

Teaching to the Paradoxes: Human Rights Practice in U.S. Law School Clinics

Deena R. Hurwitz

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Deena R. Hurwitz, *Teaching to the Paradoxes: Human Rights Practice in U.S. Law School Clinics*, 26 Md. J. Int'l L. 18 (2011).
Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol26/iss1/5>

This Conference is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Teaching to the Paradoxes: Human Rights Practice in U.S. Law School Clinics

DEENA R. HURWITZ*

I. INTRODUCTION

I think most would agree that there is no single paradigm for human rights clinics. They are diverse and, like human rights advocacy itself, innovative and context specific. As the *Re-imagining International Clinical Law* Symposium (Symposium) organizers point out, international human rights clinics share the

[U]ndergirding principle that globalization both changes the law and is in turn changed by it, an assumption that challenges traditional notions of state sovereignty and the salience of domestic legal regimes, and acknowledges the resulting transnationalization of legal, political, and economic systems and the generation of new global institutions.¹

International human rights clinics have to navigate the substantial tensions in the law itself. International law is simultaneously orthodox and innovative, a paradox that, in fact, challenges legal education on the whole. Law students should graduate knowing not only the “black letter” norms and principles but also being able to critique the rules and anticipate changes in the field. International human rights law (IHRL) is intrinsically evolving,

* Associate Professor and Director, International Human Rights Law Clinic and Human Rights Program, University of Virginia School of Law. J.D., Northeastern University School of Law. I thank the Symposium organizers, the Maryland Journal of International Law (MJIL) and Professors Peter Danchin, Barbara Olshansky, and Michael Millemann, for their stimulating and insightful guidance in framing the conversations. Thanks are also due to the editors of MJIL, especially Emily Siedell, for their patience in bringing this article to publication.

1. Panel Themes/Guidance Questions, *Re-imagining International Clinical Law* Symposium, Maryland Journal of International Law (on file with author).

and even as it evolves, it must constantly justify its efficacy by re-asserting its foundational tenets.

II. THE VALUE OF CRITICAL LEGAL THEORY AND CRITICAL THINKING

Conventional legal education trains lawyers rationally to apply law to facts as a neutral process. For decades, critical legal theorists have censured the doctrinal method taught at law schools for failing to probe “the social, economic, and political conditions underpinning legal doctrine, legal process, and particular legal results.”² Consequently, little space is devoted to discussion about the role of values, voices, emotions, and political choices—in both legal process and substantive outcomes.³ Fundamentally, clinical legal education asserts that the law is not neutral; it teaches students to read between the lines of legal doctrine and look for the multiple stories that lie within. Clinical legal education subscribes to the principle that lawyers have an ethical obligation to use the law for the betterment of society. It aims to impart a sense of professional responsibility for social justice, to expose students to methods and skills, and to provide opportunities for them to practice using the law for social change.

Nowhere is this more true than in the realm of international human rights, with all its contradictions, and where the line between law and politics is often blurred. The paradox of orthodoxy and innovation that I invoke underscores the value of critical thinking as context, skill, strategy, and goal of international clinical education. Professor Balakrishnan Rajagopal writes that human rights is an essentially conservative discourse, but, by examining the “historiography” (history and context), we can easily uncover the multiple competing universalisms underlying the discourse that are part of and result from globalization.⁴ The compartmentalization of rights into “generations,” for example, can be understood not as a hierarchy of values or a statement of legitimacy, but as an artifact of the priorities established by sovereign States and international

2. Janet Mosher, *Legal Education: Nemesis or Ally of Social Movements?*, 35 OSGOODE HALL L.J. 613, 624–25 (1997) (cf. Karl Klare, *The Law Curriculum in the 1980s: What’s Left?*, 32 J. LEGAL EDUC. 336, 366 (1982)).

3. *Id.* at 624.

4. See generally BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

institutions for human rights protection, fulfillment, and enforcement.⁵

Human rights practice spans the gulf between the orthodox and the innovative. It inevitably works within and between both realms, and clinics have the challenge of teaching on the continuum from one extreme to the other. What is more, students enroll in international human rights clinics with vastly different expectations and experiences. Some are eager to engage the field of contestation; others subscribe to “sovereignism”⁶ and the orthodox view of human rights.

Many U.S. law students are baffled, if not altogether skeptical, about human rights practice and enforcement. Human rights lawyering benefits from a solid foundation in the traditional sources of international law and, especially, an understanding of customary international law. Using Article 38 of the International Court of Justice (ICJ) Statute as a point of departure,⁷ my students and I

5. *Id.* at 216. Human rights were conceived first in negative and individualist terms—civil and political rights govern what States must not do to individuals. Juxtaposed against obligations of immediate effect, progressive realization refers to what States should (N.B., not *shall*) do gradually to fulfill their obligations for economic, social, and cultural rights according to their narrowly determined means. Even when collective rights (e.g., self-determination) were introduced, they were required to conform to the traditional principle of the territorial integrity of States and to steer clear of economic self-determination. *Id.* at 247; *cf.* Deena R. Hurwitz, Book Review, *The Politics of the People, Human Rights, and What Is Hidden From View*, 37 GEO. WASH. INT’L L. REV. 293, 297 (2005).

6. D.A. Jeremy Telman, *Plural Vision: International Law Seen Through the Varied Lenses of Domestic Implementation*, 44 VAL. L. REV. 759, 763 (2010); *see* Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1113–14 (2008) (defining sovereignism as “a position insistent on a nation’s right to define and delineate its own lawmaking”); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 654 & n.16 (2002) (characterizing sovereignism as “grounded in a general skepticism of international law and international lawmaking processes”).

7. The Statute of the International Court of Justice, Article 38(1), lays out the sources of international law:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;

discuss the process through which human rights principles, such as the prohibition of enforced disappearance or the rights of indigenous peoples to free, prior, and informed consent, crystallize into custom and codification.⁸ This grounds our clinic work in the theoretical, provides a comprehensible continuum for students to move beyond the traditional, and gives them a foundation for human rights research.

III. BRINGING HUMAN RIGHTS HOME—INTERNATIONAL LAW IN DOMESTIC LAW

One of the core characteristics that distinguishes human rights clinics from other public interest clinics is, first and foremost, the application of the international legal framework. Yet, international human rights law clinics find fertile ground in the convergence of international law and domestic law. Students learn to draw on multiple and often intersecting jurisdictional regimes in addition to international and human rights law, e.g., constitutional and other national law, international humanitarian law, religious law, indigenous law, and custom.

Important learning opportunities spring from the tensions and critical developments in the field. The relationship of international law and national law is an interesting case in point. States that are monist incorporate international law directly into domestic law; they recognize no distinction between the two legal regimes. In this context, international law can be relied upon by individuals and applied by judges in court. However academic this may seem, law

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice art. 38(1), Apr. 18, 1946, *available at* <http://www.unhcr.org/refworld/docid/3deb4b9c0.html>; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702, reporters' notes (1987).

8. *See, e.g.*, Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001); Office of the U.N. High Comm'r for Human Rights, *Enforced or Involuntary Disappearances*, Fact Sheet No. 6/Rev.3 at 5–10 (2009), *available at* <http://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf>; S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004); Seth Korman, *Indigenous Ancestral Lands and Customary International Law*, 32 U. HAW. L. REV. 391 (2010); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmts. d–m, reporters' notes (1987).

students should be aware that domestic law is more accommodating in some legal systems than in others.

