers—for ensuring accountability for grand corruption, civil society is fully capable of prompting and

assisting prosecutors in pursuing strong cases, and in mobilizing public opinion and other political support for aggressive anti-corruption enforcement.

Grand corruption cases take years to investigate and prosecute, but can achieve impact even while they are in development. The Justice Initiative supported the NGO Trial to bring a complaint against Swiss gold refinery Argor-Heraeus, alleging complicity with gold pillage in Democratic Republic of Congo. While the prosecutor ultimately did not proceed, he made a finding that Argor had violated its own anti-money laundering rules by failing to inquire about the legality of the gold it refined, and that it probably helped perpetuate the bloody conflict. This had a major impact on the reputation of Argor and the entire Swiss gold refining industry, leading to significant media coverage in Switzerland and abroad. Reports suggest that the case contributed to an overwhelming 89% public support in Switzerland for laws to hold Swiss corporations accountable for human rights violations committed abroad.

Litigation is complemented by national and regional advocacy, as well as public education. The Justice Initiative supported NGO litigation related to Equatorial Guinea by spearheading a global campaign to prevent UNESCO from accepting funds from President Obiang to create an International Prize for Research in the Life Sciences, as an attempt to clean up his unsavory image. While in the end the prize did go forward, two years of negative press coverage exposed the hypocrisy of accepting a charitable endowment from such a notorious figure, and helped turn the corrupt Obiang regime into a universally recognized symbol of greed and misgovernment.

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## TRIAL v. Argor-Heraeus S.A. (2015)

FEDERAL CRIMINAL COURT (ADVISOR TO COUNSEL)

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### **LEGAL ACTION AGAINST BUSINESS ACTORS WHO PROFIT FROM PILLAGED GOLD**

From 2004-2005, the Swiss gold refinery Argor-Heraeus S.A. refined almost three tons of gold ore that was pillaged from the Democratic Republic of Congo by an armed group whose activities were financed by the traffic in this gold ore. In essence, pillage means theft during war, and it is a war crime. When business actors knowingly purchase assets pillaged by others, they too can be held culpable for pillage. Those who materially assist such transactions may also be criminally liable. Following submission to the Swiss Federal Prosecutor of a criminal complaint against Argor-Heraeus, and review and preliminary investigation by Swiss authorities, the prosecutor dismissed the case in March 2015.

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## APDHE v. Obiang Family

AUDIENCIA PROVINCIAL DE LAS PALMAS DE GRAN CANARIA (ADVISOR TO COUNSEL)

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### **TRACKING DOWN AFRICA'S OIL WEALTH**

The people of Equatorial Guinea live in poverty, despite vast oil revenues. In July 2004, a U.S. Senate investigation found strong evidence suggesting the diversion of huge sums of Equatorial Guinea government funds into accounts suspected to be owned by senior officials, including the President, Teodoro Obiang. The transfers included approximately US \$26.5 million paid from an Equatorial Guinea Treasury account in the US to an account in Spain of a shell company the investigators suspected might be beneficially owned by the President. A dossier was submitted to Spanish investigating magistrates by the NGO Asociación Pro Derechos Humanos de España (ADPDHE), supported by the Justice Initiative. Some of the funds appear to have been used to purchase villas for relatives of the President. However, the investigation has uncovered a complex global structure of some 30 or more shell companies managed by a former Russian diplomat and his family, who, the evidence suggests, have been laundering the oil money by diverting it into property and other investments. After the Russians fled Spain in 2012 they were tracked down in Panama, where they were arrested on an international warrant, and extradited back to Spain. The investigation continues, and the trial is expected to commence in mid-2018.

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## APDHE v. Equatorial Guinea (2011)

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (CO-COUNSEL)

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### **WHO SHOULD BENEFIT FROM AFRICA'S OIL?**

Equatorial Guinea has the highest GDP per capita in Africa, due to its oil wealth, but the majority of ordinary people live in poverty. Since 2004, public reports have revealed that public revenues were siphoned out of the public domain into personal bank accounts. APDHE and the Justice Initiative brought a claim to the African Commission arguing that this violated the right of the people to freely dispose of their wealth and natural resources, protected by Article 21 of the African Charter. The African Commission declined to hear the case on the basis that the applicants had not exhausted domestic remedies, despite substantial grounds for concern that any such claims would be futile and dangerous.

