Learning Module 3: Strategic Litigation & Advocacy in Defense of Internet Freedom

Supplement: Part I

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- Arturo J. Carrillo, *Re-Imagining the International Human Rights Clinic* (with Nicolás Espejo Yaksic), 26 MARYLAND JOURNAL OF INTERNATIONAL LAW 80 (2011) ........................................................................................................................................................................... 77-109

- Arturo J. Carrillo, *Differences Between Free Legal Services Clinics and Public Interest and Human Rights Clinics* [in Latin America], in CLÍNICAS DE DERECHOS HUMANOS: UNA ALTERNATIVA PARA LA EDUCACIÓN JURÍDICA Y LA SOCIEDAD. Supreme Court of Mexico (2011) ........................................................................................................................................................................... 110-124

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SHORT GUIDE – STRATEGIC LITIGATION
AND ITS ROLE IN PROMOTING AND
PROTECTING HUMAN RIGHTS

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Introduction

Strategic litigation involves an organisation or individual taking on a legal case as part of a strategy to achieve broader systemic change. The case may create change either through the success of the action and its impact on law, policy or practice, or by publicly exposing injustice, raising awareness and generating broader change. It is important that strategic litigation is used as one part of a wider campaign, rather than being conceived as an end in itself.

This guide outlines some of the advantages and disadvantages of strategic litigation, as well as some of the key considerations involved in using litigation to effect broad systemic change.

Advantages and Disadvantages of Strategic Litigation

Strategic litigation has both advantages and disadvantages. When run well and in the right circumstances, strategic litigation can create significant systemic change that can have a positive impact on a large number of people. However, litigation is not the only tactic or indeed the most appropriate strategy in all circumstances.

Advantages:

- Strategic litigation can be a key tool in changing the law by setting important legal precedent;
- The incidental effects of strategic litigation, such as heightened media coverage and placing an issue in the public forum, can be significant, even if the case itself fails.

Disadvantages:

- Litigation is costly and can be a huge strain on resources. It may also result in an unsuccessful applicant having to pay the legal costs of the opposing party;
- By its nature, litigation is uncertain and therefore does not guarantee a successful outcome for the applicant;
- An unsuccessful case may generate negative publicity that may be damagingly channelled towards the organisation or applicant personally;
- Limitations of appropriate cases, or forums in which to bring them in, may mean strategic litigation is not appropriate for all cases.
Key Considerations

When an organisation is deciding whether considering strategic litigation is the appropriate route for them to take, it is important to consider:

- **The organisation** - what are the organisation's objectives, areas of expertise and capacity? Does strategic litigation fit within these?
- **The case** - do the facts of the case support the legal challenge and the systemic change that is sought to be achieved?
- **An appropriate forum** - is there an appropriate forum to bring the case and if so which court or jurisdiction is the most appropriate to file the claim in?

The Organisation

**Mission and objectives**

By reference to clear objectives, a successful human rights organisation can determine where the greatest impact can be achieved with limited resources.

Before taking on a strategic litigation case, human rights organisations should consider not only whether a case is meritorious, but also whether the issues raised in the case clearly fit within the organisation's mission and objectives. If it does not, then the case may be more appropriately dealt with by another organisation or legal service provider.

**Capacity and expertise**

The human rights organisation must also have the capacity to take on any proposed strategic litigation. Determining whether this is the case involves the consideration of factors such as:

- whether the organisation has either staff or access to lawyers with appropriate legal skills and expertise to conduct the case;
- are there any conflicts of interest with parties or key stakeholders;
- whether the organisation's insurance will cover the case or matter adequately;
- the likelihood of any adverse costs orders in the event that the case is unsuccessful;
- pending limitation periods for bringing any action;
- the capability of the organisation to retain its reputation and support amid any public or political backlash;
- whether the organisation has sufficient resources and funding to take on the litigation.
The Case

Facts
The facts of any proposed strategic litigation are highly important. They must:

- be capable of demonstrating the legal merits of the case;
- demonstrate the injustice the organisation wants to highlight; and
- be backed up by sufficient and attainable evidence.

Any strategic litigation case should have strong prospects of success and the claimant should be the most ideal claimant to demonstrate the injustice.

Parties
In strategic litigation, the clients should ideally have the same goals as the human rights organisation. However this may not always be the case.

- The client is often primarily interested in resolving their personal problem. A quest for wider justice or reform may be a secondary concern.
- For the human rights organisation with limited resources, strategic litigation is about effecting wider justice and reform through the litigation of one case.
- Litigation can be lengthy and draining on clients, particularly where cases are high profile or deal with personally sensitive issues. If a client is not committed to the wider cause they may take an early settlement or discontinue the action.

It is also important to consider issues relating to the other party that will be subject to the litigation, including:

- any key weaknesses in the other party's case;
- any opportunities or indeed adverse threats that may come out of litigating the case;
- the level of commitment of the opposing party and their supporters;
- if it is a group claim or class action, whether the claiming group is missing any integral claimants.

Appropriate Forum
When considering conducting any strategic litigation, a human rights organisation should consider the effectiveness of the forum they intend to litigate in. The legal system in some countries may not be effective or may not be receptive to legal arguments that support the promotion and protection of human rights.
Ideally a court should be competent, independent and impartial. Any limitations of the courts and the bias that may exist within them should be taken into account when lawyers develop litigation strategies.

The court must also have the power to hear the case the human rights organisation wants to bring before it. In order to come before a court certain jurisdictions require a case to contain a question of law or infringement of legally recognised rights. If such a question or infringement does not exist then the case cannot come before the court at all and strategic litigation is therefore not an option.

It may also be useful to consider institutions other than courts which may be useful, such as an ombudsman, national human rights institution, truth commission or regulatory body. If there is no effective local forum in which to bring a complaint, organisations may wish to consider whether regional or international forums may be available.

**Consideration of regional and international remedies**

Lawyers considering bringing strategic litigation should be aware of regional bodies that can be utilized at a higher level or incorporated into local strategies. Often, however, any effective domestic remedies must be exhausted before taking a complaint to a regional or international forum.

- Depending on the jurisdiction of the case, regional bodies that could be appealed to include the European Court of Human Rights, the African Court on Human and Peoples' Rights or the Inter-American Court of Human Rights.

- International bodies that receive complaints include the treaty bodies, or committees, which are established to oversee implementation of the core international human rights treaties, such as the International Covenant on Civil and Political Rights. It is important to check with the relevant state has accepted the jurisdiction of such bodies to receive complaints.

- Even if resource restrictions mean an organisation cannot afford to appeal a case to regional bodies, it is important to know how to apply international human rights laws and treaties in domestic courts. In less developed jurisdictions this may require lawyers to construct a legal argument for the importing of international law and human rights principles.

**Other Considerations**

*Intervening as a third party in cases*

Some legal systems allow for organisations to intervene in running court cases as a friend of the court (known as "amicus curiae"). In this situation, an organisation need not seek out a client to run a strategic litigation case on, but rather may
strategically choose existing cases in which to get involved on to help further their change agenda.

**Alternative avenues for change**

Given possible limitations of the system and the high cost and pressure of litigation, there often is a more appropriate avenue for change than strategic litigation. In any event strategic litigation is most effective when used by a human rights organisation as part of a wider campaign which may involve:

- political lobbying;
- increasing public awareness and education;
- use of the media both to raise community awareness and disseminate legal information;
- advocating at global forums such as the United Nations World Conferences.

Wider campaign methods are particularly important to apply pressure in systems where getting a judgment may not necessarily mean it is complied with.

**Other impacts of strategic litigation**

An effectively pursued individual claim can have a broad legal and political impact regardless of the outcome of the case.

Strategic litigation can place an issue in the public spotlight. Argued properly it can be an opportunity to place a reasoned view in the public spotlight, in opposition to any dominant political or corporate perspective.

Coupled with media coverage, failed test cases can also often lead to legislative reform or increased awareness of an issue that may lead to long-term change.
Children’s Rights: 
A Guide to Strategic Litigation
Acknowledgement

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Introduction

This guide has been produced to help those working toward the advancement of children’s rights to understand what strategic litigation is, and to consider using the law in the courtroom as an option for effective advocacy. The guide is aimed at legal and non legal NGO staff and can be adapted to local settings and procedures.

The report is available online in eight different sections. Each contains links to relevant information, case law, and reports. Please note that these will be updated on a regular basis. Below is a brief summary and link to each section on the website.

Chapter Summaries

1: WHAT is strategic litigation?

Strategic litigation is much more than simply stating your case before a judge. This section introduces some of the broader goals of strategic litigation, as well as some of the more important considerations that should be addressed before entering the courtroom.

Go to: http://www.crin.org/resources/infoDetail.asp?ID=17127&flag=report

2. WHEN would you bring strategic litigation?

As with many other decisions, timing can be a critical element to success in strategic litigation. This section looks at when it would make sense to bring a case, what factors influence this decision, when you can expect to get results, and what sort of time line you might operate on.

Go to: http://www.crin.org/resources/infoDetail.asp?ID=17139

3. WHO can bring strategic litigation?

Not just anyone can bring a case to the courts. In strategic litigation, as in all kinds of lawsuits, determining who the players are is key. This section will help you identify who will file the lawsuit, who they will sue, and whether or how people or organizations not named as parties in the lawsuit can intervene or otherwise get involved.
4. WHERE would you bring strategic litigation?

Filing your lawsuit may not be as simple as going down to the local courthouse. When it comes to strategic litigation, choosing where to file your case has a huge bearing on both your chances of success and the eventual results you achieve. As you do your research, you may be surprised at how many options you have. This section will give you guidance on where exactly you can file your case, and from those options, where it makes the most sense to file.

5. HOW would you bring strategic litigation?

Bringing strategic litigation can be a lengthy, complicated process, and there will be many decisions to make along the way. This section will help you figure out how you find, select, and pay for a lawyer, how you and your lawyer will prove and support your case, and - once the case is over - how you will follow up on the result.

6. WHY should you consider bringing strategic litigation?

Strategic litigation is a creative and powerful means of advocacy, but it may not always be the best or most appropriate option. Bringing strategic litigation can undoubtedly be an exciting adventure in and of itself, but you should think through things thoroughly before you pursue it. This last section will address what strategic litigation can do for your cause, what difficulties you are likely to encounter, and whether there would be other ways to achieve the same result.
Part I: WHAT is strategic litigation?

Summary:
Strategic litigation is much more than simply stating your case before a judge. This section introduces some of the broader goals of strategic litigation, as well as some of the more important considerations that should be addressed before entering the courtroom.

1. Goals. Strategic litigation, sometimes also called impact litigation, involves selecting and bringing a case to the courtroom with the goal of creating broader changes in society. People who bring strategic litigation want to use the law to leave a lasting mark beyond just winning the matter at hand. This means that strategic litigation cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves.

Advocacy. Through filing lawsuits, advocates for social justice can use the courts to bring about legal and social change. This is often a part of an overall advocacy campaign designed to raise awareness on a particular issue or promote the rights of a disadvantaged population. Many groups or individuals who bring strategic litigation also seek to convince others to join their cause, or to influence the government to change its laws.

Results. When it is successfully used, strategic litigation can bring groundbreaking results. It can spring a government into action to provide basic care for its citizens, guarantee the equal rights of minorities, or halt an environmentally damaging activity. There are no set limits as to what strategic litigation can accomplish.

Strategic litigation vs. Legal services. It is, however, important to note that strategic litigation is very different from many more traditional ideas of legal services. Traditional legal service organizations offer valuable services to individual clients and work diligently to represent and advise those clients in whatever matters they may bring through the door. But because traditional legal services are client-centered and limited by the resources of the providing organization, there is often no opportunity to look at cases in the bigger picture. Strategic litigation, on the other hand, is focused on changing policies and broader patterns of behavior. Because of this, strategic litigation is not designed to provide the best services to the largest number of people possible as traditional legal services would.
2. Considerations. Before you bring or help someone else bring strategic litigation, there are many things you should consider. You will need to look at what the legal issues are, what your goals are, who can bring the case, when you can bring the case, where you will bring the case, and how you will see the case through. These issues are discussed in more detail below.

*Strategic Litigation and Children.* Seeing your rights enforced in the justice system is truly empowering, and strategic litigation can be an exciting and rewarding journey for children. However, it can also be a long, involved and even painful process, and it may prove difficult for children to be taken seriously in court. If you are thinking about bringing a case on behalf of or otherwise involving children, you should thoroughly consider the likely impact this will have on the judicial process and, perhaps more importantly, the ways in which it might affect those children’s lives. Many particular concerns are addressed throughout this guide, although these are by no means the only challenges you may face in bringing strategic litigation to advance or enforce children’s rights.
Part II: WHEN would you bring strategic litigation?

**Summary:**

As with many other decisions, timing can be a critical element to success in strategic litigation. This section looks at when it would make sense to bring a case, what factors influence this decision, when you can expect to get results, and what sort of time line you might operate on.

1. When does it make sense to bring strategic litigation?

**Examining your options.** Not all cases make sense to file as strategic litigation, and it may not always be necessary to file a case to reach your goal or further your cause. In general, litigation can be a costly and time-consuming process. In some instances, it may make sense to reserve filing lawsuits only for people or governments who have been resistant to all other forms of change. There are many factors you might consider in making the decision whether or not to bring a case:

- Is there a legal issue involved that exemplifies or relates to a broader social or societal problem?
- Would a court decision be able to address that problem? Would the court decision have a widespread effect?
- Are your cause and the key issue in the case easy to understand for the media and the general public? How great is the potential for media coverage?
- Are other methods of accomplishing your goals possible? If so, how effective would they be compared with a strategic litigation approach?
- Are the courts in the jurisdiction you would file the case in independent from the other branches of government, well-regarded, and receptive or sympathetic to both your cause and strategic litigation in general?
Assessing your case. Because litigation can be so resource-intensive, it is wise to assess and investigate your case and the claims you wish to bring before filing a lawsuit. You should thoroughly examine the facts, the evidence, the claims themselves, and the jurisdiction in which you are planning to bring the claim. You could ask yourself:

- What are the relevant laws to your claims? Are they generally enforced? How clear are the laws? How clearly are they written? How clearly are they interpreted? How clearly are they applied?
  
  ⇒ Note that clear laws are generally easier to work with and bring claims under, whereas unclear laws offer a greater chance to create new and groundbreaking precedent, but at a higher risk.

- How strong are the legal claims? How will they be regarded by the courts and legal system? How popular will they be in the local, state, and national community?

- How likely are you to receive a favorable decision from the courts?

- Would the court be able and likely to provide for any more innovative or non-traditional remedies in your case?

In some jurisdictions, courts may be able to order that the person, government, or organization being sued not only stop from causing further harm, but actively work to remedy the damage they have caused and prevent such things from happening in the future. These bodies may be required to devise and put into place new systems and mechanisms to protect rights, provide care, or prevent abuses.

- Would there be any backlash or other political reactions or repercussions if your claims in court were successful? If they were unsuccessful?

- Is the theory behind your case clear, simple, and easy to understand? If you were successful, is the remedy that you are requesting clear, simple, and easy to implement?

- Is there another group or organization that might be better able to handle the case?