The status of international human rights norms in the domestic legal hierarchy is an important matter. In the purest form of monism, international law is superior to conflicting national law, even if entered into after the national law was enacted. In some monist countries, Colombia for example, international human rights contained in duly ratified treaties have a legal ranking similar to the Constitution.⁹

Both groups of rights must be complementary and mutually reinforcing, forming a single group in which priority is given—in the event there is a difference between one source and the other—to a *pro homine* interpretation, that is, in favour of the one that recognizes a broader scope for the rights.¹⁰

In other monist countries, such as Guatemala and Ecuador, international human rights treaties have a legal status below the Constitution but above all other national legislation.¹¹

As an example, since its adoption in 1989, ILO [International Labour Organization] Convention No. 169 on Indigenous and Tribal Peoples has been used as a tool for interpretation or as a basis for decisions by domestic and regional courts throughout Latin America. The Convention is invoked in a variety of cases:

[I]t is used in claims of unconstitutionality, actions for the protection of constitutional rights (*acción de amparo*), actions for legal protection (*tutela*), in disputes between authorities, electoral disputes, actions for nullity in administrative legal proceedings, regular civil actions (where property or displacement is an issue, for example), criminal proceedings and actions on agrarian matters, among others. In some countries—like Colombia and Guatemala—certain qualified persons are allowed to request

9. Verónica Undurraga & Rebecca J. Cook, *Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006*, in *CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE LAW* 229 (Susan H. Williams ed., 2009).

10. International Labour Organization, *Application of Convention No. 169 by Domestic and International Courts in Latin America: A Casebook*, at 11 (2009), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123946.pdf.

11. *Id.* at 11–12.

an opinion on the compatibility of the Constitution with a treaty or other legal norms from the court that has been assigned control over constitutionality.¹²

In contrast, States that follow the dualist tradition do not recognize international law unless it has been incorporated, e.g., through separate implementing legislation, into the national law. It is only applicable “as” national law. Examples of dualist countries include the United States, the United Kingdom, and Iraq.¹³

International law such as unratified treaties or ratified treaties that have not been incorporated can, however, be invoked to identify rules of international customary law or general principles of law.¹⁴ This has been a matter of significant debate among the Justices of the U.S. Supreme Court, some of whom have referred to international law and foreign law to consider the normative weight of certain practices, for example with respect to the death penalty.¹⁵ Clinics have played a role, in many cases, in supporting this trend by submitting amicus briefs describing the status of international human rights law and the widespread practice of States.¹⁶

12. *Id.* at 12.

13. Regarding Iraq, see M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, SOURCES SUBJECTS, AND CONTENTS 99 (3d ed. 2008). This is a greatly simplified treatment. In the United States, for example, treaties may be self-executing or non-self-executing, reflecting the Constitution’s Supremacy Clause, U.S. CONST. art. VI, § 2. RESTATEMENT (THIRD) OF FOREIGN U.S. RELATIONS LAW § 111(3)–(4) (1987).

14. International Labour Organization, *supra* note 10.

15. *See Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002) (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); *Roper v. Simmons*, 543 U.S. 551, 567, 576, 602 (2005) (noting execution of juvenile offenders violates several international treaties, including the UN Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, and stating that the overwhelming weight of international opinion against the juvenile death penalty provides confirmation for the Court’s own conclusion that the death penalty is disproportional punishment for offenders under the age of eighteen); *see also* Justice Sandra Day O’Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC’Y INT’L L. PROC. 348 (2002); Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (2007).

16. *Roper*, 543 U.S. at 576 (citing Brief for European Union et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); Brief for President James Earl Carter, Jr., et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); Brief for

As an example of the relevance of this issue of the legality of international law in the domestic legal order, consider the harmonization requirement of the Rome Statute of the International Criminal Court (ICC). In accordance with Article 88, all States party to the ICC must make their laws consistent with the Statute. This may be a *fait accompli* upon ratification, or it may take significant negotiation in a country like France, which ratified the Statute, but where implementation has been more complicated.¹⁷ The attitude of the U.S. government towards international treaties is another case in point. This country ratified the International Covenant on Civil and Political Rights (ICCPR) in 1994 but has yet to adopt implementing legislation.¹⁸ This means that while the ICCPR constitutes part of U.S. law, individuals have no right of action to its protection in the United States.

International human rights and other public interest or social justice clinics in monist countries find common ground, as the legal

Former U.S. Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); Brief for Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633)). Among the clinics involved in amicus submissions in support of the Respondent were: American University Washington College of Law, International Human Rights Law Clinic, under the supervision of Professor Richard J. Wilson (Brief for the European Union et al.); the University of San Francisco School of Law, under the supervision of Professor Constance De La Vega (Brief for the Human Rights Committee of the Bar of England and Wales et al.); Yale Law School, Allard K. Lowenstein International Human Rights Clinic, under the supervision of Professors James Silk and Mary Hahn (Brief of Amici Curiae for Former U.S. Diplomats); Northwestern University School of Law, Bluhm Legal Clinic, under the supervision of Professor Thomas F. Geraghty (Brief of Amici Curiae for President James Earl Carter, Jr. et al.).

17. Int'l Justice Tribune, *Europe Supports the ICC Without Fail and Without Zeal*, RADIO NETHERLANDS WORLDWIDE (May 20, 2007), <http://www.rnw.nl/international-justice/article/europe-supports-icc-without-fail-and-without-zeal>.

“Although 16 EU countries have harmonized their penal codes with the Rome Statute, many other states are making no headway in that direction. For example, France still has not voted on incorporating the Rome Statute into domestic law—seven years after having ratified the Statute.” *Id.*; see also *International Criminal Court: Rome Statute Implementation Report Card*, AMNESTY INT’L (May 1, 2010), <http://www.amnesty.org/en/library/info/IO53/011/2010/en>.

18. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by the United States on June 8, 1992).

bases of their work plainly converge.¹⁹ In the United States, of course, the reliance on international law is far more challenging and contentious. Not only are we limited in the ways we can invoke human rights law as a basis for protecting individuals but also exceptionalism and xenophobia in the United States make it pedagogically, if not strategically, important to understand the scope and applicability of international human rights law.

Ironically, resistance to international law in the U.S. domestic legal system can sometimes authenticate its target. In November 2010, Oklahoma voters overwhelmingly passed an amendment to the state Constitution that would forbid Oklahoma courts from considering or relying on international law, Shari'a Law, or the "legal precepts of other nations or cultures."²⁰ It was challenged not on the basis of international law but on the basis of individual constitutional rights.

Muneer Awad, Executive Director of the Council on American-Islamic Relations Oklahoma chapter (CAIR-OK), filed a lawsuit alleging that the constitutional amendment violates the First Amendment's Establishment Clause. On November 8, U.S. District Judge Vicki Miles-LaGrange granted a temporary restraining order blocking certification of the ballot measure by the Oklahoma State Board of Elections.²¹ Upholding the restriction by preliminary

19. See generally Nicolás Espejo Yaksic, *Clinical Legal Education in Latin America* (Nov. 2010) (unpublished manuscript) (on file with the Maryland Journal of International Law).