# JUDGMENTS

Since its launch in 2004 as part of the Open Society Foundations, the Justice Initiative has obtained more than 60 judgments from apex national courts and regional and international tribunals.

1. **Herrera Ulloa v. Costa Rica**, 2 July 2004, Inter-American Court of Human Rights (Third Party Intervention).

***Conviction for criminal defamation chills free speech.*** The conviction of a journalist for criminal defamation for a story that alleged a former diplomat was corrupt violated free expression. The Court found that public officials must tolerate greater debate on matters of public interest.

2. **Marques v. Angola**, March 2005, UN Human Rights Committee (Co-Counsel).

***Arrest and trial of journalist violates free expression.*** Raphael Marques was convicted of the crime of defamation for a news story that criticized the President. The UN HRC found that his arrest and detention were arbitrary and violated free speech.

3. **Nachova v. Bulgaria**, 6 July 2005, European Court of Human Rights (Grand Chamber) (Third Party).

***Police discrimination against Roma.*** The military police shot dead two unarmed Roma conscripts while shouting racist abuse. The Court found that this was unlawful discrimination, and that the failure to control the use of firearms violated the right to life.

4. **Yean & Bosico v. Dominican Republic**, 8 September 2005, Inter-American Court of Human Rights (Third Party).

***Discriminatory denial of citizenship.*** Children of Haitian descent were not recognized as citizens, and left stateless. The Court found that this was discrimination, and violated their rights to juridical personality, equal protection, and education.

5. **Anyaele v. Taylor**, April 2006, High Court of Nigeria, (Third Party).

***Challenging impunity for war crimes.*** When Nigeria's President gave asylum to Charles Taylor, two of his victims brought a legal challenge, arguing that he was accused of international crimes. Taylor was later surrendered to the Special Court for Sierra Leone.

- 6. *Claude Reyes v. Chile***, 9 September 2006, Inter-American Court of Human Rights (Third Party).

***The right to information.*** The Inter-American Court was the first international tribunal to recognize a right to access government information as part of freedom of expression, ruling that States must reform secrecy laws and adopt laws to give effect to the right.

- 7. *D.H. v. The Czech Republic***, 13 November 2007, European Court of Human Rights (Grand Chamber) (Counsel).

***Educational segregation of Roma children.*** Roma children were disproportionately sent to “special schools” for children with mild mental disability. The Court ruled that there was no justification and it was indirect discrimination – the first such judgment.

- 8. *Prosecutor v. Nahimana***, 28 November 2007, ICTR (Third Party).

***Incitement to genocide.*** The founders of Rwanda’s *Radio-Television Libre des Mille Collines (RTLM)* were convicted of incitement for statements encouraging the killing. The Appeals Chamber found that hate speech laws were not directly relevant to establish guilt.

- 9. *TASZ v. Hungary***, 14 April 2009, European Court of Human Rights (Third Party).

***The right to information in Europe.*** Following *Claude Reyes v. Chile*, the European Court held that NGOs such as the Hungarian Civil Liberties Union have a right to access information needed for them to play their role as a public watchdog.

- 10. *Williams v. Spain***, 30 July 2009, UN Human Rights Committee (Counsel).

***Discriminatory identity checks.*** The Committee found it was racial discrimination for the police to stop someone based on their racial or ethnic identity, the first finding by an international tribunal that racial profiling is unlawful.

- 11. *Casas Chardon v. Transport Ministry***, 28 September 2009, Constitutional Court of Peru (Third Party).

***Financial information of public officials.*** The Court ruled that where information on the property and assets of public officials was recorded in public registers it could be disclosed, to help prevent corruption and encourage good governance.

- 12. Romanenko v. Russia**, 8 October 2009, European Court of Human Rights (Third Party).

**Reliance on official statements.** A journalist was convicted of libel when he published an article about the sale of timber by the local council based on the statements of officials, without checking their truth. The Court held this violated freedom of expression.