Examples:
1. India: M.C. Mehta v. State of Tamil Nadu and Others. In this case, Indian activist plaintiff M.C. Mehta sued the state of Tamil Nadu to improve the working conditions for children and to provide children rescued from hazardous labor with an education. Full details: http://www.crin.org/Law/instrument.asp?InstID=1264

2. Paraguay: Niños en conflicto con la ley: Instituto de Reeducación del Menor vs. Paraguay. In a case surrounding an overpopulated juvenile detention center in Paraguay,
the Inter-American Court of Human Rights established minimum standards of care for young people in conflict with the law held in state custody. Full details: http://www.crin.org/Law/instrument.asp?InstID=1074

**International law considerations.** If your claim involves international human rights law or international law in general, you may want to look at how international law interacts with the jurisdiction in which you plan to bring your case. (See the guide to international law for children's rights at http://www.crin.org/law/index.asp).

One of the best ways to do this is to look at how a government is applying existing national and international laws. If the application of existing laws has been arbitrary or inconsistent, it may strengthen your case and provide an opportunity to give the local courts or authorities guidance. You might ask yourself:

- How do the government and national courts interpret their own national civil, political, and human rights standards? Is this in line with the way the international community interprets those standards?
  
  ⇒ If standards have not been clearly established, there may be an opportunity through strategic litigation to work with governments and courts to figure out what the best practices should be.

- Would national or local government officials and authorities benefit from court guidance on how they can meet and operate under international human rights standards?

- Is there a reason to believe that the government isn’t fully complying with either international standards or its own national standards? If so, is there any evidence that this might be open to a legal challenge?

*Look up international, regional and national laws related to children's rights by country:* http://www.crin.org/law/

**The United Nations Convention on the Rights of the Child (CRC).** The CRC grants wide-ranging human rights for children and has been approved in every country except for the United States and Somalia. Although there is currently no specific international court or other body exclusively for the CRC where children can bring cases, it is a valuable source of law for national and regional courts. While courts will deal with the CRC in very different ways and some may be more receptive than others to international children’s rights, it is certainly worth thinking about the CRC as you put together your claims.

Look up international, regional and national case law examples citing the CRC: http://www.crin.org/law/crc_in_court/

See the campaign to introduce an individual complaints mechanism under the CRC: http://www.crin.org/resources/infoDetail.asp?ID=20291

Evidence. Providing a court with evidence - information that proves your case - is key to your success. If there is no evidence to support your claims, you may have a difficult road ahead and a tough time winning in the courtroom. You should also be aware that although you may learn many things in your assessment, research, and investigation, there is a chance that a court might not accept all of your information as evidence when it examines your case.

Rules of Evidence. You should be sure to look at the rules of evidence in the relevant jurisdiction; in particular, since many claims brought in strategic litigation are unconventional and can be difficult to prove, you should try to determine the rules for submitting less common evidence like sociological and field studies.

Experts. Experts can be critical in providing and analyzing evidence. In many jurisdictions, relevant experts in the field may express opinions to the court in the way that lawyers and other representatives cannot. For this reason, it is worth exploring whether there would be well-respected and reliable expert witnesses or consultants willing to participate in your case.

Children and Evidence. In many jurisdictions, courts may be mistrustful of or reluctant to accept evidence from children. To the extent possible, you should try to figure out whether there are particular rules, procedures or practices in the relevant jurisdiction for dealing with evidence that is produced or presented by children. If you have serious concerns about the court taking children’s evidence seriously, you might also consider looking for adults who have personal knowledge of the evidence you are working with.

Resources. In considering whether to bring strategic litigation, resources are critical. Litigation can go on for many years, even decades, and resources must be available to support your legal team and fully fund all activities necessary to continue with the case. Given the uncertain outcome at every stage of litigation, you should think long-term and be sure to consider the worst-case scenario.
2. What are requirements and expectations about timing?

**Statute of limitations/Prescriptive periods.** A statute of limitations or prescriptive period is a law that sets out how long you have to file your lawsuit, and is often thought of and discussed as a sort of countdown clock.

Different types of claims or lawsuits usually have different time requirements, so it is important to know the nature of the claims you are hoping to bring in order to determine how long you have to file them with the court. You should always check the statute of limitations or prescriptive period in the jurisdiction in which you hope to bring your suit before you file it. Because of the statute of limitations or prescriptive period, finding the best case to advance your cause or goal through strategic litigation may be difficult. You might want to research the time limits you will face as soon as you have an idea that strategic litigation could be a strategy worth pursuing.

**Starting the clock.** The clock usually starts running from when the actions over which you hope to sue actually occurred, although in some cases there may be special extensions. These extensions often involve cases where the injured party was not aware of the damage being done at the time it was happening, as may be the case with things like fraud or exposure to toxic and dangerous substances. In those instances, the clock may start running from when the injured party becomes aware of the harm.

**Stopping the clock.** "Tolling" the statute or limitations or prescriptive period is a legal term meaning that the clock has stopped running. The clock may stop running for any number of reasons, including if the person suffering the harm is temporarily disabled or the person causing the harm becomes involved in certain other legal proceedings.

**Tolling the clock for children.** In many jurisdictions, the clock may not even start running for children until they reach the age of majority. This preserves children’s legal claims, and may mean that young adults in some jurisdictions can still bring claims related to children’s rights. You should also be aware, though, that many jurisdictions toll the statute of limitations or prescriptive period until adulthood because they do not allow children to bring legal claims. If this is the case, working with child plaintiffs on their own to bring a case may not be possible.

**Appeals.** If you lose your case in a lower court or other judicial proceeding, you may be able to challenge this loss and ask for a higher court to take another look at the case.
However, it is likely that if you are able to appeal, there will be a time limit on how long you have to ask the higher court to look at the lower court’s order or decision.

When you first bring a case, you should be sure to look at whether you are guaranteed an appeal, whether you can apply for an appeal but will not automatically be entitled to appeal, or whether the court’s decision will be final. If you will be able to at least apply for an appeal, note the deadline to start the process, which usually begins by filing a legal request or otherwise contacting the court. Some jurisdictions may allow you to extend this deadline, but be sure to investigate this fully as extensions may not be automatic.

**Exhaustion of remedies.** In order to have your case heard by some international or higher national courts, you must have exhausted your remedies. This means that you must first go through other judicial channels available before the new court will hear your claim.

In terms of international tribunals, this may mean that you will be required to go through the national courts of the jurisdiction in which you would file your claim until you can no longer appeal. Once you have done so, there may be a time limit on how long you have to bring your claim to a higher court, or else the last court’s opinion or order may stand. Many international tribunals set this limit at six months.

**Exceptions.** There may be exceptions made both for the exhaustion of remedies requirement and for any time limits set. For example, if you can prove that the courts in the jurisdiction you would file your claim in are corrupt, you may not be required to pursue a remedy in those courts. Or if you can show why you could not bring your case within the expected time limit, you may be given an extension.

**Time frame expectations.** Because litigation necessarily involves other people, organizations, or governments and must be overseen by a judicial body, it is often difficult to predict how long it will take before getting a final decision. Any number of factors may influence how long a lawsuit takes, but in general litigation will go on for longer periods of time the more complex the case, the more parties who are involved, the less willing the parties are to resolve matters, and the busier the court’s schedule. In the best of worlds, cases may be resolved in a matter of months. In some instances, it can take years, or even decades to get a final decision. This may also vary widely both across and within jurisdictions.

Before you file your case, you should do your best to estimate how long you think the litigation process might take. You will never be able to pinpoint exactly when you will get a resolution, but you may come up with a range of time during which you might hope to hear
back from the court. Based on this range, you can allocate time and resources appropriately and set the expectations of all parties involved.

Provisional Measures. In some courts or tribunals, you may be able to apply for provisional measures, also called provisional remedies, interim measures, interim injunctions, and preliminary injunctions. Provisional measures are designed to prevent any further harm to the parties while the case is being decided, so the court or tribunal may order the defendants to cease certain actions at the outset of the case or prevent a potentially harmful law or policy from going into effect. Once a final judgment has been issued, the provisional measures may become permanent, be modified, or be lifted entirely.

Children and time commitments. If you are working with young clients, it is especially important to be clear about both how long it can take before they get a final answer from the court and how unpredictable things may be along the way. Also bear in mind that children often have many different obligations and schedules that change from year to year, so it can be difficult for them to make the kind of long-term commitment that strategic litigation requires. Because of this, however, courts in some jurisdictions are able to “fast track” certain types of cases involving children, especially those that relate to family matters or claims of child abuse and neglect. If you are concerned about the time line for a case you hope to bring involving children, it may be worth investigating whether there are rules or practices in the jurisdiction in which you hope to file that would provide for you to reach a speedier resolution.
Part III: WHO can bring strategic litigation?

Summary

Not just anyone can bring a case to the courts. In strategic litigation, as in all kinds of lawsuits, determining who the players are is key. This section will help you identify who will file the lawsuit, who they will sue, and whether or how people or organizations not named as parties in the lawsuit could intervene or otherwise get involved.

1. Who will file the lawsuit?

Standing. Many jurisdictions still require what is known as standing. Standing is just another way to figure out who should bring a lawsuit. For example, in some countries, in order to have standing to bring a lawsuit, you must have been directly damaged or victimized by the person, organization, or government you are suing. It is important to look at whether your jurisdiction or the jurisdiction in which you plan to bring a case requires standing, and – if so – what limits that places on who can bring a case. Some jurisdictions may relax the standing requirement for cases filed in the “public interest,” which often include cases about human rights violations.

Organization vs. Individual. Standing requirements usually make clear whether an organization may file a complaint on behalf of people who have suffered wrongs, or if those people must file their cases directly. If you have the choice between the two, note that a case filed in your group’s name will likely generate much more publicity for your group than if your group’s name were not directly involved.

Third parties. Standing may determine whether interested third parties are allowed to directly intervene or join in a case that has already been filed. These third parties might be people or organizations who were not directly damaged by actions or behavior of the person, organization, or government you are suing, but retain a strong interest in the outcome of the litigation.

⇒ Legally-oriented non-governmental organizations (NGOs) might want to intervene in a case for numerous reasons. They might see the key issues in the case as
central to their mission, feel that their resources would be of necessary or genuine assistance to the case, or see the case as an opportunity for good publicity.

If third parties are not allowed to directly intervene or join in a case, they may still assist in the litigation by making their opinions known as amicus curiae. Amicus curiae means “friend of the court,” and many jurisdictions permit interested organizations to prepare and file legal papers in support of one of the parties in the case.

Children and standing. Many jurisdictions and international courts or tribunals do not allow people under the age of majority to bring cases directly. This may mean that children will need to wait until they have reached adulthood before they can start legal proceedings, or that simply that they cannot bring legal claims at all. In some courts, parents, guardians, or other adult representatives may be able to file claims on a child’s behalf. Where this is possible, be aware that children and their representatives may not always have the same interests at heart. You should do your best to be sure that everyone involved is on the same page before bringing a case, particularly true where children’s legal claims relate to family or other sensitive matters.

Group action lawsuits. A group action lawsuit, also known as a class action, collective action or group litigation, may be a possibility in some jurisdictions. Under the collective action model, a small group of people or a representative organization sues on behalf of a much larger group.

Filing a group action lawsuit may require approval from the court, and you should find out what these requirements are before bringing the case to the court. Courts may want to examine the people who are hoping to bring the lawsuit, their claims, and the people they are hoping to represent, so it would be wise to consider each of these if you wish to pursue a group action suit.

Example:

1. United States: The American Civil Liberties Union successfully brought a class action suit against a school district that had been discriminating against Native American students. Full details: [http://www.crin.org/Law/instrument.asp?InstID=1227](http://www.crin.org/Law/instrument.asp?InstID=1227)

2. How do you choose plaintiffs?

Finding and recruiting plaintiffs. Not all strategic litigation cases are carefully selected
from the outset, but given the nature of strategic litigation, you may find yourself in a
position of looking for the right people to bring a case that supports your cause or goal. If
you have such a case in mind, there are many ways you can search for and identify people
who can file their claims with the courts. These people are usually known as plaintiffs, but
may also be called complainants, claimants, or petitioners.

Before you begin looking for plaintiffs in any manner, be sure to look at local laws and
practices to determine whether and how it is permissible to recruit or solicit clients. Bear in
mind that the rules may differ for paying and non-paying clients. Regardless of whether
you expect plaintiffs to pay for legal services in connection with the case, do remember
that you are seeking to advance your own or your organization’s cause when you speak
with potential plaintiffs. Be sure to be up front about this goal. With this in mind, below is a
list of common ways to find or recruit plaintiffs:

- Field visits/interviews;
- Referrals from legal aid or other law-oriented client-based services;
- Referrals from NGOs;
- Existing channels for complaints, like local groups or organizations, community
centers, and trade or labor unions;
- Setting up new channels or points to receive complaints with the assistance of local
and national advocates, willing and interested lawyers, law students, and other
volunteers;
- Keeping consultation or office hours;
- Training programs;
- Journals, newsletters, casework bulletins and other publications;
- Print or online advertisement; and
- Meetings or conferences with interested advocates and legal practitioners.

**Contacting child plaintiffs.** Searching for young plaintiffs can raise many sensitive issues.
Remember that it can be very intimidating for children to be approached by people they do
not know, particularly when they are not in familiar environments or with adults they know
and trust. Where possible, you might first consider contacting children through their
families, schools, recreation or youth centers, or other safe spaces. If you do feel you need
to approach a child directly, you should do so on the child’s terms and be extremely careful
that your interaction does not place them at any unnecessary risk of harm.
Evaluating potential plaintiffs. Once you have determined that a potential plaintiff's (or potential plaintiffs') case would advance your cause in a meaningful way, you should then evaluate their particular circumstances and individual characteristics thoroughly before you or they file a lawsuit. Things you might want to consider in this evaluation include:

- The strengths and weaknesses of the potential plaintiff's claims, and the individual facts surrounding those claims;
  - Plaintiffs' claims may be more appealing if they stem from many incidents or involve multiple grounds.
  - In some cases, it may be wise to stay within more traditional and established fields of law if you are testing the powers of a new law or fighting system-wide discrimination. For example, you might want to bring straightforward employment discrimination claims rather than adopting a more creative or novel argument.
- The plaintiff's financial means, particularly if they will be paying in any way for legal services;
- The plaintiff's lifestyle, schedule, free time, and availability to meet and actively participate in the case;
- The plaintiff's interest in the cause;
- Personal characteristics like credibility, charisma, and the ability to communicate clearly and effectively; and
- The likelihood of success and the effects that success or failure might ultimately have on the plaintiff's existence.

Safety concerns. It is extremely important that you consider the safety of potential or actual plaintiffs and any additional people involved in the case at all times.

Plaintiffs, lawyers, organizations and other persons assisting in the case, or even simply supporting the case, may face severe economic, social and personal consequences. It is critical to make sure those involved in the case feel safe and protected. If there is immediate backlash against the case when it is filed or the situation worsens down the line, you should ensure that all parties involved know whom they can contact should they ever feel that they are in danger.
If a person or organization ultimately feels that they must discontinue their involvement in the case, you are certainly encouraged to discuss this decision with them, but must above all else respect their wishes.

**Confidentiality.** All communications between lawyers and potential or actual clients must be held in the strictest confidence. Even the fact that you are meeting with lawyers or thinking about filing a lawsuit is confidential. When you are interviewing potential plaintiffs in connection with a lawsuit, you should assure them that you intend to keep any information you learn in confidence unless they give you permission to share, broadcast, or otherwise use that information. This should be the case regardless of whether they ultimately become a plaintiff or otherwise participate in your lawsuit.

3. How do you choose defendants?

**Determining and selecting from possible defendants.** Just as important as finding people who will be bringing a lawsuit is figuring out whom exactly they should sue. Once a case is filed, the party being sued is usually known as a defendant, or may also be called a respondent. In some instances, it will be very clear who the appropriate defendant for a lawsuit would be. Even so, there may be more options available than you think, and there are several things you might wish to consider:

**Substance.** The substance of your claim and the laws you wish to enforce may dictate or explicitly direct who the appropriate defendant would be.