20. The measure passed with seventy percent of the vote. Barbara Hoberock, *Order Blocks Oklahoma Constitutional Amendment*, TULSA WORLD (Nov. 8, 2010), http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20101108_11_0_OKLAHO357431; *Oklahoma State Questions for General Election Nov. 2, 2010 - State Question No. 755*, OKLA. STATE ELECTION BD. (Aug. 2010), http://www.ok.gov/elections/documents/sq_gen10.pdf; *Enrolled House Joint Resolution 1056 Enacted by the Second Regular Session of the 52nd Legislature of the State of Oklahoma Numbered by the Secretary of State: State Question Number 755, Legislative Referendum Number 355* (May 25, 2010), <https://www.sos.ok.gov/documents/questions/755.pdf> (discussing Oklahoma State Constitution amendment section 1(c), known as the "Save Our State Amendment").

21. Hoberock, *supra* note 20. Awad's claim linked Shari'a and constitutional rights: the Oklahoma court would be unable to probate his last will and testament because it would be required to consider Shari'a Law. *Awad v. Zirriax*, No. CIV-10-1186-M, 2010 WL 4814077, at *4 (W.D. Okla. Nov. 29, 2010). The Court was persuaded by his argument that Shari'a Law "lacks a legal character," being rather "religious traditions that provide guidance to [him] and other Muslims regarding the exercise of their faith." *Id.*

injunction on November 29, Judge Miles-LaGrange made a rights-based argument:

This order addresses issues that go to the very foundation of our country, our [U.S.] Constitution, and particularly, the Bill of Rights. Throughout the course of our country's history, the will of the "majority" has on occasion conflicted with the constitutional rights of individuals, an occurrence which our founders foresaw and provided for through the Bill of Rights. . . . As the United States Supreme Court has stated, "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."²²

Both the lawsuit and the court avoided any real discussion of the prohibitions on international law and laws of other nations or the difference between the two. Others address these key issues, however. Professors Martha Davis and Johanna Kalb note that "[t]he Oklahoma initiative is just the latest in a series of federal and state legislative efforts to prohibit judicial citation of foreign and international law. [What is more, r]eligion is associated with international law in many of these proposals."²³ Professors Davis and Kalb go on to discuss that

[W]hat the proponents of the amendment fail to acknowledge, however, is that it is impossible to bar judicial "consideration" of any source—particularly when, as described above, international law is relevant to the dispute. If anything, the amendment forces judges and justices to be less transparent in their reasoning or (if they try to abide by the strict letter of the provision) to reach incorrect decisions.²⁴

Davis, Kalb, and others call attention to the federalist implications of Oklahoma's action, and they warn that such isolationist measures may have severe consequences for the "government's capacity to protect American citizens and businesses

22. *Awad*, 2010 WL 4814077, at *1 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

23. Martha F. Davis & Johanna Kalb, *Issue Brief: Oklahoma State Question 755 and an Analysis of Anti-International Law Initiatives*, AM. CONST. SOC'Y L. & POL'Y 1, 1, 3 (Jan. 2011), available at <http://www.acslaw.org/node/18016>.

24. *Id.* at 11.

on the international stage” which is “directly related to its ability to guarantee our nation’s reciprocal compliance.”²⁵

While the Oklahoma ballot initiative and its aftermath were percolating, a related but potentially contradictory process was underway with the federal government at the UN Human Rights Council. Led by a high level State Department delegation, the United States was going through the Universal Periodic Review (UPR) of its obligations and human rights record.²⁶ Responding to the recommendations of the UN Human Rights Council, State Department Legal Advisor Harold Hongju Koh acknowledged the broad concerns over U.S. domestic implementation of human rights. Koh stated,

[B]ecause we take this process seriously, we now plan to conduct a considered, interagency examination of all 228 recommendations, and to give our formal response at the March 2011 Council session We believe the best human rights implementation combines overlapping enforcement by all branches of the federal government working together with state and local partners.²⁷

25. *Id.* “Oklahoma’s action threatens our national commitment to honoring our international obligations and undermines the states’ ability to work cooperatively with the federal government to implement them.” *Id.* A report by the New York City Bar Association similarly concluded that:

The Question’s prohibition against consideration of “international law” will confuse and complicate legal matters in Oklahoma for all those whose personal and business affairs relate to international affairs or matters in other countries. And in our globally connected world, many of us have foreign and international involvements we are unaware of, including the entity that owns our own business or holds our mortgage. No state should so isolate its entire population, and denigrate a segment of its population that is entitled to the full protection of U.S. and State law.

NYC BAR ASS’N COMM. ON COMPARATIVE & FOREIGN LAW, THE UNCONSTITUTIONALITY OF OKLAHOMA REFERENDUM 755—THE “SAVE OUR STATE AMENDMENT” 1–2 (2010), available at <http://www.nycbar.org/Publications/reports/reportsbycom.php?com=62>.

26. See *Universal Periodic Review*, OFF. U.N. HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (last visited Mar. 21, 2011); *Universal Periodic Review Process*, U.S. DEP’T ST., <http://www.state.gov/g/drl/upr/process/index.htm> (last visited Mar. 21, 2011).

27. Eileen Chamberlain Donahoe & Harold Hongju Koh, *United States Response to UN HRC Recommendations*, U.S. MISSION (Nov. 9, 2010), <http://geneva.usmission.gov/2010/11/09/un-hrc-recommendations/>.

A broad-based national human rights campaign was coordinated by Professor Sarah Paoletti, director of the University of Pennsylvania School of Law Transnational Legal Clinic, who served as Senior Coordinator for the U.S. Human Rights Network UPR Project.²⁸ According to Professor Paoletti, involving her Clinic students in the process was more difficult than she anticipated: “I had students coordinate and draft the migrant labor stakeholder report, and I brought two students with me to Geneva in November, but their ability to contribute to the broader advocacy efforts was more limited than I had hoped.”²⁹ She attributed this in part to the demands of the Clinic’s other activities (including an immigration docket). Then too, “there is such a learning curve with respect to substance, process, goals, and human rights advocacy more generally—especially in the one semester context.”³⁰

With a year-long Human Rights Clinic and two supervising attorneys on the Human Rights in the U.S. Project, Columbia Law School students were significantly engaged in the UPR process.³¹ Although they did not attend the review in Geneva, Columbia’s Human Rights Clinic students were involved in the report-writing phase, the lobbying of countries to advise them on key issues to pursue in questioning the U.S. delegation, and in the follow-up with the Administration. Clinic students contributed background memos for a joint report on treaty ratification (coordinated with members of the Bringing Human Rights Home treaty ratification working group) and related fact sheets for lobbying.³² They

28. See, e.g., *Universal Periodic Review Project*, U.S. HUM. RTS. NETWORK, http://www.ushrnetwork.org/campaign_upr (last visited Mar. 21, 2011); UNIVERSAL PERIODIC REVIEW OF THE UNITED STATES OF AMERICA: NATIONAL REPORT SUBMITTED TO THE OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS (Aug. 2010), available at <http://geneva.usmission.gov/wp-content/uploads/2010/11/UPR-USA.pdf>; Risa E. Kaufman, *Human Rights Abroad—and at Home*, POLITICO (Nov. 9, 2010), <http://www.politico.com/news/stories/1110/44881.html>.

29. E-mail from Sarah Paoletti, Assoc. Professor of Law, Dir. Transnational Legal Clinic, Univ. of Penn. Sch. of Law, to author (Feb. 17, 2011) (on file with author) [hereinafter Paoletti]; Albany Chapter, Local Council for Latin Am. Advancement et al., *Submission to the United Nations Universal Periodic Review: Migrant Labor Rights* (2010), <http://www.ushrnetwork.org/sites/default/files/declaration-treaty/Migrant%20Labor%20Joint%20Report%20USA.pdf>.