- 13. Sejdic and Finci v. Bosnia and Herzegovina**, 23 December 2009, European Court of Human Rights (Third Party).

**Denial of political and voting rights to ethnic minorities.** Minorities are restricted from political representation in Bosnia and Herzegovina under the Dayton Peace Accords. 15 years after the war's end, the Court ruled this amounted to discrimination.

- 14. Good v. Botswana**, May 2010, African Commission on Human and Peoples' Rights (Third Party).

**Discrimination against non-citizens.** An Australian who had lived in Botswana for 15 years was expelled after he wrote an article critical of the presidential succession. The Commission found that the decision was arbitrary, and should have been made by a judge.

- 15. The Gaza Inquiry**, September 2010, United Nations Inquiry (Third Party).

**The duty to investigate war crimes.** The UN Fact-Finding Mission on the Gaza Conflict concluded that the role of the Military Advocate General both to provide legal advice to the IDF and to conduct any prosecutions meant the system was not effective or independent.

- 16. Sanoma Uitgevers v. The Netherlands**, 14 September 2010, European Court of Human Rights (Grand Chamber) (Third Party).

**Protection of journalistic sources.** The Court found that the arrest of an editor for refusing to provide the police with photographs violated freedom of expression. Media premises can be searched only when strictly necessary for the investigation of a serious crime, and with a judicial warrant.

- 17. Gomes Lund v. Brazil** (Araguaia), 24 November 2010, Inter-American Court (Third Party).

**The right to truth.** Thirty years after their families disappeared, the Court affirmed the right to truth about gross human rights violations, in order to protect rights and investigate abuses, and concluded that Brazil's amnesty laws were unlawful.

- 18. MGN Ltd v. UK**, 18 January 2011, European Court of Human Rights (Third Party).

***Excessive costs threaten press freedom.*** The Court found that where legal costs of £1.1 million (approx. \$2 million) were awarded in a libel case worth only £3,500 (approx. \$7,000) in damages, there was such a chilling effect on newspapers that it breached freedom of expression.

- 19. Nubian Minors v. Kenya**, 22 March 2011, African Committee of Experts on the Rights and Welfare of the Child (Co-Counsel).

***A child's right to nationality.*** Nubians are not registered as Kenyans at birth, and grow up with few life prospects. In its first decision, the Committee found that such discrimination leading to statelessness violates African human rights standards.

- 20. Kasabova v. Bulgaria**, 19 April 2011, European Court of Human Rights (Third Party).

***Convicted for exposing corruption.*** A reporter was convicted of defamation for a corruption story, although the officials had been convicted. The Court found that this violated freedom of expression, as the burden of proof was too high and no defenses were allowed.

- 21. Moidunov v. Kyrgyzstan**, 19 July 2011, UN Human Rights Committee (Co-Counsel).

***Unlawful killing.*** Tashkenbai Moidunov died in police custody, supposedly of a heart attack, but had finger marks around his neck. The Committee found that he had been ill-treated and killed in custody, and that Kyrgyzstan was responsible.

- 22. Adalah v. Israel**, January 2012, Supreme Court of Israel (Third Party).

***Discriminatory ban on family unification.*** Israel does not allow citizens who marry individuals from the OPT to bring their spouses to Israel. The Supreme Court narrowly rejected the petition, finding that it was proportionate to the protection of national security.

- 23. Gerasimov v. Kazakhstan**, 24 May 2012, UN Committee against Torture (Co-Counsel).

***Police beating to force confession.*** Alexander Gerasimov went to a police station to ask about his son, but was then interrogated and beaten for 24 hours, before being released without charge. The Committee found that his treatment amounted to torture.



- 24. Centro Europa 7 v. Italy**, 7 June 2012, European Court of Human Rights (Grand Chamber) (Third Party).

**Broadcast pluralism.** Centro Europa 7 won a contract for a new TV station but was not given a frequency. The Grand Chamber found that States have a duty to ensure pluralism in the audiovisual sector and to prevent domination of the airwaves by all-powerful actors.

- 25. Alade v. Nigeria**, 11 June 2012, ECOWAS Community Court of Justice (Counsel).

