

# STRATEGIC HUMAN RIGHTS LITIGATION

Philip Alston and James A Goldston

SYLLABUS, FALL 2017

As of August 30

Over the past twenty years or so strategic litigation designed to uphold international human rights legal standards has mushroomed. Prominent examples can be found in the domestic courts of a diverse array of countries, and the strategy is increasingly being used to bring test cases before international courts such as the European Court of Human Rights and the Inter-American Court of Human Rights and before quasi-judicial international bodies such as the UN's Human Rights Committee and the African Commission on Human and Peoples' Rights.

At its best, strategic litigation in defense of human rights both tests and advances, a society's commitment to the rule of law. In its relatively short life, such litigation has freed political prisoners, given dissidents a voice, compelled far-reaching changes in education policy, promoted sexual and reproductive rights, tackled the problem of statelessness, and sent war criminals to jail. But going to court is costly, time-consuming and, at times, counter-productive. Critics have also condemned it as being a tactic by which powerful funders can distort priorities and promote national political objectives. This seminar will explore the practicalities as well as the complexities of such litigation and seek to identify the conditions under which it might be an ideal, or at least a viable, tool for promoting human rights. The seminar will be built around a series of case studies, the details of which will often be explained by the principal litigators. But it will also seek to take a critical look at the field through engagement with the relevant scholarly literature.

The seminar will explore the nature of the field, including the definition of strategic rights litigation, its history and its recent evolution. It will scrutinize the practice of rights litigation including: its goals, challenges and tactics; how best to select cases and for a; what considerations to weigh in marshaling evidence of violations for courtroom proceedings; the relevance of ethical considerations in guiding or constraining rights litigators; and the types of remedies that are available and the circumstances under which they might be effective. Against that background, consideration will then be given to questions such as: is rights litigation more (or less) successful in some countries, or in addressing certain kinds of rights, rather than others; by what criteria do we assess its impact; how important are factors such as national law, legal and popular culture, the judiciary, the bar, civil society, and funders?

The seminar will be co-taught by Philip Alston and James Goldston. Goldston is Executive Director of the Open Society Justice Initiative, and one of the most experienced and respected international litigators in this field.

**Course materials**

The principal sources are the supplementary materials set out in this syllabus. Additional updates might also be provided in advance, especially if they relate to current events.

The ‘additional readings’ suggested below are mainly for those who might write a paper on the relevant issue.

**Office hours for Philip Alston:**

9.00 – 11.00 on Thursdays, sign-up with Brianne Cuffe, VH 310 (cuffeb@mercury.law.nyu.edu). Prof. Goldston can be contacted at <james.goldston@opensocietyfoundations.org>

**Class sessions:**

Many sessions of the seminar will also involve guest presenters who have played a key role in the relevant litigation.

In the early weeks of the semester, there will be four Wednesday make-up sessions (Sept. 13, Sept. 20, Sept. 27, and Oct 4, from 6.00 – 7.50). These have already been scheduled and are reflected in the syllabus below. This also means that the final session of the seminar will take place on November 9.

**Assessment**

For this seminar you are required to write a paper for 2 credits (or 3 if an additional writing credit is approved). The regular 2 credit paper should be at least 6,500 words in length; a 3 credit paper must be at least 10,000 words. Both figures include footnotes.

The topic must focus on an aspect of strategic human rights litigation but need not be limited to a specific issue addressed in class.

It is your responsibility to propose a topic. Once I have indicated agreement in principle, you will need to submit a one page outline identifying a specific research question, describing the methodology, and outlining the proposed structure of the paper. Friday October 20 is the deadline for submitting this outline.

All papers must be handed in by the end of the exam period (December 22). The footnotes should follow any one of the standard style formats, but it need not be Blue Book.

The paper should be sent to philip.alston@nyu.edu You do not need to submit a hard copy. You will receive an email acknowledgement from me.

Final grades for the course will also take account of class participation.

## **Session 1: Introduction and locating strategic litigation**

**Thursday, August 31, 3.00 – 4.50 – FH318**

### **Materials**

Thomas Carothers, *Closing Space and Fragility* (2016)

Martín Abregú, ‘What strengthening human rights has to do with challenging inequality’ (2017)

Scott L. Cummings and Louise G. Trubek, ‘Globalizing Public Interest Law,’ 13 *UCLA J. Int’l L. & For Aff* 1 (2008)

### **Additional reading**

Christopher McCrudden, ‘Transnational culture wars,’ 13 *Int’l J. Constitutional Law* (2015) 434

Jeremy Waldron, ‘Transforming Our View of the Law,’ *New York Review of Books*, June 23, 2016: review of David Cole, *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law* (2016)

## **Session 2: Building a Case**

**Thursday, September 7, 3.00 – 4.50 – FH318**

**Case study:** the exploration of different jurisdictions in order to draw attention to the problem of corruption in the context of battling the ebola disease in West Africa