**Procedure.** The laws that underlie your claim or the court in which you bring your claim may have procedural requirements that suggest or mandate selecting a particular defendant.

**Success.** The likelihood of success you might have in bringing your suit against potential defendants could also come into play. It might be easier to prove that one potential defendant was responsible for the harm your plaintiff suffered than another, so you might consider focusing your attention and resources on defendants against whom you have more evidence.

**Remedies.** Different defendants may be able to offer different solutions to remedy the harm your plaintiff suffered if you win the case. For example, if you sue a company, they may be able to offer money, but will not be able to change a law. When selecting defendants, you should revisit your central goal in the case to figure out which defendants
could offer you the results you desire. Remember that the defendant will be instrumental in bringing about the social change you desire.

**Multiple Defendants.** Just as it is possible to have multiple plaintiffs, it is possible to have multiple defendants. It may make sense to sue more than one party to get the relief that you are requesting, particularly if you are seeking money. In some instances, one defendant may be required to pay for the wrongs that all other defendants have inflicted. This is called joint liability.

**Common defendants in strategic litigation.** There are a few sorts of defendants that are sued regularly in strategic litigation. Since the aim of strategic litigation is broader social change, the defendants are most often branches of the government. Sometimes, however, it may be possible to sue public or private companies and corporations. A list of the most common defendants in strategic litigation cases and things you might want to think over in bringing a lawsuit against them follows:

**National governments.** National governments have the broadest power to change the laws or practices on a large scale. They may also have the most resources to defend a suit and be the most resistant to change. Questions you might ask yourself before suing a national government include:

- What is the national government’s likely position on your lawsuit? Will they be supportive, or will they vow to fight it? Why?
- If the national government is not supportive, is there any organized political opposition? Is that opposition public and vocal?
- If the national government as a whole is not supportive, are there individual national or local politicians who are or would be supportive?
- How many resources will the national government be able to devote to defending the case? How skilled are their lawyers? What will their strategy likely be?
- Are there any upcoming elections or other changes in power that might impact the national government’s position?

**Arms of the national government and lower levels of government.** This category includes national and local authorities, government ministries or agencies, and certain institutions. Within a national jurisdiction, counties and municipalities or other political subdivisions may have their own governmental powers and be appropriate defendants. In a federal system, state governments may be similarly appropriate. As above, it will be important to
ask yourself questions about the potential defendant’s stance and resources, but suing a lower level of government comes with its own set of considerations as well:

- If your suit is successful, will the defending government body have the resources, funds, and infrastructure to supply the relief you have requested?
- Is there localized or community opposition? If so, are there feasible ways to overcome it?
- Will the lawsuit draw national attention? If this is likely, will national politics change the perception of the suit or otherwise influence the government body or community at large?

**Schools.** Many children spend much of their time in the classroom, and education authorities are often appropriate defendants where cases arise from things that happened at school. Because schools can play such important roles in children’s lives, though, you should be very careful that bringing a lawsuit against a school authority does not jeopardize a child’s educational, social, or extracurricular opportunities.

**Corporations.** Suing corporations may have a sizable global impact and set a strong precedent for business practices. However, corporations also have many legal resources, and lawsuits can be tricky given how many places and in what ways a sizable corporation does business.

⇒ Publicly held corporations, which are listed on stock exchanges and tend to be larger in scope, can expect reactions to the lawsuit from many interested parties. These parties include the corporation’s shareholders, management, workforce, creditors and competitors. The general financial markets and market regulators may also take interest. This will likely result in more people paying greater attention to your case, but bear in mind that this could work both for and against your lawsuit depending on what the interested parties have to say.

**Examples:**

1. **National Government. Russia:** Chelyabinsk/Mayak Nuclear Production Facility cases. Following one of the largest nuclear disasters in world history, children in affected areas were forced to assist in clean up efforts and have suffered long-standing serious health problems. Many have successfully sued the government and now receive small support payments. Go to: [http://www.crin.org/Law/instrument.asp?InstID=1262](http://www.crin.org/Law/instrument.asp?InstID=1262)

2. **School. United States.** Brown v. Board of Education of Topeka, Kansas. A group of parents sued on behalf of their children attending racially segregated schools. In a landmark decision, the U.S. Supreme Court ordered that schools across the country integrate their student bodies. More details: [http://brownvboard.org/](http://brownvboard.org/)

4. Corporation. **Cote d'Ivoire**: A case was brought in United States courts against three large corporations (Nestlé, Archer Daniels Midland Co., and Cargill) on behalf of individuals who had been trafficked into slavery on cocoa farms as children. Full details: [http://www.crin.org/docs/FileManager/nestle_cocoa.pdf](http://www.crin.org/docs/FileManager/nestle_cocoa.pdf)

4. What role can NGOs and other players take?

**NGOs.** Many, if not most, NGOs are not fully equipped to run large scale strategic litigation cases without assistance. If a case is to be filed in a location beyond commuting distance from an NGO’s headquarters or field office, it may be very difficult to bring that case without local representation. However, NGOs without the resources to bring their own cases can still be heavily involved in strategic litigation. They can identify potential plaintiffs and cases; manage, service, and advise on active lawsuits; publicize case progress and the eventual results; monitor enforcement of judicial decisions; and advocate for the cause behind the litigation in other ways.

**Other interested organizations.** You may want to think about getting people and organizations who are not directly involved in your case, but have an interest in it, to participate.

Think about who these people and organizations might be, and why you think they might want to get involved. If they are interested, you may be able to pool resources or work on the case together. For example, you can consult with legal advisers, local NGOs, or experts in the field your case addresses to help you formulate your legal strategy, provide useful evidence, gather support in the community, or simply give general feedback and encouragement. Before and as you reach out, do bear in mind that you may be dealing with sensitive or confidential information. You should be sure to first run any potential third party you hope to consult with by your lawyers and the plaintiffs involved to ensure that you have their permission.
Part IV: WHERE would you bring strategic litigation?

Summary: Filing your lawsuit may not be as simple as going down to the local courthouse. When it comes to strategic litigation, choosing where to file your case has a huge bearing on both your chances of success and the eventual results you achieve. As you do your research, you may be surprised at how many options you have. This section will give you guidance on where exactly you can file your case, and from those options, where it makes the most sense to file.

1. Where can you file your case?

Researching jurisdictional laws. Your first step should be to determine where you can file your case. You should track down and examine the relevant local, state, national and international laws, rules and customs that set forth who may file a claim, when they may file a claim, and what filing a claim would entail.

You will need to figure out where your claim would meet the threshold criteria for filing; be creative and thoughtful when you begin your research and you may be surprised by how many options you have.

Jurisdiction. If you file your case in a local, state or national court, the place where you file will be known as your jurisdiction. Jurisdictions have very different rules as to when and by whom a case may be filed. There may be residency, citizenship, or other requirements. The laws and rules that apply in this jurisdiction will be very important to the outcome of your case. Sometimes a court may look to or apply the laws of another jurisdiction when they are relevant, but will likely do so in its own discretion and with its own point of view.

International mechanisms. If you file your case with an international body, they may still apply the rules and laws of a certain jurisdiction. But in determining whether you are eligible to file your claim, you will most likely find your answer in the court or tribunal’s rules. If you choose to file with an international body, be sure to think about how the case could interact with other local, regional, national or international efforts.

Find out more about international mechanisms:
http://www.crin.org/law/mechanisms_index.asp

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2. Where should you file your case?

**General options.** In thinking about where to file your case, it is not just a matter of location. Your first thoughts may include the jurisdictions where the plaintiffs reside, where the defendants reside, and where the actions or violations about which you are suing occurred. However, these are not your only choices – there are both international tribunals and national courts in other jurisdictions that might be willing to hear your case. After you have figured out your full range of options, it is well worth your while to research the possible jurisdictions, courts, tribunals, and other judicial bodies before you make your selection. A general list of places you might consider filing your case follows:

- Municipal, local, or state courts;
- National courts;
- International courts, tribunals, or commissions (see [http://www.crin.org/law/mechanisms_index.asp](http://www.crin.org/law/mechanisms_index.asp))
- United Nations treaty bodies (see [http://www.crin.org/UN/TBs.asp](http://www.crin.org/UN/TBs.asp))

**Judges and Legal professionals.** The independence and integrity of judges and legal professionals working in the jurisdiction is crucial to your success. In order to ensure that your case is given a fair chance, judges, lawyers, and all judicial and legal personnel must have the means, opportunity and support to do their jobs well.

**Judges.** As judges and judicial employees will both oversee your case and write relevant orders and decisions, you will want to look for a system that offers a competent, well-trained, independent and impartial judiciary. Given the progressive nature of strategic litigation, you might also prefer more proactive judges.

If judges in a certain jurisdiction are known to be prone to outside influence or otherwise partial, the goal of your case might not be to win, but to highlight this corruption and bring it to the attention of the international community.

**Example:**

1. **Guatemala:** Two NGOs jointly brought a case before the Inter American Commission on Human Rights to challenge adoption proceedings where judges had allegedly been taking
bribes to fast track approval. Full details (in Spanish):
http://www.crin.org/resources/infoDetail.asp?ID=15672&flag=news

**Lawyers.** Lawyers are key to winning your case as they will be advocating in the courtroom on behalf of the plaintiffs. To be effective, lawyers must be able to work without being threatened, intimidated, harassed, or otherwise confronted with interference. They must be able to freely travel to meet their clients, experts, consultants, and other persons involved with the case both domestically and internationally. If they act within a jurisdiction or tribunal’s codes of professional or ethical conduct, they must be able to rely on those codes and know that they will not be sanctioned or otherwise punished for their behavior in connection with the case.

**Legal systems.** Because of the different legal systems operating across jurisdictions, the impact your case can have on the laws in those jurisdictions varies widely. The three major types of legal systems in the world are **common law**, **civil law** and **religious law**. You should determine which system each of the potential jurisdictions has adopted and be aware of the impact that it will have on your case. You may also wish to research the way in which international laws or treaties interact with the relevant jurisdiction’s legal system.

**Common law.** Some jurisdictions, particularly those of the United Kingdom and former British colonies, operate on a system of common law. In common law jurisdictions, the law is determined not only by written laws, but by court decisions. This means that when a judge looks at your case, he or she will not only look to the statutes, regulations, guidance, code, or other written laws you reference, but will also look for any past court decisions that might relate to your case. In common law systems, precedent – the body of past court decisions – plays a much larger role than in other legal systems.

**Civil law.** Civil law is the most widespread system of law, and is in place across most of the continent of Europe and many former European colonies. Civil law relies more heavily on written codes than common law. As a result, precedent plays less of a role and judges are less likely to give weight to past decisions in civil law jurisdictions. This means that although your case may have a big impact on your plaintiffs’ lives, it may not necessarily greatly alter the courts’ ways of looking at the law in general or in any similar cases that might arise in the future.

**Religious law.** In religious legal systems, religious doctrines or texts take a primary role in the crafting, interpretation and application of the jurisdiction’s laws. The importance of court decisions and precedent varies depending on the predominant religion and the precise legal system in place, but judges in many jurisdictions do give at least some weight
to both previous court decisions or orders and the opinions of respected religious legal scholars.

**International law** – Monist and Dualist systems. In general, there are two ways jurisdictions approach treaties and other international agreements. In what are called monist systems, international laws and agreements can be enforced directly by national authorities and in national courts once a treaty or agreement has been signed, ratified, and entered into force. In dualist systems, however, treaties or agreements cannot be enforced by the authorities or in the courts until there are national laws passed to incorporate the principles behind those treaties or agreements. Because of this, if your lawsuit involves international matters, it may be in some ways easier to bring a case in a monist system, a jurisdiction that would apply the clear language of the treaty or agreement itself.

*Convention on the Rights of the Child*. Although the CRC is in force almost everywhere in the world, this means very different things in different jurisdictions. In some countries, children enjoy their full legal rights under the Convention and may be entitled to bring cases where their CRC rights have been violated. In others, the Convention serves only as a source of aspiration and is not directly enforceable in court. Even where it does not carry the full force of law, however, the CRC may be a valuable tool for courts to look at claims that relate to children’s rights.

*See how the CRC has been incorporated in various jurisdictions at:*  
http://www.crin.org/law/index.asp#th

*For case law examples referencing the CRC:* http://www.crin.org/law/crc_in_court/

**Laws and precedents.** Different courts, even within the same jurisdiction, may have widely varying laws, rules and procedures. They will rely on different precedents in analyzing both your claims and the law itself, and you want to be sure to figure out what each court or tribunal’s likely outlook or predisposition towards your case might be. To begin, you should look to see if the court or tribunal you hope to file your case in has dealt with any similar cases before or any strategic litigation in general. If not, you might want to try to figure out how active a role judges and courts take in overseeing cases and what their general tendencies are. More conservative jurisdictions or tribunals may be less open to innovative claims or potentially groundbreaking activist litigation.

⇒ If during your research you uncover that a court or tribunal is currently addressing a case with a very similar subject matter, you may want to contact the lawyers on that case about intervening, cooperating or pooling your resources. You may also
be able to file your own case and then have the court or tribunal consider the two of your cases together.

**Remedies and impact.** Depending on the court you file in, the remedies you can seek in your case may also be vastly different. Some courts may only be able to offer monetary compensation, whereas others will have broader powers. By the same token, the impact of your success or loss may be dramatically higher or lower depending on the court or tribunal that issues the order or decision.

As a general rule, the higher the court or tribunal, the broader and more powerful the impact. You might wish to choose a well-known or respected court whose judgments will be influential not only on a national level, but potentially on an international scale as well.

**Appeals.** Access to higher courts may be wholly or partially restricted to appeals, cases where a lower trial court has already made a determination and the losing party has asked a higher court to review that decision. Appeals can be key to strategic litigation, both in terms of ensuring that your case will be fairly heard and in terms of getting access to higher, more prominent courts to raise the profile of the case and offer a deeper impact.

You should be sure to investigate the appeals procedure in the jurisdiction where you want to file your case and figure out which courts you could appeal a decision to (including relevant international tribunals) and how long the process might typically take at each step or level.

**Timing.** The impact of your case and the effectiveness of the remedies the courts could offer might also depend greatly on timing. Where the harm being done to the plaintiffs is severe and continuing, you may want the court to intervene early on to prevent further damage and ensure the plaintiffs' safety. If the damage has already been done, though, timing can be less crucial as the court may be able to offer little more than monetary compensation. Nevertheless, obtaining a quick, early win may still be able to help gather momentum and support behind your cause and lay the groundwork for other cases to succeed.

**Children and timelines.** When you are working with child plaintiffs, keep in mind that children sometimes operate with a different sense of time and may expect a faster resolution than is possible in the court system or with the kind of claim that you are bringing. Because of this, you should be sure to be clear and up front with child plaintiffs about your timing goals and expectations.
**Civil vs. Criminal.** In some instances, you may have the option to pursue both civil and criminal cases. Civil cases are generally brought by individuals or organizations seeking remedies from the court to cease or compensate for damage caused by the defendants. Criminal cases are usually filed by government or tribunal lawyers (often called prosecutors) to punish or otherwise sanction a defendant for breaking the jurisdiction’s criminal laws or codes of conduct, although some jurisdictions may allow for privately-filed criminal cases in certain circumstances.