**A decade in pre-trial detention.** Sikuru Alade was held in pre-trial custody for more than nine years, a routine problem in Nigeria where the majority of the prison population are not convicted. The Court found that this was arbitrary detention and ordered his release.

- 26. Kuric v. Slovenia**, 26 June 2012, European Court of Human Rights (Grand Chamber) (Third Party).

**Citizens erased from records.** When Yugoslavia broke apart, residents of Slovenia who failed to apply promptly for citizenship were erased from the register, becoming stateless. The Court found that this violated their private life and was unlawful discrimination.

- 27. Makhachev v. Russia**, 31 July 2012, European Court of Human Rights (Co-Counsel).

**Racist assault by police.** Three brothers were detained and severely beaten by the police, while being subjected to racist insults. The Court found that the authorities ill-treated the brothers due to their race, and failed to adequately investigate the racial motivation.

- 28. Gudiel Álvarez v. Guatemala** (Diario Militar), 20 November 2012, Inter-American Court of Human Rights (Third Party).

**Death squad killings.** A leaked diary revealed details of the last moments of 183 political opponents of the former military regime. The Court found Guatemala responsible for the torture and disappearances, and found a violation of the right to truth.

- 29. El-Masri v. Macedonia**, 13 December 2012, European Court of Human Rights (Grand Chamber) (Co-Counsel).

**CIA Torture.** Khaled El-Masri was kidnapped by the CIA and flown to a secret prison in Afghanistan. The Grand Chamber found that this was torture, and that he had been effectively disappeared by the US and Macedonian authorities.

- 30. *Yildirim v. Turkey***, 18 December 2012, European Court of Human Rights, (Third Party).

***Blocking websites.*** When Turkey blocked access to the whole of Google Sites in order to block one website they found offensive, the European Court found that this violated the right to share information, given the importance of the internet for free expression.

- 31. *Salkanovic v. Ministry of Interior***, 24 May 2013, Italian civil courts (Advisor to Counsel).

***Italy's Roma Census.*** The Civil Court of Rome found that the collection of fingerprints, photographs, and other personal information under emergency laws introduced in 2008 targeted Roma and amounted to racial discrimination.

- 32. *Y, T, A v. Berlin Education Authority***, 26 September 2013, Berlin Administrative Court (Advisor to Counsel).

***Segregated classes.*** A Berlin school was effectively creating segregated classes for children of migrant background. A legal challenge highlighted the problem and forced the schools to change their practice, although it failed in the courts.

- 33. *Home Secretary v. Al-Jedda***, 9 October 2013, UK Supreme Court (Third Party).

***Arbitrary deprivation of citizenship.*** The UK government stripped a man of his citizenship, leaving him effectively stateless. The Supreme Court applied international standards to find that he was stateless, regardless of his right to recover a previous nationality.

- 34. *Janowiec v. Russia***, 21 October 2013, European Court of Human Rights (Grand Chamber), (Third Party).

***History and the Right to Truth.*** The European Court found that there was a duty to disclose documents concerning the 1940 Katyn massacre, but that there was no obligation to prosecute crimes that occurred before the Convention came into force.

- 35. *Pauliukas v. Lithuania***, 5 November 2013, European Court of Human Rights (Third Party).

***Right to Reputation.*** A local politician sued a newspaper for libel but lost. He argued that the state had failed to protect his reputation. The Court held that the right to reputation is engaged only if the allegations go beyond what is protected by freedom of expression.

**36. Vargas Telles v. City of San Lorenzo**, 15 October 2013, Supreme Court of Paraguay (Third Party).

*The Right to Know.* The Supreme Court applied *Reyes v. Chile* and held that the right to information meant that the assets of public officials should be made public, including their salaries. The decision led to demonstrations and a new access to information law.

**37. Transparency Law Challenge**, 21 January 2014, Colombian Constitutional Court (Third Party).

*Maximum Disclosure of Information.* The Court reviewed a draft law on access to information, that contained many exceptions for national security, public order, and access to information. The Court rejected the law, as the duty to disclose was too limited.