30. Paoletti, *supra* note 29.

31. *Human Rights Clinic*, COLUM. L. SCH., <http://www.law.columbia.edu/focusareas/clinics/humanrights> (last visited Mar. 21, 2011).

32. The *Bringing Human Rights Home Network* is a program of Columbia Law School’s Human Rights Institute, the institutional umbrella that also includes the

conducted outreach to country missions, attended lobbying meetings at the United Nations in New York, and drafted recommendations for countries that were being lobbied, based upon their review of past UPR sessions. Students also researched and drafted a memo to the U.S. State Department on UPR implementation efforts of other countries. Columbia Law School's Clinic students remain engaged in UPR follow-up, focusing on raising awareness of the UPR at the state and local level, and are currently drafting a UPR implementation toolkit for state and local human rights commissions.³³

Still, when the UPR "campaign" is over and the time comes for the Administration to act on the recommendations, how will the Administration come to terms with the views that lead to the Oklahoma and other States' isolationist initiatives?

IV. LAWYERING IN THE VOID: "RIGHTS WITHOUT REMEDIES, DUTIES WITHOUT JURISDICTIONS"?³⁴

The Symposium coordinators invited panelists to consider blind spots and weaknesses in the pedagogy and practice of international human rights clinics. Among the most fundamental and persistent would have to be the dilemma of human rights enforcement and the related challenge of measuring States' accountability. "A feature of lawyering is its commitment to instrumentalism, and success is understood as the [achievement] of a favorable legal result."³⁵ With international human rights law, favorable results appear protracted, if not elusive. Yet, the absence of an immediate remedy renders the right no less valid or fundamental. One of the fathers of modern international law, Sir Hersch Lauterpacht, distinguished the instrumental (rules) from the intrinsic (principles):

[One must not] exaggerate the importance of what is, in the last resort, a procedural rule. The faculty to enforce rights is

Human Rights Clinic. *Bringing Human Rights Home Lawyers' Network*, COLUM. L. SCH., http://www.law.columbia.edu/center_program/human_rights/HRinUS/BH_RH_Law_Net (last visited Mar. 21, 2011); *Treaty Ratification*, U.S. HUM. RTS. NETWORK, <http://www.ushrnetwork.org/content/papersdocuments/treatyratification> (last visited Mar. 21, 2011).

33. E-mail from JoAnn Kamuf Ward, Counsel, Human Rights in the U.S. Project, Columbia Law Sch., to author (Mar. 9, 2011) (on file with author). Clinic students were involved in the project in academic years 2009 and 2010. *Id.*

34. Subheader borrowed from ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 74 (2006).

35. Mosher, *supra* note 2, at 617.

not identical with the quality of a subject of law or of a beneficiary of its provisions. A person may be in possession of a plenitude of rights without at the same time being able to enforce them in his own name. This is a matter of procedural capacity. Infants and lunatics have rights; they are subjects of law. This is so although their procedural capacity is reduced to a minimum. Secondly, the rule preventing individuals from enforcing their rights before international tribunals is a piece of international machinery adapted for convenience. It is not a fundamental principle.³⁶

The distinction and relationship between procedural rules and fundamental principles are critical to international human rights lawyering. They form part of the domain of international clinics, whose work involves discovering ways to hold States and non-State actors accountable where such mechanisms are deficient or altogether absent. Consider gender-based violence in Haiti. A host of NGOs and law school clinics have been documenting the problem and calling the government to account for the serious violations against women and girls in the post-earthquake displaced person camps.³⁷ The Government of Haiti has clear obligations, as a party to the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW),³⁸ the Committee on the Elimination of Racial Discrimination (CERD),³⁹ the Convention on the Rights of the Child

36. Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht*, in THE GENERAL WORKS 286–87 (E. Lauterpacht ed., 1970).

37. These include New York University Global Justice Clinic, City University of New York International Women's Human Rights Clinic, University of Virginia International Human Rights Law Clinic, University of Miami Human Rights Law Clinic, Yale International Human Rights Law Clinic, University of Pennsylvania Transnational Legal Clinic, and University of Minnesota Law School International Litigation and Advocacy Clinic, among others.

38. Convention on Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13. Haiti ratified the Convention on July 20, 1981. *Convention on Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION (Apr. 1, 2011), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

39. *Committee on the Elimination of All Forms of Racial Discrimination: Monitoring Racial Equality and Non-discrimination*, OFF. U.N. HIGH COMMISSIONER FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/cerd/> (last visited Apr. 1, 2011). CERD monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195. Haiti ratified the Convention on Dec. 19, 1972. *International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. TREATY COLLECTION

(CRC),⁴⁰ the ICCPR, and the Inter-American Convention on the Elimination of Violence Against Women (Belém do Para).⁴¹ What is more, Haiti has a monist system. According to the Haitian Constitution, Article 276-2,⁴² upon approval and ratification, international treaties become part of domestic law and abrogate any conflicting laws.⁴³

Considering Haiti's legal, economic, and political devastation, dysfunction, and corruption—which predate the January 2010 earthquake—the options for progressive realization of rights are grim. In his clever litany of “50 Ways International Law Hurts Our Lives,” Professor José Alvarez includes the “privileging of globalization over human rights.”⁴⁴ Haiti exemplifies the dilemma of poor nations that find themselves in the untenable position of having to choose between making good on their international law obligations and repaying their loans (never mind that Haiti has not ratified the

(Apr. 1, 2011), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en.

40. Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3. Haiti ratified the Convention on June 8, 1995. *Convention on the Rights of the Child*, U.N. TREATY COLLECTION (Apr. 1, 2011), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

41. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, *opened for signature* June 6, 1994, *available at* <http://www.oas.org/juridico/english/sigs/a-61.html>. Haiti ratified the Convention on April 7, 1997. *Id.*

42. HAITI CONST. art. 276-2, *available at* <http://www.unhcr.org/refworld/docid/3ae6b542c.html>.

43. INST. FOR JUSTICE & DEMOCRACY IN HAITI ET AL., *OUR BODIES ARE STILL TREMBLING: HAITIAN WOMEN'S FIGHT AGAINST RAPE* 24 (July 2010), *available at* <http://ijdh.org/wordpress/wp-content/uploads/2010/07/Haiti-GBV-Report-Final-Compressed.pdf>.

44. José E. Alvarez & David Lachman, *International Law: 50 Ways It Hurts Our Lives*, AM. SOC'Y INT'L L. 1, 16 (2010), *available at* http://www.asil.org/ilpost/president/50_ways.pdf.

Privileging globalization over human rights. Poor governments are faced with a Hobson's choice between honoring the demands of the International Covenant on Economic, Social and Cultural Rights (ICESCR) or complying with the commands of international economic institutions. If they violate human rights, governments may face complaints or international investigation. By contrast, the World Bank and IMF can cut off aid, reducing the resources that governments have available to fulfill the economic human rights of their people.

See José E. Alvarez, *The Future of Our Society: The 2007 Presidential Address of the 101st Annual Meeting of the American Society of International Law*, 102 AM. SOC'Y INT'L L. PROC. 499 (2008).

International Covenant on Economic, Social and Cultural Rights). Fortunately for Haiti, NGOs, international organizations, and inter-governmental organizations have stepped up to fill the gap. This humanitarian assistance, however, does not relieve the Haitian Government of its obligations. In fact, it raises an important corollary question: What (if any) human rights obligations do state and non-state third party actors assume when they intervene for development or humanitarian purposes in post-conflict and post-disaster contexts?⁴⁵

In the last panel of the *Re-imagining International Clinical Law* Symposium,⁴⁶ Professor Barbara Olshansky noted one of the fundamental principles of international human rights law—there are no legal vacuums.⁴⁷ No individual is ever without rights, no matter what the State does or does not do, no matter where the person is, or what she has done or said or proffered.⁴⁸ That is a powerful starting point.