**Civil cases.** Filing a civil case generally gives you more control over the proceedings as you are pursuing your claims directly before the court. With imprisonment and other criminal punishment off the table, there may also be more relaxed standards for evidence or proof which could make it easier for you to win your case. As the goal in civil cases is to remedy the wrongs that were done, they also generally provide opportunities not only to force defendants to stop harmful actions, but also to seek compensation for damage already inflicted. However, civil cases are generally lengthier and more expensive to bring than criminal cases. This is especially true where separate criminal cases have been filed against the same defendants; in those instances, courts or government lawyers may suspend all civil cases until the criminal cases have been resolved.

**Criminal cases.** Criminal cases can be higher profile and more powerful than civil cases. Because of the penalties or punishments that criminal cases bring, they may also serve to warn other people or organizations involved in similar activities to change their behavior. However, criminal cases may be both harder to bring and harder to win. The standards for evidence or proof could be higher, and the government lawyers might have more limited resources or be politically constrained. These factors may be worth considering before you encourage the government to press charges, pursue a private criminal lawsuit, or otherwise agree to participate in a criminal case.

**Context:** In addition to looking at the laws of the land, you must not forget about the context in which the lawsuit will be filed. You should think carefully about the levels of corruption in the jurisdiction; the general stance of the government as to human rights; and the physical or other dangers those involved with your lawsuit might face. If you have serious reservations about safety or fear of retaliation in a jurisdiction, it may be best to file and run the case from outside that jurisdiction.

**Children in context.** Children are particularly vulnerable to the potential negative effects of bringing lawsuits in their name, especially where cases involve schools they attend, places they reside, or close family members. Children may not have the resources or ability to leave dangerous situations, so you should be extremely vigilant in ensuring that child plaintiffs receive the security and support they need.
Financial considerations. Bringing a case can be very expensive, so it would be wise to investigate court costs, legal fees, bond or security requirements, and other financial commitments involved in every potential jurisdiction. Legal costs might be prohibitively expensive in some jurisdictions, so it may make more sense to file your case in a jurisdiction where your resources would go further. You should also investigate whether legal fees would be recoverable if you won, meaning that the losing defendants would have to pay for your lawyers and court costs. Some jurisdictions provide for this arrangement specifically in human rights or general public interest litigation.
Part V: HOW would you bring strategic litigation?

Summary

Bringing strategic litigation can be a lengthy, complicated process, and there will be many decisions to make along the way. This section will help you figure out how you find, select, and pay for a lawyer, how you and your lawyer will prove and support your case, and - once the case is over - how you will follow up on the result.

1. How do you find a lawyer?

First steps. As soon as you realize that you may want to bring strategic litigation, your first step should be to consult with a lawyer.

Because you might not be sure where exactly you would file your lawsuit and there will be many decisions to make, you may want to speak with both an international organization that works in many different countries and a lawyer qualified to practice in your jurisdiction.

Once you know where you will file your case, you can make a more informed decision about where to look for a lawyer and what kind of lawyer could best handle your case.

Finding a lawyer. Once you have a general sense of the lawyer you are looking for, you will need to begin your search. Since there are likely quite a few lawyers to choose from, contacting a few of the groups suggested below may help to narrow down your search.

Lawyer networks. You may want to start by contacting any local or national lawyer networks in the jurisdiction, like a bar association or trade guild.

Legal aid organizations. Both government and non-government funded legal aid organizations and traditional legal service providers are run by lawyers knowledgeable in their field who may be able to provide you legal advice or services free of charge.

NGOs. NGOs frequently have in-house lawyers who might be willing and able to take your case or can refer you to an organization or firm that more likely meets your needs.
Legal clinics. Some universities and law schools have legal clinic programs run by professors, staff lawyers, and law students, and may be similarly able to handle or refer your case.

Referral. Referral is very common in the legal field, and if a lawyer or organization cannot help you, it is always worth asking if they could recommend someone who can.

Retaining counsel. Once you have several candidates in mind to handle your case, you will need to learn more about them and hopefully meet with them before you make your decision. There will be many factors to consider, including but not limited to those described below.

Fees. First and foremost, you should get a sense of how the lawyer, organization, or firm will be charging you for legal services. Financing your case is discussed in more detail below, but here are a few things to think about:

⇒ In some cases, you may be able to find pro bono representation for strategic litigation, meaning that your legal services will be provided free of charge. Even where this is the case, however, you should be sure to work out whether you will be expected to cover any other costs or expenses associated with the case, like court fees or travel expenses.

⇒ Where you will be paying for legal services, you will need to figure out how you will be charged. Will you be paying by the hour, or a flat fee? Will you only pay if you win, or will you pay no matter what the outcome? How will you be billed?

Background and experience. Try to get a sense of the lawyer, firm, or organization’s background and level of experience. Look for experience in general, in the jurisdictions and courts you could file your case in, and with similar cases, groups, or clients. You may also want to investigate whether the lawyers have any ties or contacts with NGOs or other potentially valuable connections.

⇒ Involving children in strategic litigation can pose many unique and sensitive issues. If you hope to do this, you may wish to seek out lawyers or organizations who have experience with or specialize in working with children in the legal system.

Resources. You should ask potential lawyers how much time and how many resources they expect to have available to manage your case. Do they have adequate facilities and support staff? If not, would they be willing to accept outside help? In general it is also a good idea to get a feel for how closely the lawyers would manage the case and how open they would be to working with experts or other groups.

Personal philosophy. Although lawyers’ jobs require that they place their clients’ interests first, it may be important to you to find lawyers who are committed to or at the very least
understand your cause. As you could be working together for years to come, seeing eye-to-eye on the central issues in your case can make things move along much more smoothly and efficiently.

2. How do you pay for your lawyer?

**Financing your case.** In many jurisdictions, legal fees can quickly become very expensive. In terms of strategic litigation, this may be even more true as novel ideas or never before seen claims can take large amounts of time to research and prepare for court. However, you may be able to work out arrangements for paying your lawyers only if your case succeeds or, even better, not paying your lawyers at all. There are many common ways of financing strategic litigation beyond traditional fee for service arrangements:

*Pro bono.* Lawyers in private practice may be willing to offer you their legal services for free. In some jurisdictions, the *pro bono* ethic is well-established and you may even have a choice of law firms to assist you in bringing your case. Many law firms look to NGOs or legal aid organizations to screen and refer cases, so you might contact relevant organizations in potential jurisdictions for your lawsuit to see if they have any partnerships or other referral mechanisms in place with local law firms or practitioners. Do be aware that even in *pro bono* relationships, you may still be expected to cover court costs or other expenses.

*Legal aid.* Although many traditional legal service organizations do not have the means to handle a large strategic litigation case, some legal aid providers may have divisions or sectors designed to promote lasting change and tackle complex litigation. These organizations may be willing to bring and manage your case free of charge.

*Contingency or Conditional Fees.* In some jurisdictions, it may be permissible to work out a contingency fee or conditional fee arrangement. In a contingency fee arrangement, your lawyers would not charge up front or hourly for their services; instead, their payment would be contingent on their success. If the lawyers win your case, they will get to keep a percentage of the plaintiffs’ damages, that is, the amount of money the judge, tribunal or jury awards the plaintiffs to compensate them for the harm they suffered at the hands of the defendants. If the lawyers lose, they may get nothing. In a conditional fee arrangement, legal fees may be increased or reduced depending on the amount of damages you receive, but may not disappear entirely.

Since this approach often requires that your claim seek a substantial sum of money, it may not make sense to request a contingency or conditional fee arrangement when you are asking the court for a more novel remedy.
Insurance. You may be able to obtain legal expenses insurance for your case, which would pay for at least a percentage of your legal costs if you lost. However, this kind of insurance can be very expensive, and if your case is risky or very novel, it may simply be unavailable.

3. How do you prove your case?

Beginning your investigation. Thoroughly investigating your case is critical to figuring out the best strategy for success in the courtroom. As a first step, you should gather all publicly available documents and data relevant to your case. This includes newspaper, journal and magazine articles; media and academic reports; and statistics, studies or other scientific information.

Once you have a good grasp on this background information, you should think about going out into the community to speak with people who have actual knowledge or experience with the events and occurrences that underlie your legal claim. Where it would not endanger the plaintiffs or harm your case, you should consider talking with plaintiffs’ friends, family, and colleagues; government officials or authorities; other advocates or lawyers in the area; and anyone else who may have witnessed or known about things that happened in your case. Remember, though, that you can’t learn everything, and you will have a chance to find out more through official channels once your case has been filed.

Confidentiality. As always, all communications between lawyers and potential or actual clients must be held in the strictest confidence. Bear this in mind when you are investigating your case as you do not want to place the plaintiffs or your case in jeopardy, and should never reveal information about your case or client without consulting your lawyer and getting the plaintiff’s permission. Sometimes, even letting other people know that you are planning to file a lawsuit may violate confidentiality.

Keeping records. It is very important to create a paper trail of your investigation. Keep copies of all published or written information you find. Take notes and pictures during any interviews or field visits you conduct, and if possible, ask permission to record them. Be sure to account for every piece of information you learn during your investigation in some way. The more organized you are in how you gather and store your information, the easier it will be to find and use it throughout your case.

Children and investigations. You should be even more careful when investigating cases that involve children. In particular, speaking with a child plaintiff’s parents, teachers, or other authority figures may raise very sensitive issues. To avoid placing a child in harm’s way or damaging family or school relationships, you should fully explain to child plaintiffs...
who the people you would like to meet with are and what you hope to learn before you begin your investigation.

**Filing.** When you have learned enough information in your investigation to understand and explain your claims, you might then consider initiating legal proceedings. The procedure for filing a lawsuit is determined by the laws, regulations, and practice in the jurisdiction in which you are bringing your case, but will likely involve providing the court with a document that sets out your claims. Before you file, be sure to research all of the relevant rules – some systems may require very formal and detailed documents, while others need only a letter signed by the plaintiffs.

**Serving.** After you have filed your case, it is likely that you will need to serve the defendants with your papers, which usually requires a formal delivery process to let the defendants know that you are suing them. This might be done by providing them with a copy of your filing, either directly or through the court. If you are filing in a jurisdiction different from the one in which the defendant’s actions or violations occurred, it may be difficult to serve the defendant with your papers in line with the rules of the court. If you cannot successfully serve a defendant, it is possible that you will not be able to proceed with your lawsuit in that jurisdiction. If that is the case, you may need to file your suit either where the violations occurred or where the defendant is currently located.

**Fact-finding.** Most jurisdictions provide for a fact-finding or discovery period when you first file your case. During this period, you have an opportunity to get documents and information from your adversaries, and they likewise have an opportunity to get documents and information from you. As you find out more information from your opponents, you should continue investigating on the ground with more specific goals and questions to help your case further as it develops.

**Proof.** In order for the court to make its decision, you will need to submit evidence to prove your case. As discussed above, the rules of evidence vary widely across jurisdictions, and you should thoroughly understand them before your investigation is underway. With these rules in mind, you will want to bring the court’s attention to many of the relevant things that you have learned during your investigation.

**Witnesses.** People who know, saw, or otherwise experienced things that are relevant to your case may be able to serve as witnesses. Typically, you would arrange for a witness to come to court where your lawyers, the defendants’ lawyers, and the judge would all have an opportunity to ask questions. It may also be possible to meet and interview a witness on record outside the courtroom if the other parties in the case agree to this arrangement.
Think about who could serve as a witness in your case and begin meeting with those people early on in the process — remember that you may very well want to ask the plaintiffs and defendants in your case to serve as witnesses. You should thoroughly prepare the questions you hope to ask witnesses and any documents or other evidence you might want them to discuss. Before you bring any witness to court or otherwise ask that witness questions on record, you should be sure that he or she understands how the process works and what he or she will be expected to talk about.

Serving as a witness can be a very stressful experience, and working with young witnesses in particular can raise issues for both the children and courts involved. It can be very hard for children to talk about upsetting events, especially where family members or authority figures are involved. Moreover, legal proceedings are difficult to understand for most adults, much less children, who are likely to be even less familiar with the actors, processes, and vocabulary of the justice system. If you are working with a child witness, you should therefore be sure to explain the process in clear and straightforward terms that they can understand. When the time comes for the child witness to speak to the court, you should also remember that many courts may not be designed for or accustomed to dealing with child witnesses, and judges may be skeptical of what children have to say. More recently, though, some jurisdictions have begun to make special provisions for child witnesses, and you should be sure to research whether the court hearing your case has separate rules and procedures for children or can offer any special arrangements or accommodations.

For more information on bringing children into the courtroom, see the Council of Europe’s website on child-friendly justice:
http://www.coe.int/t/dghl/standardsetting/childjustice/default_en.asp

Evidence. If you have written or photographic documentation, scientific studies or surveys, voice or video recordings, or physical evidence, you may be able to submit this to the court directly. In some jurisdictions, it may be possible or preferable to bring this evidence to the court’s attention while you are questioning a witness whose role in the case relates to the evidence you want to submit. Be aware that you may be required to bring the person who provided the evidence to the court with you so that the court can assess how reliable and credible the evidence is.

Experts. If you have consulted with any experts, those experts might submit reports to the court or appear before the judge as an expert witness to explain their views. As with any other witness, you will need to thoroughly prepare any experts you work with for questioning before you bring them to court.
**Strategy.** Strategies and tactics on the road to and inside the courtroom will be central to any victory, and will in large part be the responsibility of your lawyers. However, this is only one part of the overall strategy in your case. You should try to develop a comprehensive vision of advocacy that includes drawing international attention and gathering widespread support to your cause, and you may want to push for educating courts and legal professionals on the issues in your case locally, nationally, and globally.

You will need to have a follow-up strategy for after the case has been decided, and you should certainly anticipate that your cause will have a much longer and broader struggle than one simple court decision, no matter how groundbreaking or symbolic it may be.

**Settling.** Often times, settling your case out of court may not be in line with the goals of strategic litigation as it does not typically offer an opportunity to set precedent for future cases. However, it may at times be the better option for strategic or practical reasons. If you do decide to settle your case, think about negotiating solutions and remedies that would extend beyond simply the plaintiff or plaintiffs involved in the suit. You can actively involve the defendants, the government, and the public. You should also seek to make your settlement public knowledge by filing the agreement with the court if permissible and discussing the terms with the media. Settlement can provide a valuable means to initiate advocacy and reform movements, and may also serve to prevent future harm or damage done in similar cases by defendants.

**Losing.** If you do not believe that your case will succeed in court, all is not lost. You can adopt different advocacy strategies from the outset or as soon as you realize that you are likely to lose. You may start calling for the courts to be monitored and reformed, or begin an effort to overturn a decision outside the courtroom with the help of the local, state, or national government. If support is lacking in the jurisdiction in which you have filed, you may want to take your advocacy outside its borders. International pressure can be instrumental in promoting social change.

4. How else can you support your case?

**Amicus curiae briefs.** Some jurisdictions allow NGOs, governments, trade associations, corporations, or other interested parties to submit legal briefs as amicus curiae, papers written by “friends of the court” that take a position in support of either the plaintiff’s or defendant’s arguments.
In jurisdictions where these kinds of briefs are accepted, you may want to recruit groups that support your cause to write and file papers with the court. You may find that there is a limit to the number of submissions that non-parties can make, in which case you will want to carefully select whom you invite or allow to file supporting papers. You might want to consider potential contributors' profiles, reputations, institutional knowledge, prestige, general mission, motive for supporting your case, and the quality and importance of the work you think they will be able to contribute.