**38. SAS v. France**, 1 July 2014, European Court of Human Rights (Grand Chamber) (Third Party).

*Criminal ban on full-face veils.* When France introduced a ban on women covering their faces, the Court rejected arguments that the ban was necessary for women's rights, gender equality, or public safety, but justified it on the basis of "living together".

**39. Arrest Rights Challenge** (Lipowicz), 3 June 2014, Constitutional Court of Poland (Third Party).

*Access to a lawyer for petty offences.* The Constitutional Court concluded that denying access to legal advice for those accused of petty offences violated international standards for fair trials.

**40. Deyda Hydara Jr. and Others v. The Gambia**, 27 June 2014, ECOWAS Community Court of Justice (Advisor to Counsel).

*Who killed Deyda Hydara?* The ECOWAS Court found that the National Intelligence Agency (NIA) had not conducted an impartial investigation into the assassination of journalist Deyda Hydara, as they had been accused of complicity in the crime.

**41. Al Nashiri v. Poland**, 24 July 2014, European Court of Human Rights Grand Chamber (Co-Counsel).

*Torture in CIA black site.* The European Court found that Poland had hosted a secret CIA prison where Al Nashiri was secretly held and tortured, and that they assisted in his transfer from Poland despite the risk of further torture and the death penalty.

- 42. Etxebarria v. Spain**, 7 October 2014, European Court of Human Rights (Third Party).

**Safeguards against torture.** Two suspects alleged that they had been tortured in police custody. The Court found that Spain had not investigated the allegations, and called for the introduction of safeguards against police station torture.

- 43. Rodriguez v. Google**, 28 October 2014, Supreme Court of Argentina (Third Party).

**Liability for search results.** A fashion model sued Google when search results produced defamatory articles. The Court held that search engines could only be responsible where they were notified of illegal content and had effective knowledge of it.

- 44. Da Cunha v. Yahoo de Argentina SRL and Another**, 15 January 2015, Supreme Court of Argentina (Third Party).

**No obligation to filter content.** The Court considered the liability of search engines for illegal results, and held that requiring filters to block search results would be prior censorship. The correct action was to sue the producer of the content, not the search engine.

- 45. Nubian Community in Kenya v. Kenya**, February 2015, African Commission on Human and Peoples' Rights (Co-Counsel).

**Discriminatory denial of citizenship.** Nubians are forced to go through a lengthy vetting process to obtain ID cards that are essential for everyday life. The Commission found that this lack of effective access to citizenship leaves them with a second-class status.

- 46. German Headscarves Ban**, 13 March 2015, Constitutional Court, Germany (Third Party).

**Headscarves ban for Muslim teachers.** The Constitutional Court struck down as discriminatory regional laws that banned teachers from wearing religious clothing, but which exempted Christians from the ban.

- 47. Pham v Home Secretary**, 25 March 2015, Supreme Court of the United Kingdom (Third Party).

**Protecting the stateless.** The government stripped Pham of his UK citizenship, even though Vietnam had declared he was not a citizen. The Court held that under Vietnamese law he was still a citizen, and so he had not been made stateless.

- 48. Ernazarov v. Kyrgyzstan**, 25 March 2015, UN Human Rights Committee (Co-Counsel).

*Police cell killing.* The victim was charged with a sexual offense and placed in a cell with six other men, who abused him. He then died in unexplained circumstances. The HRC found that he had not been protected, and that there had not been a proper investigation.

- 49. Zhovtis v. Kazakhstan**, 1 April 2015, UN Human Rights Committee (Co-counsel).

*Unfair trial silences human rights defender.* A trial against a human rights defender for a serious traffic accident was biased against him and resulted in an excessive sentence. The HRC concluded that the case was inadmissible.

- 50. Nikolova v. CEZ Electricity**, 16 July 2015, Court of Justice of the EU (Co-Counsel).

*Discriminatory stereotyping of Roma.* A Bulgarian electricity company had a policy to put electricity meters at the top of very high poles in Roma districts. The Court found that this was discrimination that stigmatized Roma and others who lived in such districts.

- 51. People v. Cote d'Ivoire**, October 2015, African Commission on Human and Peoples' Rights (Counsel).