The idea that there are no legal vacuums is especially relevant in countries that follow the dualist legal tradition, like the United States. The fact that the U.S. government has not ratified the International Covenant on Economic, Social and Political Rights (ICESCR),⁴⁹ for example, does not mean that Americans have a lesser claim to the right to health or housing than, say, Colombians or Canadians, whose governments have ratified the ICESCR.⁵⁰ “Once the procedural international remedy is granted [or undertaken] by the state, the right becomes more effective, but the remedy does not generate the right.”⁵¹

45. See, e.g., Margaret L. Satterthwaite, *Indicators in Crisis: Rights-Based Humanitarian Indicators in Post-Earthquake Haiti*, 43 N.Y.U. J. INT’L L. & POL. (forthcoming 2011).

46. The last panel was entitled International Clinical Law: Theory and Critique.

47. Barbara Olshansky, Remarks at the University of Maryland School of Law Symposium: Re-imagining International Clinical Law (Nov. 18, 2010) (recording on file with the University of Maryland School of Law).

48. *Id.*

49. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

50. Colombia ratified it on Oct. 29, 1969, and Canada acceded to it on May 19, 1976. *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION (Apr. 1, 2011), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en. The United States signed the ICESCR on Oct. 5, 1977 but has not yet ratified it. *Id.*

51. CLAPHAM, *supra* note 34.

Just as individuals are rights-holders even in the absence of procedural jurisdiction, so are States generally duty-bearers in many an apparent void. It is hard enough to assess and monitor States' compliance with their obligations when they have expressly agreed to be held accountable through treaty ratification. How do we measure accountability in those all-too-frequent situations where States fail to fulfill their duties or refuse to be bound by universal human rights law and principles? Human rights scholars and advocates are responding to the enforcement challenge by developing more systematic methods of evaluating the impact of our work and measuring the extent to which States fulfill their human rights commitments.⁵² The heightened use of rights-based indicators is one concrete response to demands for quality and accountability.

V. REVOLUTION OR PARADOX? BALANCING QUANTITATIVE AND QUALITATIVE APPROACHES TO HUMAN RIGHTS ACCOUNTABILITY

In 2005, Michael Ignatieff and Kate Desormeau noted that a measurement revolution has been underway in the fields of development and governance. By measurement revolution, they meant the exponential diffusion and rising influence of standardized and quantifiable measures of performance in international public policy. Yet, they noted that as this quantitative revolution has spread—increasingly measuring all aspects of human wellbeing, changing the way international organizations monitor governments' behavior, and the way governments assess each other and target their aid and development policies—the human rights movement has stood aside.⁵³

Traditional economic and social science indicators rely on quantitative data but reveal little about the qualitative aspects or context in which they operate. Anchored in human rights treaty standards and general comments of the monitoring committees, in particular the ICESCR,⁵⁴ rights-based indicators evaluate in a contextually relevant manner the extent to which States respect,

52. AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT'L L. 253, 256–57 (2009).

53. Eitan Felner, *A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Advocacy*, 9 SUR – INT'L J. HUM. RTS. 109, 134 (2008).

54. ICESCR, *supra* note 49.

protect, and fulfill their human rights obligations.⁵⁵ They place marginalized groups at the core of the approach, along with the transversal rights issues of non-discrimination and equality, participation, and accountability.⁵⁶ For example,

[W]hile traditional development indicators evaluate education as a basic human need to be checked against development goals, right to education indicators aim to measure the extent to which States fulfill their legal human rights obligations. In addition, development indicators may tend to regard marginalised groups as recipients of aid, rather than rights holders per se. . . . Rights-based indicators, on the other hand, aim to assess the conformity of education with human rights standards, by focusing on what goes on in and outside the classroom. For instance, they question the suitability of the infrastructure, learning material, teaching methodology, but also consider children's socio-cultural characteristics, interaction, distribution, learning outcomes, and opportunities for stakeholders' participation. In other words, right to education indicators measure not only the right *to* education but also rights *in* and *through* education.⁵⁷

Three forms of indicators constitute a framework by which cause and effect can be measured, "reflect[ing] the commitment-effort-results aspect of the realization of human rights through available

55. Office of the U.N. High Comm'r for Human Rights (OHCHR), *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, ¶ 5, U.N. Doc. HRI/MC/2008/3 (June 6, 2008) [hereinafter *2008 U.N. Report on Indicators*]; see also OHCHR, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, ¶ 7, U.N. Doc. HRI/MC/2006/7 (May 11, 2006) [hereinafter *2006 U.N. Report on Indicators for Monitoring Compliance*].

56. *2008 U.N. Report on Indicators*, supra note 55, ¶ 24 ("[F]or all indicators it is essential to seek disaggregated data on the human rights situation of vulnerable and marginalized population groups vis-à-vis the rest of the population."); Gauthier de Beco, *Right to Education Indicator Based on the 4A Framework* 13–19 (Right to Educ. Project, Concept Paper, May 2009), available at http://www.right-to-education.org/sites/r2e.gn.apc.org/files/Microsoft%20Word%20-%20Concept%20Paper_final.pdf.

57. *Beyond Statistics: Measuring Education as a Human Right: A Consultative Workshop on Indicators for the Right to Education* 1 (The Right to Educ. Project, Background Paper, Apr. 19, 2001), available at http://www.right-to-education.org/sites/r2e.gn.apc.org/files/Background_paper.pdf.

quantifiable information.”⁵⁸ Structural indicators monitor how well the State’s laws reflect, incorporate, and implement its treaty obligations. Process indicators account for what mechanisms the State has created to implement its existing laws toward the realization of the right. They capture the *cause* element of a cause-and-effect relationship. Outcome indicators measure the reality on the ground—the *effect* element, to what extent the population has access to and enjoys a particular right.

Structural indicators include the existence (or nonexistence) of constitutional provisions, case law precedent, and/or national legislation providing free and compulsory primary education for all, as mandated by international human rights law.

Process indicators include the existence (or nonexistence) of regulations permitting charges/fees in primary and secondary schools for enrollment, tuition, uniforms, school supplies, school meals, and school transport.

Outcome indicators, disaggregated by rural/urban, income, gender, and ethnicity, include: the proportion of all children who have to pay for primary education and, for these families, the average expenditure for education (direct costs and some indirect costs, like compulsory levies—even when portrayed as voluntary—on parents, and relatively expensive uniforms).⁵⁹

While it may not be a groundswell, human rights advocates have not been entirely oblivious to the quantitative “revolution.” Some human rights clinics have been using quantitative methodology in their project work for some time. The International Human Rights

58. Rosga & Satterthwaite, *supra* note 52, at 296 (citing Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶ 17, U.N. Doc. E/CN.4/2006/48 (Mar. 3, 2006) (by Paul Hunt)).