Examples:


2. **Europe**: The Commissioner for Human Rights at the Council of Europe can submit amicus curiae briefs. Full details: [http://www.coe.int/t/commissioner/Activities/mandate_en.asp](http://www.coe.int/t/commissioner/Activities/mandate_en.asp)

**Training.** If your case is novel and the judges and lawyers who work for the court system or tribunal do not have a lot of experience, you may be able to offer, arrange for, or advocate for training programs conducted by outside experts to educate court officials and employees on children’s issues, human rights, international law, or other developing areas of the law that are particularly relevant to your case.

**Media.** Strategic litigation can be an excellent way to get the media interested and involved. The media provide a platform to dramatically increase awareness surrounding both your case and your cause in general; if you manage the publicity for your case well, this awareness may in turn become support. Even if your case is unpopular locally or nationally, international media may foster widespread support beyond your jurisdiction’s borders.

When you first file your case or when any subsequent major steps are taken, you may want to write a press release or otherwise alert local, national, and international media outlets. In some cases, it may also make sense to contact politicians you think would support your efforts. As always, do bear in mind that your legal strategy and communications between lawyers and clients are privileged and confidential information.

**Children in the spotlight.** Dealing with the media can be very intimidating for children, and you must remember that litigation is by its nature a very public process. This is particularly
true of strategic litigation, where the primary purpose of bringing a case is often to draw national or international attention to violations of human rights. Because of these concerns, you should be sure to prepare any children involved in your case for dealing with journalists or reporters. If the children you are working with do not wish to interact with the media, you may also be able to ask courts in some jurisdictions to ensure that their identities remain anonymous even where other details of the case are publicized.

**NGOs, Academics, and other Human rights specialists.** There is likely a wide range of groups and people willing to offer their help and support for your case. NGOs can provide invaluable assistance by campaigning for your case in the community, networking with other supporters, researching legal or factual issues, and gathering information on the ground. Academics have access to extensive research facilities and can write articles about the issues in your case, speak at meetings and conferences, or otherwise raise awareness in the legal and human rights communities.

National human rights institutions (see [http://www.crin.org/GMI/Ombudsperson.asp](http://www.crin.org/GMI/Ombudsperson.asp)) may offer libraries, general advice, and a chance to link up with other interested groups, while individual human rights advocates and specialists can share their own experiences and offer friendly advice. And, of course, do not forget the invaluable messages of support you may receive from plaintiffs’ families, friends, and communities.

5. **How do you follow-up once your case has been decided?**

**Enforcement/Monitoring.** Settling or winning a case before the court is only the beginning of the broader social change that strategic litigation seeks to bring about. In fact, enforcing court orders and settlement agreements has historically been one of the biggest challenges faced by those involved in strategic litigation. Remember that the goal of strategic litigation is lasting reform, and you may well need to continually monitor compliance with judgments or agreements to ensure that they remain in force.

**Sanctions.** If there is a history, pattern, or practice of judgments or other court orders not being enforced in a jurisdiction or against a particular defendant, you may want to argue for a court order or decision that gives realistic and easily enforceable sanctions in the event that the losing parties do not comply with the judgment. These may include things like putting oversight and monitoring programs into place or awarding punitive money damages.
**Assistance.** It may often make sense to ask other interested organizations in the jurisdiction to assist you in monitoring and enforcing your judgment. If they receive reports that governments or other defendants have not changed their behavior in line with a court judgment, you might ask them to document these instances and refer the parties involved to you or your lawyers. Other groups may also offer to help proactively ensure that your judgment takes effect by providing services ordered by the court or interviewing members of the affected community to see whether they feel their positions have improved.

**Continued Advocacy.** Without continued advocacy, any victory in the courtroom can be quickly forgotten or – worse yet – undone. Whether you win or not, post-litigation advocacy is essential to furthering the goals of strategic litigation, and you must not stop arguing for better government policies and improvements like more effective aid programs, education, and general community services in line with your cause. Connecting with grass roots organizations in the affected communities in particular and the jurisdiction overall can be vital to your effort’s success.
Part VI: WHY would you bring strategic litigation?

Summary: Strategic litigation is a creative and powerful means of advocacy, but it may not always be the best or most appropriate option. Bringing strategic litigation can undoubtedly be an exciting adventure in and of itself, but you should think through things thoroughly before you pursue it. This last section will address what strategic litigation can do for your cause, what difficulties you are likely to encounter, and whether there would be other ways to achieve the same result.

1. What can strategic litigation do?

Rule of Law. The clearest goal of strategic litigation is to somehow alter the existing laws that govern a jurisdiction. Whether that is through enforcing laws already on the books, clarifying laws that remain untested, challenging laws you believe should be repealed, or building a body of new law, strategic litigation aims to use the power of the courts to defend and promote human rights and to change the way that laws control behavior in a society.

Enforcing laws. If there are laws in place in a jurisdiction and those laws are simply not being followed, you can bring strategic litigation to draw attention to, improve and hopefully ensure enforcement of those laws. Although people living in that jurisdiction may already be entitled to certain rights and protections, that matters little if they do not in practice receive those protections or cannot exercise those rights.

Clarifying laws. You might bring strategic litigation to clarify an existing law. Strategic litigation can help to strengthen the power of a law or a legal system overall by providing a better interpretation and understanding of how the law and system work.

Challenging laws. Probably most strategic litigation cases are brought to challenge laws or policies that violate rights or protections. Strategic litigation can prevent the enforcement of these laws, strike them from the books, and force governments or other defendants to change their policies and practices.

Building laws. Strategic litigation can reveal gaps in existing laws, and can at the same time create new laws and precedents. It can both lay the groundwork for future cases and
speed up the development of new practices and policies to address violations of rights or provide other protections on the ground.

**Advocacy.** Strategic litigation can be an excellent tool for advocacy and advancing your cause or goal, and a single case can have a dramatic impact. Advocacy inside the courtroom is only one part of strategic litigation, and your case gives you an opportunity to send your message out to the media, the public, and the governing forces.

**Awareness.** Strategic litigation can bring a cause or issue into the limelight, sometimes at far less expense than an overall media campaign. This attention can raise general awareness and foster public discussion and debate. Given the open and public nature of most courtroom proceedings in many jurisdictions, it can also provide an excellent opportunity for media coverage surrounding all parties and organizations involved to gather momentum behind your cause. Changing public attitudes can be instrumental to any victories achieved being felt on the ground.

⇒ Strategic litigation also creates a record of the injustices that underlie your case for all to see. Even if you lose, you can still highlight these injustices and potentially lay a foundation for future efforts to succeed.

**Education.** Strategic litigation can educate the courts and legal professionals about your cause and the way that laws have brought about or failed to remedy the problem. As awareness spreads, your case may even lead to the introduction of formalized training programs both inside and outside the courthouse walls.

**Reform.** Strategic litigation can serve as a way for people to organize and bring pressure on a government for social change or legal reform. This pressure can come from both within and outside a jurisdiction; strategic litigation frequently becomes a matter of international discussion. Strategic lawsuits can hold governments accountable for their actions, mobilize communities, change public attitudes, and empower people whose rights have been violated to press for reform themselves.

2. **What are the difficulties with strategic litigation?**
Precedent. One of the main reasons to bring strategic litigation is to set a precedent for similar cases in the future to succeed. As discussed above, the impact your case will have varies based on the legal system in place in the jurisdiction in which you bring it. If your case will have little value for future plaintiffs, you may think twice about bringing it.

Highest court. In jurisdictions that rely heavily on precedent, your case may not achieve a great impact unless it is heard by the highest court available. Because of the different ways appeals work, you may not always have a chance to get a judgment from the highest court.

Losing. Remember that if you lose your case, you could be setting bad precedent and building roadblocks for future cases. Losing can reinforce or strengthen a harmful law or practice, only making matters worse. On the other hand, a clearly unjust loss may be helpful to your cause overall.

Cost. Strategic litigation can be an incredibly expensive undertaking and a costly way of launching an advocacy campaign or bringing attention to an issue. Legal fees and expenses can be difficult to predict, and may easily become prohibitive. In addition, you may also be responsible for the winning parties’ expenses if you lose your case. If you cannot find affordable counsel or volunteer lawyers to handle your case, you may be better off funnelling your resources into other forms of advocacy that are less expensive or more stable and predictable.

Control. Strategic litigation can be very difficult to control as you are bringing in both plaintiffs and lawyers to your campaign. Understandably, plaintiffs in strategic litigation can be less than ideal clients to begin with. Some may be afraid, inconsistent in their statements, have few resources, and lack the education to fully understand the legal process. Particularly where there are many of these plaintiffs involved, it may not be easy to run and manage the case. Lawyers are another potential source of conflict, and you may find that you do not always agree with their legal advice or recommendations and prefer to maintain more direct control over your advocacy strategy.

Lack of impartiality. Where the courts are not truly independent from the government, it may not be worth your while to bring strategic litigation in an effort to change the way the law works. Instead, it might make more sense to avoid the hassle of the courtroom and put your efforts toward convincing the ruling government to change its laws, policies, or practices directly.

Impact. As is the risk with any lawsuit, the outcome cannot be guaranteed. Even if you win
in the courtroom, your case may have little impact on the ground if there is no system in place to enforce new rights, laws, practices or policies. It is also important to remember that the judgment from the court may not necessarily reflect public opinion, and you may have little support on the ground for change. If there is widespread opposition, it may even be the case that the government overturns your result by instituting or passing a new rule or law. If you fear that your case will have little impact in the community or jurisdiction in which you bring it, you may consider first trying other methods of advocacy to build support and lay a foundation for change.

**Risk of harm.** Strategic litigation can be a long, drawn out, and traumatic process, and the risk of psychological or even physical harm to plaintiffs may be great. While strategic litigation can promise broad systemic changes, you must not forget about the people who have been directly affected by your case.

⇒ Particularly if your case would involve child plaintiffs, who may be especially vulnerable, you should think twice before bringing strategic litigation where there are concerns that doing so would have a serious negative impact on their lives.

### 3. Is strategic litigation the right decision?

**Other forms of Advocacy.** Strategic litigation is but one of many strategies to advocate for your cause. When you make the decision whether to bring strategic litigation, you should look at all of the other ways you might be able to use your resources to further your goal. If you can achieve the same or similar results through awareness campaigns, lobbying efforts, community outreach programs, or other forms of advocacy without the expense and unpredictability of a trial, you may want to consider funneling your resources into non-courtroom oriented advocacy campaigns.

**Continuing the fight.** Strategic litigation can achieve truly innovative, groundbreaking victories and change the fabric of society, but it can also be a costly and unpopular endeavor with uncertain or ineffective results. However you paint it, strategic litigation is an incredibly interesting and creative means to advocate. Whether you choose to bring strategic litigation or not, it is above all else most important to find the best ways support your cause and continue to fight for change.
Annex 1: References


Dr. Svitlana Kravchenko, Citizen Enforcement of Environmental Law in Eastern Europe, 10 Widener Law Review 475 (2004).


SOLID Training Programme: Development of an NGO Strategy on Litigation and Support at the National Level, January 2006, Trainers guide to the session on ‘Is litigation the right


Annex 2: Glossary of legal terms

**Amicus curiae** means “friend of the court,” and many jurisdictions permit interested organizations to prepare and file legal papers in support of one of the parties in the case as amicus curiae.

**Appeals** are cases where a lower trial court has already made a determination and the losing party has asked a higher court to review that decision. Appeals can be key to strategic litigation, both in terms of ensuring that your case will be fairly heard and in terms of getting access to higher, more prominent courts to raise the profile of the case and offer a deeper impact.

**Civil cases** are generally brought by individuals or organizations seeking remedies from the court to cease or compensate for damage caused by the defendants.

**Civil law.** See Legal systems.

**Common law.** See Legal systems.

In a **Contingency fee arrangement**, your lawyers would not charge up front or hourly for their services; instead, their payment would be contingent on their success. If the lawyers win your case, they will get to keep a percentage of the plaintiffs’ damages, the amount of money the judge, tribunal or jury awards the plaintiffs to compensate them for the harm they suffered at the hands of the defendants. If the lawyers lose, they may get nothing.

**Criminal cases** are usually filed by government or tribunal lawyers (often called prosecutors) to punish or otherwise sanction a defendant for breaking the jurisdiction’s criminal laws or codes of conduct, although some jurisdictions may allow for privately-filed criminal cases in certain circumstances.

**Damages** are the amount of money that judges, tribunals or juries award the plaintiffs to compensate them for the harm they suffered at the hands of the defendants.

**Defendants.** Once a case is filed, the parties being sued are usually known as a defendants, although in some courts they may also be referred to as respondents.
Dualist systems: see Monist and Dualist systems.

Evidence is information that you submit to the court to prove your case.

An exhaustion of remedies requirement means that you must first go through other judicial channels available before a court will hear your claim. For instance, before appealing to an international court, you are usually expected to go through the national court system first.

In a group action lawsuit, also known as a class action, collective action or group litigation, a small group of people or a representative organization sues on behalf of a much larger group.

Jurisdiction. If you file your case in a local, state or national court, the place where you file will be known as your jurisdiction.

Legal systems. The three major legal systems in the world are common law, civil law and religious law:

- In Common law systems, most prominent in the United Kingdom and former British colonies, the law is determined not only by written laws, but by court decisions. This means that when a judge looks at your case, he or she will not only look to the statutes, regulations, guidance, code, or other written laws you reference, but will also look for any past court decisions that might relate to your case. In common law systems, precedent – the body of past court decisions – plays a much larger role than in other legal systems.

- Civil law is the most widespread system of law, and is in place across most of the continent of Europe and many former European colonies. Civil law relies more heavily on written codes than common law. As a result, precedent plays less of a role and judges are less likely to give weight to past decisions in civil law jurisdictions.

- In Religious legal systems, religious doctrines or texts take a primary role in the crafting, interpretation and application of the jurisdiction’s laws. The importance of court decisions and precedent varies depending on the predominant religion and the precise legal system in place, but judges in many jurisdictions do give at least some weight to both previous court decisions or orders and the opinions of respected religious legal scholars.
Monist and Dualist systems. In general, there are two ways jurisdictions approach treaties and other international agreements. In what are called monist systems, international laws and agreements can be enforced directly by national authorities and in national courts once a treaty or agreement has been signed, ratified, and entered into force. In dualist systems, however, treaties or agreements cannot be enforced by the authorities or in the courts until there are national laws passed to incorporate the principles behind those treaties or agreements.

Plaintiffs, also called complainants, claimants and petitioners, are people who can bring the case to court that supports your goal or cause.

Precedent represents the body of past court decisions, and is often most relevant in common law systems.

Pro bono legal services are provided free of charge.

Provisional measures, also called provisional remedies, interim measures, interim injunctions, and preliminary injunctions, are designed to prevent any further harm to the parties while the case is being decided, so the court or tribunal may order the defendants to cease certain actions at the outset of the case or prevent a potentially harmful law or policy from going into effect.

Religious law. See legal systems.

The Rules of Evidence determine what kind of proof you will be allowed to present to the court.

Serving the papers you file with a court to begin a lawsuit means formally delivering a copy to the defendants to give them notice that you are suing them.

Standing is just another way to figure out who should bring a lawsuit. For example, in some countries, in order to have standing to bring a lawsuit, you must have been directly damaged or victimized by the person, organization, or government you are suing.
A **Statute of limitations** or **prescriptive period** is a law that sets out how long you have to file your lawsuit. Different types of claims or lawsuits usually have different time requirements, so it is important to know the nature of the claims you are hoping to bring in order to determine how long you have to file them with the court.