**Guest: Malcolm Dort,** Legal officer for anticorruption at the Open Society Justice Initiative, New York.

### **Materials**

Introductory note on ‘corrupt diversion and mismanagement of ebola response funds: strategic litigation summary’

*SERAP v. Nigeria (UBEC)* (ECOWAS 30 Nov. 2010)

Kai Kupferschmidt, ‘Nigerian virologist delivers scathing analysis of Africa’s response to Ebola’

Kate Thomas, ‘Mistrust of government spurs Ebola spread’

‘Ebola viral disease in West Africa: a threat to global health, economy and political stability,’ *Journal of Public Health in Africa*

‘Will Ebola change the game? Ten essential reforms before the next pandemic,’ *Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola*

***The final reading is lengthy, but easy to skim. You don’t need to read it carefully:***

Ebola Fund Watch: Tracking Funds for Ebola Crisis in West Africa

## **Session 3: Situating litigation within the broader frame of human rights advocacy**

**Wednesday, September 13, 6.00 – 7.50 – FH326**

**Case study:** Equal Education in South Africa

**Guest:** Nurina Ally, Executive Director of the Equal Education Law Centre (EELC), in South Africa.

### **Materials**

Steven Budlender, Gilbert Marcus SC and Nick Ferreira, *Public interest litigation and social change in South Africa: Strategies, tactics and lessons*, Executive Summary, (The Atlantic Philanthropies, September 2014)

Timeline of the ‘struggle for norms and standards of school infrastructure’. To be viewed online at <http://www.equaleducation.org.za/content/2014/08/02/Timeline-Final-Digital.pdf>

Legal Resources Center, ‘Letter to government authorities about emergency relief for Cape schools,’ 3 Aug. 2011

Notice of Motion, Eastern Cape High Court, 29 Feb 2012

Founding Affidavit of Yoliswa Dwane, Equal Education National Chairperson in the N&S case, 29 Feb 2012.

Responding affidavit - Minister of Basic Education.

High Court, Order of 11 July 2013

South African Schools Act 84 of 1996, Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, 29 November 2013.

### **Additional Materials**

EE Video on Solidarity Visit with Eastern Cape Schools:

<https://www.youtube.com/watch?v=wqpUJaQHKT4>

Campaign video explaining Norms and Standards Campaign:

<https://www.youtube.com/watch?v=zJ1Xxg0kghg>

## **Session 4: Forum selection and international litigation planning**

**Thursday, September 14, 3.00 – 4.50 – FH318**

**Case study:** litigation alleging CIA responsibility for the rendition and torture of terrorism suspects. The focus will be on the range of forums available to pursue the case including: national courts on the basis of either territorial jurisdiction or universal jurisdiction; regional and sub-regional courts in Europe, Africa, and the Americas; and UN treaty monitoring bodies.

### **Materials**

Open Society Justice Initiative, *Extraordinary Renditions: The Right to the Truth*

Amy Davidson, ‘Torturing the Wrong Man,’ *The New Yorker*, Dec 13, 2012

Steven M. Watt, ‘Now Can Torture Survivor Khaled El-Masri Have His Apology?,’ Dec. 15 2014

Jamil Dakwar, *New CIA Torture Documents Confirm Chilling Details of Khaled El-Masri's 'Kafkaesque' Ordeal*, 17 June 2016

Souad Mekhennet, 'A German man held captive in the CIA's secret prisons gives first interview in 8 years,' *Washington Post*, Sept 16, 2015

ACLU summary of case following release of Senate report on CIA abuses – Dec 2014 – *El-Masri v. The Former Yugoslav Republic of Macedonia*, European Court of Human Rights, Grand Chamber, Judgment, 13 Dec. 2012

## **Session 5: Criteria for selecting cases**

**Wednesday, September 20, 6.00 – 7.50 – FH326**

**Case study: challenging torture in Mexico**

**Guest: Masha Lisitsyna**

### **Materials**

Masha Lisitsyna & Adriana García, 'Mexican Courts Can Help End the Use of Torture. So Why Don't They?,' September 8, 2015

Adriana García & Mercedes Melon, 'How Mexican Human Rights Lawyers Found a New Route to Accountability,' February 21, 2017

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum, *Mission to Mexico*, (2014).