59. Sital Kalantry et al., *Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, 32 HUM. RTS. Q. 253, 306 tbl.3 (2010). The Cornell International Human Rights Clinic, the Robert F. Kennedy Center for Justice and Human Rights (RFK Center), and the University of Virginia International Human Rights Law Clinic collaborated to produce a report for a hearing before the Inter-American Commission on Human Rights. *Id.* at 253; ROBERT F. KENNEDY CTR. FOR JUSTICE AND HUMAN RIGHTS, RIGHT TO EDUCATION OF AFRO-DESCENDANTS AND INDIGENOUS PEOPLES IN THE AMERICAS: ACHIEVING DIGNITY AND EQUALITY FOR ALL (2008), available at http://www.rfkcenter.org/files/20090907_rt2ed_ENG.pdf.

Law Clinic at the University of California, Berkeley School of Law, under the direction of Professor Laurel Fletcher, has conducted empirical studies of the human rights impacts of Hurricane Katrina, the 2004 tsunami, and forced labor in the United States, among other projects.⁶⁰

Professor Margaret Satterthwaite, director of NYU Law School's Global Justice Clinic and a leading scholar in the field of human rights indicators, has produced several reports with her students that successfully combine the quantitative and qualitative approaches in assessing stakeholder responsibility for rights violations in Haiti.⁶¹ While Professor Satterthwaite is a proponent of rights-based indicators, she is conscious of the challenges and contradictions of the quantitative methodology.⁶² On the one hand, the "trust in indicators" can be understood as a way to authenticate the "troubled" authority of human rights mechanisms,

[G]iven the longstanding and unresolved issue of the status of the treaty bodies—and thus of their assessments—in international law. Indeed, the turn toward mechanics of measurement and notions of scientific objectivity may appear to offer a kind of authority that the treaty bodies

60. FREE THE SLAVES & THE HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES (2004), *available at* http://www.law.berkeley.edu/files/hiddenslaves_report.pdf; HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY & E.-W. CTR., AFTER THE TSUNAMI: HUMAN RIGHTS OF VULNERABLE POPULATIONS (2005), *available at* http://www.law.berkeley.edu/HRCweb/pdfs/tsunami_full.pdf; INT'L HUMAN RIGHTS LAW CLINIC, BOALT HALL SCH. OF LAW ET AL., REBUILDING AFTER KATRINA: A POPULATION-BASED STUDY OF LABOR AND HUMAN RIGHTS IN NEW ORLEANS (2006), *available at* http://www.law.berkeley.edu/HRCweb/pdfs/report_katrina.pdf; INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CAL., BERKELEY, SCH. OF LAW ET AL., IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (2010), *available at* http://www.law.berkeley.edu/files/IHRLC/In_the_Childs_Best_Interest.pdf.

61. Jointly, the New York University School of Law Center for Human Rights and Global Justice, Partners in Health, RFK Center for Justice & Human Rights, and Zanmi Lasante have published the following reports: SAK VID PA KANPE: THE IMPACT OF U.S. FOOD AID ON HUMAN RIGHTS IN HAITI (2010), *available at* <http://www.chrgj.org/projects/docs/sakvidpakanpe.pdf>; WÒCH NAN SOLEY: THE DENIAL OF THE RIGHT TO WATER IN HAITI (2008), *available at* http://www.chrgj.org/projects/docs/wochnan_soley.pdf. Professor Satterthwaite and her clinic students are currently employing a combination of qualitative and quantitative methodology in a major study of the relationship of the rights to water and food and gender-based violence in Haiti.

62. *See generally* Rosga & Satterthwaite, *supra* note 52.

have never been able to achieve through the “quasi-judicial exercise[s]” that make up their core functions.⁶³

At the same time, Satterthwaite, her co-author, AnnJanette Rosga, and others call attention to the intrinsic flaw in efforts to use indicators in the context of, for example, UN treaty monitoring, in order to imbue the procedures with a kind of technical objectivity.⁶⁴

[T]his effort will never solve the problem that generated the ICESCR’s audit practice to begin with: the relationship of distrust between the treaty bodies and the States whose efforts they monitor. . . . While the conceptual clarity concerning the standard of progressive realization is helpful, even a pristine level of clarity will never allow a human rights professional to assess *as a technical matter* the adequacy of the State’s measures because adequacy is never only a technical question. . . . It requires, instead, the exercise of [human] *judgment*.⁶⁵

Human rights advocates, as well as States and UN bodies, must give critical thought to tendencies that “privilege those (generally numerical) indicators whose interpretive work is invisible” while devaluing those indicators that require qualitative, human assessment.⁶⁶

The pedagogical value to including this discussion in a clinic’s work should be apparent. It allows for evaluative discussion and facilitates an interdisciplinary examination of methodology, strategy, impact, interpretation, and sustainability. It is beneficial for students to be familiar with the general comments of the treaty-monitoring bodies, for example, as a source for the qualitative and quantitative scope of particular rights.⁶⁷

63. *Id.* at 289.

64. *Id.* at 302.

65. *Id.* at 303–04.

66. *Id.* at 285.

67. 2006 *U.N. Report on Indicators for Monitoring Compliance*, *supra* note 55, ¶ 9.

The human rights monitoring mechanisms refer to a wide range of indicators (qualitative and quantitative) that are reflected in the human rights normative framework comprising the various international instruments, their elaborations through general comments, reporting guidelines and concluding observations. While some quantitative indicators are explicitly quoted in the human rights treaties, the general

Emilie Hafner-Burton and James Ron maintain that the different research methods, i.e., quantitative and qualitative, lead to divergent conclusions about how to protect human rights. “Qualitative and quantitative scholars see the same empirical world from different vantage points. Case specialists are embedded in the twists and turns of local conditions, but statisticians fly high above the landscape, focusing only on the broadest of trends. Understandably, these different views yield quite different assessments.”⁶⁸

Hafner-Burton and Ron laud the fact that human rights has become integral to global culture and the discourse of social change in the developing world. “Rights language has diffused across global divides, infusing both Northern and Southern discussions with new terms and agendas.”⁶⁹ They suggest, however, that “this global network of ‘principled issue’ actors . . . is engaged in two separate campaigns,”⁷⁰ sometimes at play simultaneously, sometimes working at cross-purposes. One campaign pursues a strategy of moral persuasion, focusing on the pragmatism and desirability of universal human rights.⁷¹ The methodology of this strand favors case studies, documentation, and reporting. The other campaign utilizes empirical data in an effort “to translate human rights policies and language into lasting reality.”⁷² As the two rely on substantially different methods, “persistent gaps between rhetorical success and empirical reality” result.⁷³ In the final analysis, human rights are best protected where the two methodologies are employed jointly. Without the voices and experiences of those who are impacted by transnational development and human rights violations, human rights become dehumanized.⁷⁴

comments adopted by the treaty bodies specify the type and role of these indicators.

Id.

68. Emilie M. Hafner-Burton & James Ron, *Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes*, 61 *WORLD POL.* 360, 373–74 (2009).

69. *Id.* at 361.

70. *Id.*

71. *Id.*

72. *Id.* at 362.

73. *Id.*

74. Tamara Relis, *Human Rights and Southern Realities*, 33 *HUM. RTS. Q.* (forthcoming 2011) (manuscript at 20), available at <http://ssrn.com/abstract=1592042> (quoting Upendra Baxi, “individual biographies of the violated must feature more prominently in human rights theory. This focus would serve to

VI. THE PARADOX OF PARTNERSHIP⁷⁵

Human rights clinics engage with organizations and individuals whose cases and strategic objectives they find compelling and educational. I refer to these relationships as partnerships,⁷⁶ and on principle, such relationships should be based on transparency, mutual respect, empowerment, and accountability. Yet, contradictions inherent in clinical legal education can create tensions in the relationships due to distance, pedagogical priorities, distinct core constituencies, and cultural, linguistic, and educational differences. To the extent that IHRL clinics embrace the paradox of partnership as a given, they can use it to their pedagogical advantage.