**Strategic litigation**: sometimes also called impact litigation, involves selecting and bringing a case to the courtroom with the goal of creating broader changes in society. People who bring strategic litigation want to use the law to leave a lasting mark beyond just winning the matter at hand.

**Third parties** are people or organizations who were not directly damaged by actions or behavior of the person, organization, or government you are suing, but retain a strong interest in the outcome of the litigation.
PERPETRATING
GOOD:

The Unintended Consequences
of International Human Rights Advocacy

By Barbora Bukovská

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Half of the harm that is done in this world
Is due to people who want to feel important.
They don’t mean to do harm—but the harm does not interest them.
Or they do not see it, or they justify it
Because they are absorbed in the endless struggle
To think well of themselves.

—T.S. Eliot, 1949

Being a human rights advocate is hard and noble work. It means speaking truth to power. It means standing up for the other—for the oppressed, disadvantaged, marginalized, poor, and underrepresented. It means making the world—which is full of human rights abuses, repression, and inequalities—a better place. The role of human rights advocates is indeed a heroic one: they are helpful and courageous experts, who deploy their legal and advocacy skills to call attention to human rights abuses, promote justice, and make perpetrators of violations accountable. In all of this, they are motivated primarily by altruism and a deep commitment to justice.

However, there are some fallacies inherent in such perceptions of human rights advocacy that I would like to confront; contradictions I would like to expose in the ways in which human rights advocates operate. I do so through an inquiry into three popular and widely used methods applied by international human rights advocates in the pursuit of their well-intended goals: reporting, advocacy, and strategic litigation. By focusing on the impact of these methods on human rights victims, I seek to assess whether these methods are working—and if they are, for whom. My assessment is a critical one: I argue that the means used by human rights advocates in their work might sometimes be damaging and counterproductive, because rather than eliminate relations of power and domination over those
whom they aim to benefit, they often sustain them. Ultimately, I submit that these methods falsify the true experience of victims of human rights violations, and end up suppressing their independence, competence, and solidarity.

In my analysis, I focus solely on the application of human rights methods by international nongovernmental organizations (NGOs)—that is, by organizations that have no particular constituency or specific group of beneficiaries, but that operate at the international level and whose experience with human rights abuses is indirect. I am aware that these methods are also popular among national or grassroots NGOs and are often effectively applied by them at the national level; however, their application by international NGOs raises a specific set of questions and concerns that are significantly different from those pertaining to domestic groups. In this regard, I contest the legitimacy with which international NGOs claim to speak on behalf of defined (or undefined) classes of victims or on behalf of “international civil society.” At the same time, I reflect on the lack of genuine connection between the international world of NGOs on the one hand, and the situation of human rights victims on the ground on the other.

The critique in this paper does not intend to suggest that the methods of human rights advocates are completely incompatible with the interests of victims and should cease to be used. Certainly, they are important mechanisms in promoting respect for, and protection of, human rights worldwide. Still, I believe that if human rights advocates are to be responsible to themselves, and those whom they defend or represent, they need to examine their activities and the practical results honestly. Therefore, instead of offering specific solutions to issues identified here, I urge human rights advocates to embrace different and more holistic models of activism: activism that, in paraphrasing the terminology of critical scholars, I call “rebellious” or “community” activism. By this, I mean activism that interacts with victims of human rights violations on a nonhierarchical basis, truly cooperates with them, and does not simply advocate on their behalf. Only collective efforts that are closely connect-
ed to communities, groups, and individuals facing oppression, and that "nurture sensibilities and skills compatible with a collective fight for social change," can ultimately be successful in addressing the human rights problems that we face at present, and may face in the future.

The Bright Side of Human Rights Methods

Human rights advocates have a broad range of tools that can be used to expose human rights violations and to seek solutions to issues conceived as problems. Undeniably, the most popular and effective of these tools are undeniably documenting human rights abuses via fact-finding missions and publishing reports on findings; lobbying or otherwise advocating for recognition of their causes or about abuses they have identified at the international, regional, and domestic levels; and taking individual cases of human rights violations to domestic or international courts. These three human rights methods—reporting, advocacy, and litigation—have certainly proved very successful over the years. While using them, human rights advocates have succeeded in shaming governments about serious human rights violations, and in gaining publicity and raising consciousness about neglected human rights issues. They have been very useful in pushing for legal reform in various areas of human rights protection, and have brought concrete remedies to many victims of human rights abuse. Thanks to the effectiveness of these methods, human rights advocates have been accepted as partners by governments and intergovernmental organizations, and are consulted in policy formulation and in negotiations on various issues of public interest.

However, as the following sections of this paper show, these methodologies also have their shadowy parts and too often might be increasing, instead of reducing, the subordinated positions of victims of human rights violations.
Everybody Wants to Listen

Reporting and advocacy are closely linked. Gathering information and documenting human rights abuses are prerequisites for any further action. Fact-finding serves as “a means of producing authoritative accounts” and evaluating situations that are later targeted via concrete action. Facts are usually collected through fact-finding missions or research, and are published in the form of analytical reports, empirical studies, or personal accounts.

Reporting is followed by advocacy: the presentation of information to various actors, mainly to international bodies charged with monitoring states’ performance in implementing human rights standards, as well as to regional bodies and to transnational political organizations (such as the Organization for Security and Cooperation in Europe) and their respective governments. For example, organizations and advocates produce shadow reports that contradict governmental reports on compliance with specific international or regional human rights treaties, lobby the human rights bodies to follow up on the situation in individual countries, or send protest letters or “letters of concern” to governments—all accompanied by media attention. It is hoped that, as a result of the shame that is brought on them, violators will subsequently change their practices, amend the law, and provide remedies, as warranted. Scholars and activists suggest that “promoting change by reporting facts” is effective because it has a universal language, moral authority, and a measure of accountability that can invigorate the struggles of affected individuals and groups and put pressure on governments to end violations.

Undoubtedly, reporting and advocacy have provided an invaluable service to victims of human rights abuses by calling the world’s attention to their condition. However, lately these methods have been the subject of increasing criticism for at least three reasons: the way they portray the victims, the way the facts in the reports are obtained, and the imposition of certain interpretations of situations while suppressing victims’ voices.
**Perpetuating Victimization**

In order to secure attention from an otherwise uninterested audience, human rights reports need victims. Human rights reporting, therefore, always adds "a human touch" and describes particular stories of persons "subjected to cruelty, oppression or other harsh or unfair treatment or suffering death, injury, ruin, etc. as a result of an event, circumstances, or oppressive or adverse impersonal" violators. Typically, the victim is also described as someone who is not responsible for his or her condition and who is weak, submissive, pitied, defeated, and powerless. By reproducing images of incompetence, dependence, and weakness, reports on human rights violations can constitute further victimization. For example, David Kennedy argues that reporting on victims is an "inherently voyeuristic or pornographic practice which no matter how carefully or sensitively it is done, transforms the position of the victim in his or her society and produces a language of victimization for him or her to speak on the international stage." Similar criticism has been formulated by Makau Mutua, who defines human rights reporting by the savage-victims-savior metaphor, in which the victim is portrayed as a "powerless, helpless, innocent whose naturalist attributes have been negated by the primitive and offensive action of the state." He objects that this construction does not promote the rights of victims but rather serves the interests of the organizations producing the reports.

This victimization can also lead the portrayed individuals to conform to the expectations and stereotypes that outsiders have about their identity, as well as entrench stereotypes about some groups (such as women, the disabled, minorities) in the eyes of the public.

**Collecting Testimonies**

Some concerns can also be raised about the way the facts for human rights reports are obtained. International organizations that produce those reports are based outside the countries they criticize, and operate at the international level. The information collected in the
reports is gathered through interviews with victims who are either contacted directly, or are spoken to randomly when reporters visit places where victims live and can be found, or through the contacts of domestic and community NGOs. Based on my experience, the approach of those conducting the fact-finding is, in many instances, disrespectful toward victims. Interviewers are unable to explain who they are, what they are doing and why, and what will happen with the information provided. Even if the interviewers honestly try to explain their mission, victims are often not in a position to comprehend the full impact of the results of the reports. Moreover, in many instances, victims are willing to provide testimonies due to growing frustrations over some problems or in the interest of distracting themselves from a monotonous life (for example, in prisons or segregated communities). The validity of these testimonies, especially when collected during a single visit and not through systematic monitoring, can sometimes be dubious. Critics also suggest that in the reporting strategy, international NGOs depend on maintaining a high public profile, and “[they] feel pinch[ed] to break the reporting stalemate by devising dramatic new angles, uncovering even greater atrocities” or simply “seizing on issues that seem designed more to promote their own image and fundraising efforts than to advance the public interest.”

**Monopolizing the Struggle**

Reports on human rights abuses are prepared and issued by organizations that grasp the techniques necessary for the compilation of these reports and who have sufficient funding for them. Victims, who are dealing with the problems on the ground, either do not have the personal financial resources to publish and use these kinds of reports, or would not have the resources to work with them at the necessary international level after they have been issued. Complex reports prepared by outsiders necessarily interpret the language of victims: the
victims are not allowed to serve as subjects in the production of their own narratives but are only sources of material for the reports. In this regard, critics raise concerns that such reports might reinforce and distort the information conveyed and hamper the access of victims to the audience. Eventually, by repackaging grievances into a legal format and using legal jargon, reports can effectively silence the lay voices of victims and create “a hostile cultural setting” for marginalized groups.

These arguments are certainly consistent with what I have experienced in my work on human rights violations in Central and Eastern Europe. Reports are produced by international human rights organizations from the detachment of their comfortable offices in New York, Geneva, and other such places, far from the places where violations occur. The situations described in the reports are usually the result of complicated and manifold circumstances that in the studies are only summarized and adapted into an easily understandable form for an outside audience. Moreover, regardless of who the particular victims are in a given case—rural women, ethnic minorities, prisoners, refugees, disabled persons—by discussing victims as objects of research rather than giving them the opportunity to be subjects of a whole process, the human rights reporters maintain control over them, their reports perpetuating the image of victims as incapable individuals or groups that must be saved from their misery by human rights advocates. As such, I believe this process can represent a new form of victimization.

Further, many times in my experience, the contacts that international organizations producing reports have with victims stop with the end of their fact-finding missions. The victims are almost never subsequently visited and are not given help either with the documented problems or with the potential backlash that they might face because of the report.

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al organizations “[a]re focusing more on overall and systemic changes. . . . There are no individual victims as far as our organization is concerned.”

If the fact-finding is targeting a serious problem such as genocide or another serious human rights violation, usually a large number of international organizations are documenting, reporting, and advocating the issue; later on, the number of interviews with victims is multiplied by the media covering the problem after the publication of the human rights reports. When no practical remedy is seen on the ground, communities and individuals affected by the particular problem subsequently feel disillusioned, and conclude that everybody wants to hear their stories but nobody wants to help them. Sometimes, studies conducted by organizations disconnected from victims might even have a negative impact on the work of local groups, which—as intermediaries in contact with international NGOs—are blamed for any backlash or increase in media attention.

**In Whose Interest?**

Impact or strategic litigation has been another powerful tool used by human rights advocates in addressing certain problems. Impact litigation is a type of lawsuit that has a wider effect than simply providing a remedy for a particular plaintiff in a specific case. It involves cases at a higher level—for example, before supreme or constitutional courts or international bodies such as the Human Rights Committee, the European Court of Human Rights, and other regional human rights bodies—where it aims to change the law or practice through judicial decisions. Often, it also seeks to interpret constitutional or international law, in particular in those areas where it is “difficult to achieve legislative consensus on an issue.”

In strategic litigation, the relationship between human rights advocates and victims is even more important and sensitive than in reporting and advocacy. Strategic litigation fares better in comparison with reporting: despite its potential limitations, which I discuss below, at least some participation by victims is necessary. Minimally,
there needs to be a concrete individual who comes forward with a case and lets himself or herself be represented. Moreover, in an ideal case of obtaining a remedy or compensation, the victim gets something tangible out of it. Compared with reporting and advocacy, victims are not reduced to passive objects completely in the care of brave human rights advocates and devoid of any material or even moral compensation. But as with the previously discussed methodologies, litigation has been criticized for creating and maintaining a power imbalance between human rights advocates, in this case lawyers, and their clients. Victims are often uneducated, with little or no understanding of the law, and assume a subordinated position with regard to tactics and strategy after human rights advocates decide on litigation. Once victims are confronted with a mysterious legal procedure and complicated legal language, their “fate is no longer in their hands” as legal specialists automatically take over their problems.

What I have experienced in my legal practice, and in cooperation with international human rights organizations promoting impact litigation is, again, precious little consideration of ethical responsibilities or even a basic respect for victims. In many cases, there is obviously the conflict between the interest of clients and the goal one wants to achieve with the case. I have seen that in international or other high-impact litigation, the interest and opinion of plaintiffs are very rarely taken into consideration; instead, they are sacrificed for the public interest. Once the case is filed, or very often even before, the represented person becomes a secondary consideration, and the individual client fades into the background, left to deal with the consequences of litigation on her own.

The involvement of victims is particularly important in cases where a particular issue is identified by an outside organization that decides that the best way to address it is through litigation, then develops a case and persuades someone from an affected group to be its client. Litigation can have a great impact on a particular issue,
but without extensive support for victims, it can be completely disruptive for the individual. It can very easily happen that the victims are, in a sense, manipulated and abused twice when the focus of the action is not the victim but an ideology alien to them.

This problem can be demonstrated through two examples. The first is the story of the woman identified only as Jane Roe in the famous *Roe v. Wade* case. The case is certainly one of the most important decisions of the U.S. Supreme Court. The plaintiff in the case revealed her identity several years ago and spoke about her frustration over the case. She publicly criticized her attorneys as being unable to defend her interests: what she really was after was an abortion—but she never got it, as it would not have been good for the case. She claims:

> Plain and simple, I was used. I was a nobody to them. They only needed a pregnant woman to use for their case, and that is it. I was chosen [to sign the affidavit in the Roe case] because [the attorney] needed someone who would sign the paper and fade into the background, never coming out and always keeping silent. As long as I was alive, I was a danger. I might speak out. I could be unpredictable. . . . Even after the case, I was never respected—probably because I was not an Ivy-League educated, liberal feminist like they were.\(^\text{17}\)

Eventually, the woman became an evangelical Christian and an anti-abortion activist, and filed for a reversal of the case.

The second example is the success story in the case of *Koptová v. Slovak Republic*, brought by an international NGO under the International Convention on the Elimination of Racial Discrimination. The case involved two municipalities in Eastern Slovakia, Nagov and Rokyтовce, that, in 1997, enacted resolutions expressly forbidding local Romani families from registering permanent residencies in these municipalities. One resolution even prohibited Roma from settling there and threatened them with expulsion should they try to do so. The international organization initiated a complaint to the Committee on the Elimination of Racial Discrimination; the complainant was Mrs. Koptová, a person of Romani origin but not
directly affected by the decrees—she did not reside in the municipalities and did not have any connection at all with the local communities. Under international pressure, the municipalities rescinded both resolutions, upon which the Committee recommended that the Slovak Republic “[t]ake the necessary measures to ensure that practices restricting the freedom of movement and residence of Romas under its jurisdiction are fully and promptly eliminated.”

This ruling has been celebrated as a great victory for legal strategy; however, as the international organization that initiated the case was not working with a local community and focused on publicizing the case internationally, it did not follow up with the situation on the ground. If it had done so, the organization would have found that the municipalities continued discriminatory policies despite a formal abolition of the municipal resolutions. When I visited Romani settlements in both towns a few years later, in 2002, none of the Romani families living there were registered as permanent residents in the municipalities, none of them were aware of any previous decision of an international body, and none of them had ever seen a lawyer to advise them on how to proceed when refused registration for permanent residency. I subsequently contacted the international organization and asked it to step in and provide legal assistance to Romani families, but I got the response that the problem had been sufficiently addressed in the international forum in 1999, and was not of interest to the organization anymore.