*Discriminatory denial of citizenship.* New citizenship policies resulted in the denial of citizenship for minority groups. The African Commission found that this treatment failed to respect the right to nationality, which required the full integration of stateless minorities.

- 52. Askarov v. Kyrgyzstan**, 21 April 2016, UN Committee against Torture (Co-counsel).

*Human rights defender tortured.* The Committee found that the State had failed to protect human rights activist Azimjan Askarov from torture, failed to investigate what had happened, and subjected him to an unfair trial.

- 53. Jacinta Francisco, Teresa González, Alberta Alcántera v. PGR** 19 and 25 May 2016, Federal Appeals Court, Mexico (Advisor to Counsel).

*Financial liability for unlawful imprisonment.* Three indigenous women were falsely prosecuted, and claimed damages for wrongful imprisonment. The Court found that the *Procuraduría General de la República* must pay damages, setting a precedent.

- 54. *Akunov v. Kyrgyzstan***, 18 November 2016, UN Human Rights Committee (Co-counsel).

***Political activist killed in police custody.*** The victim was arrested and held in custody. Neighbors heard screams through the night, and in the morning he was dead. The HRC found that the State was responsible for his death in custody and had failed to investigate.

- 55. *Seydi and others v. France***, 9 November 2016, Cour de Cassation (Advisor to Counsel).

***Challenging police discrimination.*** Young people from ethnic minorities in France are disproportionately stopped by the police for ID checks. The *Cour de Cassation* concluded that in some circumstances this was unlawful discrimination.

- 56. *Bagdonavichius v. Russia***, 11 October 2016, European Court of Human Rights (Counsel).

***Russian government burns Roma village.*** The Russian authorities bulldozed and burned only the Roma houses in the village of Dorozhoe. The Court found that this violated their right to home, and ordered compensation of more than €250,000.

- 57. *Al-Waheed v. Secretary of State for Defence***, 17 January 2017, UK Supreme Court (Third Party).

***Detention in conflict.*** British soldiers detained hundreds of Afghans and Iraqis without charge during the conflicts. The Supreme Court held that the lack of a legal basis for the detention or a procedure to challenge it violated human rights standards.

- 58. *H.P v. Denmark***, 19 January 2017, European Court of Human Rights (Co-counsel).

***Citizenship struggle for torture survivor.*** The victim was not able to obtain Danish citizenship due to a change in the law. After a case was filed with the ECHR, the authorities granted citizenship, agreed to pay compensation, and amended the law.

- 59. *State Attorney of Israel v. Breaking the Silence***, Settled in February 2017, Petah Tikva Magistrate's Court, Israel (Third Party).

***Confidentiality of NGO sources.*** The State Attorney tried to force an NGO to disclose their sources. When it became clear that international law protects the vital role of NGOs, the authorities accepted an offer to assist without revealing sources, and dropped the case.

**60. Naming the Disappeared Cases**, 1 February 2017, Supreme Court of Mexico (Advisor to Counsel).

*Disclosure of victims' names.* The authorities argued that they could not disclose the names of those disappeared during Mexico's dirty war, as they were confidential. The Court concluded that information relating to gross human rights violations cannot be classified.

**61. Ethnic Profiling in Gyöngyöspata**, 8 February 2017, Supreme Court of Hungary (Third Party).

*Challenging unequal treatment by police.* Local police harassed Roma residents by imposing fines on them for the most minor offences. The Court agreed that this was harassment, but declined to find that it was discriminatory.

**62. Bubon v. Russia**, 7 February 2017, European Court of Human Rights (Third Party).

*Transparency of Crime Statistics.* A legal researcher sought information on prostitution and policing, but his data request was denied. The Court accepted that such information can be requested, but held that there was not duty to compile new information on request.

**63. Chowdury v. Greece**, 30 March 2017, European Court of Human Rights (Co-counsel).

*Forced labor for migrant workers.* 150 Bangladeshi men worked on a strawberry farm for six months without being paid, and were shot at when they objected. The Court held that their treatment amounted to forced labor, and that Greece had not protected them.



## Open Society Justice Initiative

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**The Open Society Justice Initiative** uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, and Washington, D.C.