Global networking has greatly facilitated collaboration with distant partners. Students can spend much of the semester working from computers in the law school or at home and use Skype™ or the telephone for more “direct” contact. At the same time, interacting with partners, clients, and communities on the ground is a goal of clinical legal education and fundamental to human rights lawyering. It imbues the work with authenticity.⁷⁷ And yet, important as it is, the

respond to questions such as, ‘Does this endless normativity [of human rights] perform any useful function in the ‘real world’? . . .”).

75. Diana Hortsch asserts that responsible advocacy includes looking closely at strategic partnerships and how they impact an organization’s human rights mission. *See generally* Diana Hortsch, *The Paradox of Partnership: Amnesty International, Responsible Advocacy, and NGO Accountability*, 42 COLUM. HUM. RTS. L. REV. 119 (2010) (framing her analysis with the International NGO Accountability Charter). Her article provides a fascinating discussion of a controversial partnership between Amnesty International’s (AI) *Counter Terror with Justice* campaign and former Guantánamo detainee Moazzam Begg, which created an apparently irreconcilable conflict with AI’s Gender, Sexuality and Identity division. *Id.* at 136–37, 146–48. The article raises many important issues about transparency and NGO accountability in giving voice to rights victims that offer critical insight for international clinical legal education. *See generally id.* I make use of Hortsch’s title to develop the themes in this context.

76. *See, e.g.,* Deena R. Hurwitz, *Lawyering for Justice and The Inevitability of International Human Rights Law Clinics*, 28 YALE J. INT’L L. 505 (2003). While I acknowledge that human rights clinics also work on a lawyer-client basis, the current article considers primarily the project-based work of clinics. Still, the dynamics discussed here can apply as well to the more traditional lawyering relationship.

77. Fraudulence forestalled? Experiences of war, poverty, and rights violations are indirect, “mediated” through projects. Hugo Slim, *By What Authority? The Legitimacy and Accountability of Non-Governmental Organisations* 1, 5 (Int’l Council on Human Rights Policy, Working Paper, 2002), *available at*

threshold question is not how often or for how long students get into the field to meet their partners.⁷⁸ The critical question is the nature of the relationship between clinics and their partners, both in person as well as through the distance. As Hugo Slim, Diana Hortsch, and others effectively assert, human rights lawyering requires an ethics of relational accountability.⁷⁹

Relational accountability calls into focus those *for*, *with*, and *on whose behalf* NGOs and clinics advocate.⁸⁰ For human rights NGOs, the question of core constituency can be answered superficially in terms of victims and survivors of human rights violations, individuals and communities seeking to develop and strengthen rights respecting mechanisms and laws, or even a more “broad or diffuse constituency (for example, advocacy to protect the environment or promote general rights awareness).”⁸¹ Relational accountability is as much process-orientated as outcome-oriented, if not more so, ensuring that beneficiaries participate fully and meaningfully in the work. However, as the International Council for Human Rights Policy (ICHRP) notes, “it is important to acknowledge that reality is often far more complicated. For instance, access to this core constituency may be restricted or limited, as it is for NGOs that work on behalf of people who are dead or disappeared; or prisoners; or detainees held in secret.”⁸² Clinics and NGOs that conduct their work from afar have to negotiate the challenges of decision-making under exigent circumstances, incomplete or differing strategic conclusions or comprehension, and distrust that may have nothing to do with the actual partnership but which lurks in the underlying ideological and historical context.

http://www.ichrp.org/files/papers/65/118_Legitimacy_Accountability_Nongovernmental_Organisations_Slim_Hugo_2002.pdf.

78. Many international human rights clinics make brief field visits—a week or two—during the course of the semester. Stanford’s International Human Rights and Development Clinic is designed around a full semester in the field. See *International Human Rights and Development Clinic*, STANFORD L. SCH., <http://www.law.stanford.edu/program/clinics/internationalcommunity/> (last visited Apr. 12, 2011).

79. See generally Slim, *supra* note 77; Hortsch, *supra* note 75.

80. Int’l Council On Human Rights, *ICHRP Online Discussion Forum on Human Rights Principles and NGO Accountability* ¶ 29 (Approach Paper), available at http://www.ichrp.org/approach_paper.pdf (last visited Apr. 21, 2011) [hereinafter ICHRP].

81. *Id.*

82. *Id.*

Competing core constituencies may sow conflicts of interest for clinics. For example, though the clinic's primary relationship may be with the partners in the field, they also have to manage another key constituency, namely their academic institution, which enables and legitimates the work by funding the clinic and by granting credit to students. The clinic's status and viability may depend on being able to publicize its fieldwork, which has a commodifying effect on the partnership and may not be in the partner's interest.

Writing for the ICHRP, Hugo Slim has noted how the credibility and legitimacy of NGOs has expanded the notion of international non-governmental organization (INGO) accountability, which has an impact in selecting partners. INGOs demonstrate their credibility and legitimacy by meeting two main requirements: they have to justify the voice with which they speak and prove the effectiveness of what they are doing.⁸³ NGOs and individuals in the "global south" learn that they have a say in deciding with whom they work.

Voice accountability requires justifying what an organization is saying (questions of veracity—can you prove it?), how it is saying it (questions of authority—from where do we derive the power to speak?), and what relationship exists with the people on whose behalf we are advocating (are we speaking *as* stakeholders, *with* them, *for* them, or *about* them?).⁸⁴ As a corollary, voice accountability also implies "refraining from speech so that others may be heard,"⁸⁵ i.e., the human rights principle that places the person on the ground at the center of the advocacy.

At times this seems to pit conventional rules of professional responsibility, such as zealous advocacy, against the principle of empowering the partner/client (although of course, this problem is not unique to human rights lawyering).

The question of partnership is more than simply a question of process, however. There is a paradox at the heart of partnership for human rights lawyering and advocacy. Two important values can at times be in tension: the goal of empowering clients, partners and communities and the goal of guarding and advancing the universalism of human rights.⁸⁶

83. Slim, *supra* note 77, at 3.

84. *Id.* at 3, 6.

85. Hortsch, *supra* note 75, at 147–48, 151.

86. *Id.* at 148–49.

The principle of “simply being ‘silent so that others may speak’ is not always sufficient to protect and advance human rights in the context of organizational partnerships.”⁸⁷ My Clinic offered to collaborate with an indigenous Latin American NGO⁸⁸ to support its work against a North American corporation involved in the extractive industry. The NGO had participated in an intensive strategic human rights litigation workshop, and people I trusted had recommended it. Within a very short time, however, it became clear that the endeavor was fraught because of communication problems in translation—language as well as expectation. The Clinic students and I worked hard at being conscious of the power dynamics and respectful of our partner’s sensitivity with regard to making strategic decisions. The NGO’s legal representative was preparing for an important hearing at the Inter-American Commission on Human Rights, but he seemed to lack basic knowledge about the proceeding. We felt that we had experience that would be helpful to him; however, he was not open to our suggestions. Members of a coalition were involved, and he was effectively coordinating the delegation, so we figured things would work out before the hearing. So we kept silent.

There were five indigenous representatives prepared to speak at the Inter-American Commission hearing in their allotted half hour; our partner was to go last. We expected his presentation to be longer than ten minutes. The first person to speak, however, delivered his comments in his local indigenous language, for which there was no translator, and he spoke for more than fifteen minutes. Needless to say, our partner never even got a chance to speak, and the hearing was a disaster. The Commissioners got nothing from the indigenous representatives during that session, and an important opportunity to address their government was squandered.