Measured by the standards of strategic litigation, the results in both of these cases can only be applauded. However, at the same time, they clearly demonstrate that the human rights advocates disregarded the wishes, opinions, or particular needs of the victims concerned, and that they sacrificed the interest of actual victims for the goal that the particular organization was pursuing.
The Right to do What They Do

An underlying concern regarding all issues discussed here is the fundamental question of the legitimacy of human rights advocates to do what they do and to say what they say when using these methods.

Legitimacy has been defined as "the particular status with which an organization is imbued and perceived at any given time, that enables it to operate with the general consent of peoples, governments, companies and non-state groups around the world," and which ensures that it "is accepted by antagonists as speaking for its constituency." As such, the legitimacy of international NGOs should be derived from their rootedness in an engaged and supportive constituency of victims.

However, with few exceptions, most international human rights NGOs purporting to speak for the masses are clearly not representatives of larger constituencies of human rights victims: their constituencies are their donors, their employees, other international organizations, and governments. Most of these organizations are professional groups that almost automatically exclude the participation of the people whose welfare they claim to advance. Unaccountable to anyone other than themselves or their donors, international human rights NGOs often can lose touch with the powerless and voiceless whom they claim to represent.

Critics also point out that many human rights activists in international organizations come from elite backgrounds and form a privileged class or social group, often shuffling back and forth from organization to organization, or eventually serving stints in governmental or intergovernmental agencies. As Chidi Odinkalu has observed, "with media-driven visibility and a lifestyle to match, the leaders of these initiatives enjoy privilege and comfort, and progressively grow distant from a life of struggle." As such, "instead of being the currency of social justice or of the consciousness driven movement, 'human rights' has increasingly become the specialised language of a select professional cadre, with its own rites of passage and methods of certification. Far from being a badge of honour, human rights activism is, in some of the places . . . increasingly a certificate of privilege."
When international organizations produce reports or initiate cases in which victims are treated as objects, it only fuels the critique by some that the global human rights market only understands the plights of oppressed groups of individuals as a commodity. The human rights field, dominated by closed networks of elites and professionals and excluding those who are directly concerned, hardly encourages the independent initiative of victims. More likely, it will “undermine the possibility of the sorts of political activity essential to any long term resolutions of the inequities that burden [the victims of abuses].”

Le Critique est Facile, mais L'art est Difficile

This paper is not intended to be a call for human rights advocates and NGOs to cease using the discussed methods and go home. It is instead a call for them to be more conscious of their weaknesses and to develop and implement an alternative set of practices. There is wisdom to be found in works of critical scholarship that demand strategic innovation and critical reflection about the means they use in their work. Their approach to advocacy has been given many labels, “community lawyering,” “critical lawyering,” “rebellious lawyering,” and the like. Regardless of the terms, the main aspect of this approach is that it values broad participation in collective efforts for eliminating injustices or improving problems. It argues that in order to make real, lasting changes, advocates must reshape the ways they think about themselves and the victims or communities they serve. This approach also embraces a greater respect for the power of marginalized and oppressed individuals and communities—deeper attention to the influences of race, gender, class, and culture on human rights advocacy, as well as the relationships between professionals and their clients. As first introduced by Gerald Lopez, rebellious or community advocates “respect the energy and the commitment of community members working together and
.. . collaborate with them for meaningful change, emerging from political and grassroot movements rather than from clever advocacy efforts by smart lawyers in suits.”

Despite a certain skepticism that this form of activism has also received for its “idealized vision” or the difficulty of implementing its ideas, I believe that this model of advocacy would not be contradictory to professionalization, as advocates would see themselves as more a part of the communities or groups for whom they work and would share with them the special knowledge and expertise they have gained through their education and expertise. They would still put human rights violations in the spotlight, but in a way that enhances the victims’ autonomy and their rights to control their own lives and affairs.

Balancing different interests is definitely not an easy task, but international human rights advocates should not give up on finding such balance. In the end, after all, human rights instruments were designed to protect the rights of individuals, not to serve the interests of their advocates or the organizations that claim to represent them.

Advocates must reshape the ways they think about themselves and the victims or communities they serve.


See Diane Orentlicher, "Bearing Witness: The Art and Science of Human Rights," 3 Harvard Human Rights Journal 83 (1990), 84. Orentlicher identifies three steps: (a) careful documentation of alleged abuses, (b) a clear demonstration of state accountability for those abuses under international law, and (c) the development of a mechanism for effectively exposing the abuse both nationally and internationally.


19 UN doc. GAOR, A/55/18, para. 10.3.

20 See, for example, William Gamson, The Strategy of Social Protest (1990), 45.


23 Odinkalu, 4.

24 Odinkalu, 1.


26 Lopez, 196.

Re-imagining the Human Rights Law Clinic

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I. INTRODUCTION

In the fall of 2010, the Mexican Supreme Court sponsored an international conference on human rights clinics to celebrate the launch of a new clinic at a prestigious law school in Mexico City.¹ A colleague from the United States was invited to speak from a clinical perspective about impact litigation, or strategic litigation as it is known in Latin American parlance, because the newly inaugurated Mexican clinic would have such a focus. Instead, the American professor challenged the conference participants to think about better

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ways of structuring human rights clinics, urging them to move away from the region’s heavy emphasis on strategic litigation and related approaches to promoting justice. In so doing, he stressed how most human rights work in practice does not actually involve litigation or even client representation.2

This colleague promoted a more expansive model of clinical activity popular in the United States that would focus on human rights monitoring, fact finding, reporting, and other less legalistic but common skills required for effective advocacy in the field. He warned that one danger of propagating the litigation model of human rights clinics was that “if you are set up as a hammer, everything looks like a nail;” in other words, you become predisposed to viewing human rights issues as primarily legal problems, thereby missing or minimizing their myriad social, political, and cultural dimensions.3 Thus, he argued that strategic litigation was too narrow a focus for a human rights clinic, which should instead seek to expose students to the diverse advocacy skills more commonly employed by activists in the real world.4

Although the U.S. professor did not expressly say so, it seemed as if he had applied several of Professor David Kennedy’s critiques of the human rights movement in general to human rights clinics in particular.5 Primary among these were Professor Kennedy’s admonition that human rights “view[] the problem and the solution too narrowly;”6 that they import “Western liberal” biases such as an overemphasis on the “universal” interests of individuals (at the expense of the community or collective action) which are enshrined in legal rights best defended through legal means;7 that as a result, human rights arrogantly promise more than they can deliver, given the limitations of law’s compliance and enforcement, especially on the international plane;8 and that “human rights remedies, even when successful, treat the symptoms rather than the illness,” leaving the

3. Id.
4. Id.
6. Id. at 109.
7. Id. at 114–15.
8. Id. at 116, 120–21.
underlying social, political, and cultural structures responsible for the pertinent violations untouched, even validated.\(^9\) There was an implicit (self) critique of lawyers, who tend to dominate the field of human rights law, and the international “bureaucracy” human rights law has engendered.\(^10\)

Be that as it may, by critiquing the focus of human rights clinics that litigate, our colleague was referencing (whether he meant to or not) the inchoate debate in U.S. clinical circles about how best to configure and operate a human rights clinic in today’s globalized world. In other words, what should be the overarching pedagogic objectives of such clinics and why? To what extent does the context in which human rights clinics operate matter? Should their focus be litigation or other types of advocacy? From a U.S. perspective, how similar are clinics of the human rights variety to more traditional models that center on providing legal services to clients? What are the differences, and how do they affect the way we in the United States conceive of clinical legal education in the international human rights context? Does it make sense, for instance, to teach classical lawyering skills such as client interviewing and counseling to human rights clinical students who have broader advocacy objectives in mind? In short, should we be training lawyers or human rights activists?

This article seeks to advance this debate. Susan Akram rightfully identifies the challenges faced in conjugating traditional clinical pedagogies with human rights advocacy in the United States:

\(^9\) Id. at 118–19.
\(^10\) See id. at 119–20. This complex critique of human rights in general, and human rights litigation in particular, is rooted in several assumptions drawn from social theory, moral philosophy, and legal theory. It also has obvious parallels to debates that characterize critical legal studies discourse. See infra note 105 and accompanying text. Accordingly, any attempt to provide a more general answer to such challenges to human rights and their place within a theory of justice, democracy, and political emancipation exceeds the scope of this article. For a general review of such critiques, see, among others: KARL MARX & FRIEDRICH ENGELS, THE GERMAN IDEOLOGY (Progress Publishers 1976) (1848); LUC BOLTANSKI & EVE CHIAPELLO, LE NOUVEL ESPRIT DU CAPITALISME (1999); COSTAS DOUZINAS, THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY (2000); Etienne Balibar, Is a Philosophy of Human Civic Rights Possible?, 103 S. ATLANTIC Q. 311 (2004); Jacques Rancière, Who is the Subject of the Rights of Man?, 103 S. ATLANTIC Q. 297 (2004).
IHR clinics are not focused on the usual kinds of skills-training that are associated with most traditional clinics: the familiar toolkit of interviewing, counseling, negotiation and trial advocacy skills. Although some IHR clinics do engage in litigation, it is not the core of most of their work. . . . [The question thus becomes] is there a core skill-set that students graduating from IHR clinics acquire? If it is not interviewing, counseling, negotiating or trial skills, what is it? Are there models of practice developing in “international advocacy skills” that are different from pre-trial and trial skills that can be standardized and measured in any meaningful way to test student output? 11

The most common response in the United States to this conundrum, as reflected in the recommendations espoused by the aforementioned speaker in Mexico City, can be summarized as follows:

Human rights lawyering, a concept at the heart of human rights clinics, is used . . . to indicate a range of diverse strategies, sometimes legal (for example, litigation, legal assistance and legislative advocacy) but more often non-legal (for example, community education, fact-finding and reporting). It is sometimes practiced in courtrooms, but more often in ‘the court of public opinion’, through the press, in the streets and in boardrooms, government offices and world conferences. . . . Thus, human rights lawyering involves litigation, advocacy, monitoring and reporting, policy and legislative drafting, organizing and lobbying. Human rights clinics aim to acquaint law students with this variety of practice, and to engage them critically and practically in developing one or more of these skills. 12

Many if not most U.S.-based human rights clinicians subscribe to some version of this view, 13 but other experiences provide


13. In practice, a large number of U.S. law clinics revolve exclusively or primarily around non-litigation advocacy involving human rights research, monitoring, fact-finding, reporting, education, organizing, and/or lobbying. Though it is impossible to generalize, a typical human rights clinic syllabus in such clinics often looks more like the syllabus of a “Law and Human Rights” type seminar than
alternative perspectives on how to configure a human rights clinic. One of these is provided by the proliferation of public interest and human rights (PIHR) law clinics (clínicas jurídicas de interés público y derechos humanos) in several Latin American countries. Our goal in this article is to contribute to the aforementioned debate by importing a number of relevant insights drawn from the Latin American experience of the PIHR law clinics. We believe that the successful trajectory of these home-grown clinics in countries like Argentina, Chile, and Colombia can be contrasted constructively with the development of their counterparts at law schools in the United States. Several of the lessons learned from this Latin American model, we will argue, are relevant to addressing the methodological challenges described, and thus can inform the growing debate on how better to understand the role and function of human rights clinics at American law schools.

We proceed as follows. Part II describes the evolution, focus, and function of public interest and human rights clinics in Latin America. While some variation naturally exists among the different manifestations of this model, it nonetheless contains a common denominator of shared purpose, perspective, and practice. Once the PIHR clinic model is described, analyzed, and illustrated with select case studies, we turn in Part III to outlining a few general lessons drawn from the Latin American experience that in our view are relevant in the U.S. clinical context. Based on our collective Latin American and U.S. perspectives, we believe great value inheres in looking to other successful approaches to human rights clinical work and learning from them. And while there are certainly substantial differences between the two clinical worlds we compare, there are even more similarities that, to our minds, bridge the geographic divide and allow for productive and constructive comparison.

that of a traditional legal services clinic. Such a course will tend to take a “patchwork” approach to teaching human rights advocacy and related skills. Each class is dedicated to addressing a different topic, such as the evolution of human rights law, the human rights situation in country X or with respect to Y issue; fact-finding and report writing; media strategies; different types of lobbying; theoretical critiques of human rights, and so on, with little or no further interconnection among them. Not surprisingly, these courses rely—sometimes heavily—on adjuncts or guest speakers to assist the professor(s) in covering such a diverse array of topics.
II. PUBLIC INTEREST AND HUMAN RIGHTS CLINICS IN LATIN AMERICA

At the aforementioned conference in Mexico City, eminent Argentine jurist Martín Böhmer gave the keynote address on the origin of public interest and human rights clinics in Latin America. His talk was more of a testimonial than a lecture on the subject, since Böhmer himself has been one of the driving forces behind the modern clinical movement in his native Argentina and around the region. The first PIHR clinics that sprung up in the 1990s in Argentina and Chile were home-grown enterprises in all respects but one—inspired generally by the well-developed world of clinical legal education in the United States, where many of the Latin American professors had carried out advanced studies, the transplanted notion of law clinics nonetheless took on a distinctly local flavor and focus once cultivated in their home countries.\(^ {14} \) What follows is an overview of the context in which public interest and human rights clinics developed, specifically their formation, evolution, and activities. This Part concludes with a short compendium of case studies from Argentina, Chile, and Colombia.

A. Social Justice and Judicial Activism in Latin America

Despite good signs of economic development, even in the context of a global crisis, Latin America is still characterized as a region with one of the highest levels of economic, social, and political inequality in the world\(^ {15} \) and low levels of effective political representation and direct participation.\(^ {16} \) At a socio-legal level, the general conditions of inequality and exclusion in the region may explain the deepening loss of confidence in political institutions and the growing use of judicial remedies as a form of obtaining the


\(^ {15} \) U.N. Dev. Programme, Regional Human Development Report for Latin America and the Caribbean, 16 (2010).

satisfaction of social interests and rights. Accordingly, human rights activists, non-governmental organizations (NGOs), and local communities have taken advantage of several constitutional reforms adopted since the 1990s throughout the region to promote an active and progressive interpretation of new constitutional rules and international human rights treaties. This constitutional approach to the rule of law includes not only the defense of civil and political rights but also the enforceability of social rights; the judicial control of economic structures; the empirical verification of how general principles of justice apply in practice; the development of associative strategies between lawyers and social movements; and the promotion of a new legal culture, as taught within law schools. In this way, as suggested by Colombian law professor César Rodríguez, a “thin” conception of the rule of law, as typically represented by U.S. constitutionalism, may be distinguished from a competing “thick” version based on an expansive understanding of civil, political, and social rights, as developed in the Global South and in European social democracies.