Amnesty International, *Surviving Death: Police and Military Torture of Women in Mexico* (2016)

'Investigators Say Mexico Has Thwarted Efforts to Solve Students' Disappearance,' *NYT*, April 22, 2016

'While Scolding Trump, Mexico Seeks to Curtail Citizens' Rights,' *NYT*, March 16, 2017

Amicus Curiae on the motion for review filed by the Procuraduría General de la República (PGR) against the judgment issued by the Federal Court of Fiscal and Administrative Justice, Feb. 11, 2016

OSJI Brief on *Claudia Medina Tamarís v. Navy & PGR Mexico*

### **Additional Reading**

*Undeniable Atrocities: Confronting Crimes Against Humanity in Mexico* (OSJI, 2016), at <https://www.opensocietyfoundations.org/sites/default/files/undeniable-atrocities-en-20160602.pdf>

## **Session 6: Evidence**

**Thursday, September 21, 3.00 – 4.50 – FH318**

**Case study: Prosecuting crimes committed in Syria in other jurisdictions**

**Guest: Steve Kostas**

## **Materials**

UN Human Rights Council, Independent International Commission of Inquiry on the Syrian Arab Republic, 'Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016- 28 February 2017'

UN General Assembly Resolution, 2016, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011

'Ex-Judge Chosen by U.N. to Gather Evidence of Syria War Crimes,' Nick Cumming-Bruce, *NYT*, July 4, 2017

'War-Crimes Prosecutor, Frustrated at U.N. Inaction, Quits Panel on Syria,' Somini Sengupta, *NYT*, Aug. 6, 2017

Trial International, *Make way for Justice #3: Universal Jurisdiction, Annual Review 2017*

Sara Birkenthal, 'The Need for an Evidentiary Standard for Open Source Evidence,' (2017)

Keith Hiatt, 'Open Source Evidence on Trial,' 125 *Yale L.J. F.* 323 (2016),

## **Session 7: The political economy of strategic litigation**

**Wednesday, September 27, 6.00 – 7.50 – FH326**

Worldwide, how much is spent on rights litigation and by whom? Where does this money go? To which countries? Which actors? For which types of litigation? How do the scale and distribution of funding affect the legitimacy of such activity in different places? What is the role of foundation funding in all of this?

## **Materials**

TBC

## **Session 8: Working with communities: Legal action against ethnic profiling in France**

**Thursday, September 28, 3.00 – 4.50 – FH318**

**Guest Speaker: Lana Hollo**

## **Materials**

Lana Hollo, A Victory in France in the Struggle against Racial Bias in Policing, November 14, 2016 (OSJI)

Lana Hollo, Baton Rape Case Fuels Anger over Racist Policing in France, February 23, 2017 (OSJI)

'Seydi and Others v. France: Application to the European Court of Human Rights,' 8 May 2016

The Court of Cassation, First Civil Chamber, Decision on appeal brought by Mr. Bocar Niane of the decision issued on June 24, 2015 by the Court of Appeals of Paris, 9 Nov. 2016

## **Session 9: From litigation to implementation**

**Wednesday, October 4, 6.00 – 7.50 – FH326**

### **Materials**

*D.H. v. The Czech Republic*, European Court of Human Rights, Application no. 57325/00, Grand Chamber Judgment, 13 November 2007

Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation* (2016)

### **Additional reading**

Jessica Montell, *Learning from What Works: Strategic Analysis of the Israel-Palestine Human Rights Community* (2015)

Socio-economic Rights Institute of South Africa, *Public Interest Legal Services in South Africa: Project report* (July 2015)

## **Session 10: The case against strategic litigation**

**Thursday, October 5, 3.00 – 4.50 – FH318**

### **Materials**

Catherine Albiston, "The Dark Side of Litigation as a Social Movement Strategy," 96 *Iowa Law Review Bulletin* (2011) 61

Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd. ed., 2004) Preface

### **Additional reading**

LaDawn Haglund & Robin Stryker (eds.), (2015)

Michael McCann, 'The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era,' 48 *Law & Society Review* (2014) 245

Sally Engle Merry, 'Inequality and Rights: Commentary on Michael McCann's "The Unbearable Lightness of Rights"', 48 *Law & Society Review* (2014) 285

## **Session 11: The risks of backlash**

**Thursday, October 19, 3.00 – 4.50 – FH318**

**Guest: Liliana Gamboa**

*Case of the Girls Yean and Bosico v. Dominican Republic*, Inter-American Court of Human Rights, Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations and Costs)

**Additional Reading**

Alba Ruibal, 'Movement and counter-movement: a history of abortion law reform and the backlash in Colombia 2006–2014,' 22 (44) *Reproductive Health Matters* (2014) 42

**Session 12: Ethics and the lawyer-client relationship**

Thursday, October 26, 3.00 – 4.50 – FH318

**Materials**

TBC

**Session 13: Evaluating Impact**

Thursday, November 2, 3.00 – 4.50 – FH318

Guest Speaker: Erika Dailey

**Materials**

TBC

**Session 14: Litigation in sub-regional courts: Slavery in the ECOWAS Court**

Thursday, November 9, 3.00 – 4.50 – FH318

Guest Speaker: Helen Duffy

**Materials**

TBC