It was, as we say in clinical legal education, a “teachable moment” (for my students at least). We discussed the situation at length, and the students wrote an incisive end-of-semester memo from which I quote:

One of the central takeaway lessons from the project is that international human rights law is as much an exercise in

87. *Id.* at 155.

88. For confidentiality reasons, specific identifying information is omitted. For information on the rights of indigenous peoples regarding extractive industry projects, see Margaret Satterthwaite & Deena Hurwitz, *The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects*, 22 ARIZ. J. INT’L & COMP. L. 1 (2005).

organizational politics as [it is about] the law as classically conceived. Our initial impression of this project was that we would be working with the “legal representative” of the [indigenous] community in advancing their case . . . before the Inter-American Commission on Human Rights (IACHR). From an American perspective, this would seem to be a straightforward task: one group of lawyers, working with a partner organization, on behalf of their clients in preparation for litigation before an established tribunal. In the international context, this dynamic is far more complicated than this conception reveals. We encountered a number of difficulties ranging from the obvious and concrete—for example, the language barrier—to the more complex and abstract—for example, our role as a clinic in a highly politicized, uncertain strategic litigation case involving multiple actors.

The cultural barrier was also evident when the representative from [the community] spoke in his local dialect during the IACHR hearing. A part of us acknowledged the [political nature of this act]—that he represented a unique living people and culture. At the same time, a part of us was frustrated that he was wasting [very limited] time speaking in a language that no one understood. From our perspective, the goal of a hearing before a tribunal is to present legal arguments. When dealing with a historically disenfranchised community, however, there is another objective: giving that community a voice that it has traditionally been denied. There is a tension between these objectives.

Presenting the best legal case may require taking control of the party’s message and the presentation thereof, while giving a disenfranchised community a voice in the international sphere requires [us] to step back and allow the community to express itself without extraneous interference. Clinic students operating in the international context should be aware of this potential tension and the need to balance legal advocacy with indigenous empowerment.

Our distance, both physically and culturally, from [the country] and the [indigenous] communities meant that we never got a good grasp on the politics and tensions underlying the case. [One of the communities] distrusts international NGOs, does not trust the municipal officials purporting to represent the community, and does not have

confidence in our partner's capacity to handle his role as legal representative. Our partner, in turn, does not trust [the U.S. based NGO that has a proven track record on these issues in many countries and before regional and international tribunals]. Compounding these internal conflicts, there are questions as to the degree the municipal officials in each community actually reflect the will of the community

We were aware that these many layers of conflict and distrust underlay the case, but our understanding of them was superficial and largely based on hearsay. The fact that the case involved so many uncertainties and tensions made us [the students] uncomfortable. We did not want to inadvertently compromise ourselves or the Law School by getting in the middle of conflicts that we did not fully understand.⁸⁹

In retrospect, it might have been an even better teaching moment had we explored the dimensions of accountability. The students were fairly disillusioned with the partner and the project, and I could not blame them. It was difficult to arouse in them a sense of accountability to the partnership, in no small part because we had not met the legal representative before the day of the hearing, and never visited the communities or even traveled to the country. Of course, that lack of relational accountability⁹⁰ was mutual.

A relatively new initiative has created an International Non-Governmental Organizations Accountability Charter (INGO Accountability Charter) around the issues of civil society legitimacy,

89. Memorandum from Clare Boronow ('12), Rajat Rana (LL.M., '10), and Gary Lawkowski ('11), Students, Univ. of Va. Sch. of Law, Int'l Human Rights Law Clinic, to author (Nov. 12, 2010) (on file with author).

90. ICHRP, *supra* note 80, ¶ 25.

Accountability is arguably best understood in relational terms: it takes form in the context of relations between individual, collective, or institutional actors. The latter include an NGO's core constituency, its donors, its staff and volunteers, the state and public authorities, and other actors in the public sphere such as other NGOs, the media, etc. In addition, NGOs have "accountability to themselves," in other words to their goals, values and mission. All these relationships taken together, related to performance or mission, provide a map of an NGO's accountability.

Id.

accountability, and transparency.⁹¹ The Charter exists in the context of a movement that seeks to articulate how “human rights values, principles and standards change or influence discussion and understanding of NGO accountability . . . [and] the relationship between human rights principles on one hand, and the various ways in which NGOs think and speak about, and operationalise, accountability on the other.”⁹²

[T]he exercise of accountability does not occur within a normative vacuum. Goals, values, standards, ideals, rules and contractual obligations all combine to govern this web of relationships. Discussion of an NGO’s accountability must therefore take account of the variety of actors and agents with whom it has an accountability relationship of some form; the work it does, since its accountability will be influenced by its primary mission and field of action; and the NGO’s values, norms and rules—including those that underpin its relationships.⁹³

Considering the fluidity with which human rights lawyering moves between the local and global, the developed and sub-developed, and the formal and informal, the dialogue, deliberation, and articulation of common principles and codes of conduct seem necessary and extremely valuable. The INGO Accountability Charter and its framework can serve as a pedagogical tool for international clinics relating to one another as well as to their partners at home and abroad.

VII. CONCLUSION

“Moral decision making involves more than knowledge of relevant rules and principles, it also demands a capacity to understand how those rules apply, and which principles are most important in concrete settings.”⁹⁴

Though international law will continue to be sovereigntist for a long time to come, the human rights-based approach provides a

91. *International NGOs Commitment to Accountability*, INGO ACCOUNTABILITY CHARTER, <http://www.ingoaccountabilitycharter.org/> (last visited Apr. 1, 2011).

92. ICHRP, *supra* note 80, ¶ 5.

93. *Id.* ¶ 27.

94. Nigel Duncan & Susan L. Kay, *Addressing Lawyer Competence, Ethics, and Professionalism*, in *THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE* 183,186 (Frank S. Bloch ed., 2011).

conceptual framework and a methodology that places individuals and communities as rights-holders at the center. Moreover, it requires critical analysis of the relationships of stakeholders to one another and of the power dynamics at play in the pursuit of justice.

Critical legal theorists have much to offer international clinical legal education. Acknowledging and owning the dark side of human rights as well as the “progressive” side, for example, the Third World Approaches to International Law (TWAIL) movement, answers the question “what is to be done” differently from traditional international lawyers.⁹⁵ Their objective is not merely to critique or reject the human rights “progress narrative” but to constantly question what has been achieved, at whose expense, to whose benefit, at what price? This is a vital lens for questioning the relationship of power in social justice and legal reform. It is a question of whose voices are dictating the strategies, and whose are silent. In the words of Professor Alvarez, “the critical mindset *is* the reform agenda.”⁹⁶

95. José E. Alvarez, Closing Remarks at the Third World Approaches to International Law (TWAIL) Conference on The Third World Today: What is to be Done? 2, *available at* http://www.law.nyu.edu/ecm_dlv1/groups/public/@nyu_law_website_faculty_faculty_profiles_jalvarez/documents/documents/ecm_p_r_o_066870.pdf (last visited Apr. 21, 2011); *see also* Makau W. Mutua, *What is TWAIL?*, AM. SOC’Y INT’L L.PROC. 31–39 (2000), *available at* <http://ssrn.com/abstract=1533471>.

96. Alvarez, *supra* note 95, at 7.