In this context, during the past two decades, several Latin American courts—chiefly constitutional courts or higher tribunals—have started to produce a body of judicial decisions in increasingly complex and collective cases. Such decisions have had an important


18. Mauricio García Villegas, El Derecho como Esperanza: Constitucionalismo y Cambio Social en América Latina, con Algunas Ilustraciones a partir de Colombia [Law as Hope: Constitutionalism and Social Change in Latin America with some Illustrations from Colombia], in ¿JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA [JUSTICE FOR ALL? JUDICIAL SYSTEM, SOCIAL RIGHTS AND DEMOCRACY IN COLOMBIA] 201, 207 (Rodrigo Uprimny et al. eds., 2006) [hereinafter JUSTICIA PARA TODOS].


impact on economic, political, and legal matters in their respective countries, creating a particular debate around the "judicialization" (judicialización) of politics in Latin America that we cannot comment upon here in detail.21 Regardless of the justification we may provide for the specific role of courts in the protection of all human rights and social rights in particular, several important considerations arise.22 First, a thick conception of the rule of law, with a strong focus on the protection of social rights, is probably one of the main features distinguishing human rights and public interest law litigation in Latin America from its counterpart in the United States. Based on constitutional models closer to the Social Democrat paradigm and generally less skeptical of collective rights, the Latin American legal framework—with few exceptions—allows for particularly fertile strategies in the justiciability of social rights. Second, the frequent complexity of the cases litigated by PIHR clinics in Latin America is characterized by: (a) the variety of political actors involved in each case, (b) the multi-dimensional nature of the reparatory measures that must be pursued by the State (e.g., legal reform, public hearings, international settlements, etc.), and (c) the need for subsequent monitoring of the effective compliance with courts’ decisions in rather weak institutional contexts.23 Finally, there is the notion in these countries that the concept of human rights is encompassed by, and should be co-extensive with, the progressive constitutional guarantees enabled by the respective post-authoritarian political processes of democratic reform.

As we will suggest, this legal-political context is a key feature for assessing the role of both national courts and the strategies


followed by PIHR clinics in Latin America. For that reason, and despite certain stylized and abstract critiques of the “idolatry of human rights”\textsuperscript{24} or the judicialization of politics by human rights litigators, we defend a politically conscious, context-driven interpretation of the role of PIHR clinics in Latin America.\textsuperscript{25} By doing so, we try to provide an alternative understanding of the meaning, objectives, and implications of strategic litigation within institutional contexts that, from a purely academic perspective, may appear misplaced, misguided, or naïve.

B. The Emergence of PIHR Litigation in Latin America

With some meritorious exceptions, Latin American legal education has been characterized by the teaching of law as an exercise in memorizing legal rules contained within a vast set of legal codes.\textsuperscript{26} At the same time, while classical clinical education and community legal services (consultorios legales) were both promoted and implemented in some Latin American countries more than thirty years ago (e.g., Chile and Colombia), the impact of these types of traditional clinics on legal education in Latin America has been marginal and largely ineffective.\textsuperscript{27} (It is important to keep in mind


that the study of law in most of Latin America is part of a five-year undergraduate degree.)

In the early 1990s, faced with this diagnosis of legal education, a small group of human rights legal clinics formed in Latin America with the aim of re-appropriating the public role of both international law and legal education in the South. Under the auspices of the Ford Foundation and the U.S. Agency for International Development (USAID), in 1995 a group of Chilean, Argentinean, and Peruvian universities formed a consortium of public interest law clinics coordinated by Diego Portales University, in Santiago, Chile.28 The consortium, eventually called “Latin American Public Interest and Human Rights Law Network” (hereinafter “PIHR Network”) started a pilot clinical program in late 1995.29 During the first stage of the program, from 1995 to 1996, four local workshops were held in Bogotá, Buenos Aires, Lima, and Santiago, while an international and comparative law seminar also took place in Santiago.30 This stage was instrumental in identifying ways to permanently involve law schools in public interest and human rights law initiatives.31

In December 1996, a second phase was initiated in Argentina, Chile, and Peru. The program established a network of public interest and human rights law university clinics, involving litigation, clinical exchange, and research. Professors and students worked within each country and also interacted in regional meetings with their counterparts in other countries. Professors heading these clinics were encouraged to spend three to four weeks at a U.S. law school clinic with extensive public interest law experience.32 The PIHR Network evolved over the next fifteen years, incorporating PIHR clinics from México, Ecuador, and Colombia, and maintaining a strong base of cooperation with select U.S. clinical programs at Columbia University, American University, Stanford University, Harvard

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28. See Wilson, supra note 27, at 536, 555.
29. Id. at 536.
31. Id.
32. Felipe González, Evolución y Perspectivas de la Red Universitaria Sudamericana de Acciones de Interés Público [Evolution and Perspectives of the South American University Network of Actions of Public Interest], in DEFENSA JURIDICA DEL INTERÉS PÚBLICO, supra note 26, at 61.
University, The George Washington University, and The University of Texas.  

Despite their particularities, all PIHR clinics developed legal strategies based on a form of judicial activism that aspired to be effective in representing the rights, needs, and interests of persons and peoples traditionally excluded from power or otherwise in a position of economic, social, or political disadvantage vis-à-vis local elites. PIHR clinics thus operate by selecting leading cases in highly sensitive areas such as non-discrimination, the enforceability of social rights, access to information, political accountability, institutional and domestic violence, and the representation of workers unions, indigenous peoples, and grass-roots community organizations. In that sense, one major difference between more traditional community legal services and PIHR clinics has been the way in which the latter conceive themselves not only as a pedagogical tool for the teaching of law, but also as agents of democratic change in instances of institutional weakness or failure characterized by a lack of political will to act in defense of socially, politically, or culturally disadvantaged groups or individuals. A good description of strategic litigation in this context comes from the Center for Legal and Social Studies (Centro de Estudios Legales y Sociales) (CELS) in Argentina, a prominent NGO that pioneered the PIHR clinic model in conjunction with the University of Buenos Aires:

[Strategic human rights litigation] seeks to operate on the nexus between the judicial and political spheres, based on the constitutional recognition of rights and new procedural mechanisms for representing [social] interests. The purpose of raising judicially public conflicts or those that transcend


the plane of the individual is to introduce issues into the agenda of social debate, [and] to question the process through which state public policies are defined, the content of such policies, as well as their implementation and potential social impact.\textsuperscript{35}

So conceived, PIHR clinics have played an active role in the process of consolidation of a “thin”/liberal conception of the rule of law in Latin America, a task essentially associated with the defense of civil and political rights. By promoting strategic litigation in the field of social rights, environmental rights, and the legal representation of local communities generally excluded from access to both the political and judicial systems, PIHR clinics have also contributed to the consolidation of a thicker conception of the rule of law, one that establishes a necessary connection between law, social justice, and democracy. PIHR clinics are thus part of a political culture based on the public role of a private profession and the civil obligation to mediate between justice and those denied access to that justice. In that capacity, these legal clinics have developed several strategies aimed at the enforceability of international human rights obligations and constitutional guarantees that have a direct impact on the protection of the rights of the most disadvantaged, excluded, dominated, and exploited persons in their society.

Most certainly, PIHR strategic litigation at the domestic and international levels is not an original contribution of human rights clinics in Latin America. Several human rights clinics in the world, including in the United States, offer this type of approach.\textsuperscript{36}

\begin{footnote}{35} \textit{See generally} Centro de Estudios Legales y Sociales [Center for Legal and Social Studies], Litigio Estratégico y Derechos Humanos: La Lucha por el Derecho [Strategic Litigation and Human Rights: The Struggle for the Rule of Law] (2008) [hereinafter CELS]. In this respect, the strategic litigation championed by PIHR clinics and Latin American activists is very similar to (and to a great extent modeled upon) what in the United States is called “public interest” or “impact” litigation. \textit{See generally} Scott L. Cummings & Deborah L. Rhode, \textit{Public Interest Litigation: Insights from Theory and Practice}, 36 Fordham Urb. L.J. 603 (2009) (situating the U.S. debate over public interest litigation in theoretical and empirical context and arguing “that such litigation is an imperfect but indispensable strategy of social change”).\end{footnote}

\begin{footnote}{36} \textit{See} David Mcquoid-Mason et al., \textit{Clinical Legal Education in Africa: Legal Education and Community Service}, in \textit{The Global Clinical Movement: Educating Lawyers for Social Justice} 23 (Frank S. Bloch ed., 2011) [hereinafter \textit{GLOBAL CLINICAL MOVEMENT}]; \textit{see also} Bruce A. Lasky & M. R. K. Prasad, \textit{The Clinical Movement in Southeast Asia and India}, in \textit{GLOBAL CLINICAL MOVEMENT}, \textit{supra}, at 36. For an example of strategic litigation conducted by a\end{footnote}
However, this wave of Latin American clinics exhibits two characteristics that, in our view, may distinguish them from their original “founding fathers” in the United States. First, PIHR clinics have placed themselves in a more direct defense of the imperatives of social justice writ large, by engaging as social actors in a democratic-constitutional context (as distinguished from the classical liberal conception of the “rule of law”). Second, PIHR litigation by these legal clinics has reinvigorated the adoption and implementation of international human rights law by virtue of their creative and sustained strategies of enforceability, geared not only toward the effective implementation of civil and political rights but also the enforcement of economic and social rights as well. By doing so, PIHR litigation has had an impact on the way law is both conceived and taught domestically, as well as the extent to which human rights law can be both applied and developed from the ground up.

C. The Pedagogy of Public Interest and Human Rights Clinics

As we will indicate in the next section of this article, one of the main contributions of PIHR clinics in Latin America can be found in the type of human rights cases that have been litigated by these clinics throughout the past two decades. But along with this contribution, it is also important to call attention to the pedagogical dimension of PIHR clinics in Latin America. As previously suggested, legal education in Latin America, as in the Continental tradition (Europe), has been mainly characterized by a black-letter law approach to the study of codes, regulations, constitutions, and even international law. As opposed to this traditional way of teaching law, PIHR clinics developed new and radically peer-oriented forms of education. Against the mere memorization of rules and doctrine, PIHR has pushed for context-based, impact-oriented, and case-driven ways of including law students in the practice of law. By analyzing the juridical possibilities as well as political implications of strategic litigation in human rights cases, PIHR law students in countries like Argentina, Chile, Colombia, and México, among others, have acquired hands-on experience in the practice of law that traditionally remained out of bounds for law students.


37. See infra Part II.D.
Re-imagining the Human Rights Clinic

On the one hand, PIHR students participated in seminars to address the main challenges of the cases in which they were taking part; they regularly participated in meetings with other lawyers who provided advice for taking on highly-complex cases; they engaged with NGO representatives to develop strategy for the cases as well as to discuss the legal initiatives spearheaded by the clinic; and in some cases, wrote newspaper articles, columns, or press releases related to the litigation. The PIHR students undertook all of this while simultaneously conducting legal research both under domestic and international law, drafting memos, and so on. Participation in this range of activities helped provide PIHR students with a more complex and robust knowledge of legal practice and human rights activism.38

During the course of their clinical experience, PIHR students also learned how to engage with their professors in a less hierarchical way. Deeply influenced in this respect by U.S. critical legal theory, PIHR law professors attempted to overcome a long tradition of intellectual distance and authoritarian control of the educational process within the law school.39 Unlike their colleagues in traditional classroom settings, PIHR students typically have been responsible for proposing to bring a case and weighing its merits under the PIHR umbrella; that is, analyzing if there have been any human rights violations, if the case is in the public’s interest, if there is a group of people interested in pursuing the political agenda of the case, etc. At the same time, PIHR students have had to defend their case proposals before their law professors and student colleagues; this meant that they needed to be able to constantly review the strategy pursued. In all its activities, the PIHR clinic tended to operate—with some obvious restrictions—as a law firm in which all members play a significant and largely equivalent role. By doing so, PIHR law professors have made a considerable contribution to the democratization of legal education in Latin America.

38. See Erika Castro-Buitrago et al., Clinical Legal Education in Latin America: Toward Public Interest, in GLOBAL CLINICAL MOVEMENT, supra note 36, at 69, 69–86.

D. PIHR Clinics in Argentina, Chile, and Colombia: Enforcing Social Justice While Training Capable and Ethical Lawyers

The experience of both designing and establishing PIHR clinics in Latin America has already been documented to some extent.\textsuperscript{40} Here we focus on a few examples of PIHR strategic litigation in Argentina, Chile, and Colombia that may be useful in grasping the particularities of such clinical experiences. To be sure, the selection of cases in this section is both limited and subjective and does not pretend or purport to be indicative of the global work more generally undertaken by PIHR clinics in the referenced countries. Nonetheless, we believe these cases provide some idea of what defending social justice and the rule of law may signify for both human rights lawyers and law students engaged in a PIHR clinic.

1. Argentina

The Argentinean clinical experience of strategic litigation led by PIHR clinics is both broad and successful in its impact. For practical purposes, we have decided to highlight two particularly successful experiences that have been in place for some time: first, the UBA-CELS Clinic,\textsuperscript{41} established by CELS and the Buenos Aires National University School of Law (UBA), and second, the Public Interest Law Clinic at Palermo School of Law.\textsuperscript{42}

Since 1995, the UBA-CELS Clinic has litigated a series of human rights cases with the express design and intent to support and

\textsuperscript{40} See Castro-Buitrago et al., supra note 38; Wilson, supra note 27.


\textsuperscript{42} Clínica Jurídica de Interés Público, UNIVERSIDAD DE PALERMO, http://www.palermo.edu/derecho/clinicasJuridicas/clinica_int_publico.html (last visited Apr. 7, 2011). The Palermo Clinic has also utilized, as an alternative, the joint venture UBA-CELS model in collaboration with organizations such as the Asociación por los Derechos Civiles [Association for Civil Rights] (ADC) and the Asociación Civil por la Igualdad y la Justicia [Civil Association for Equality and Justice] (ACIJ), while preserving some of the characteristics of a “laboratory model.” Id. Palermo School of Law also runs a clinical program on access to information, Clínica de Acceso a la Información Pública, UNIVERSIDAD DE PALERMO, http://www.palermo.edu/derecho/clinicasJuridicas/clinica%20_acceso_informacion_publica.html (last visited Apr. 7, 2011).
strengthen the Argentinean democratic regime. Among others, the Clinic filed a constitutional action, known as the acción de amparo, before a federal court with the purpose of forcing the central State to produce a vaccine (Candid I) for the so-called Argentinean Hemorrhagic Fever (FHA), an epidemic and endemic disease. Based on the State’s obligations, derived from the Universal and American Declarations of Human Rights, as well as the International Covenant on Economic, Social and Cultural Rights (Art. 12), the Court ordered the Argentinean authorities to produce the vaccine within a fixed period of time. Due to the scientific and political complexity of the case, both the Court and the public ministry, in the form of the national ombudsperson, supervised the State’s compliance with the ruling.

In a similar vein, the UBA-CELS Clinic submitted another acción de amparo denouncing a series of irregularities in both the delivery of medication and the analysis of viral levels in HIV/AIDS patients under the care of the Programa Nacional de Lucha Contra el SIDA, a federal program created to care for persons infected with HIV/AIDS, among other things. In this case the Clinic requested, on behalf of the beneficiaries of the program, the continuous and proper delivery of medication and administration of medical exams. The tribunal declared that the allegations made by the Clinic implied a serious breach of the right to life and the right to health of people living with HIV/AIDS, both recognized by the Argentine Constitution and international human rights law.

Particularly concerned with discrimination issues, the Public Interest Law Clinic at Palermo School of Law filed a petition designed to force the Argentine authorities to grant social security rights to gay partners living in “de facto” unions for more than thirty years.

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44. CELS, supra note 35, at 68.
47. CELS, supra note 35, at 68.
48. Id. at 75.
49. Id.
50. Id.
years. The Clinic argued that the denial of social security benefits (pensions) to a same sex partner was a violation of the right to equality before the law, as the Argentinean law recognizes de facto unions between heterosexuals. Both the First Instance Tribunal and the Federal Court of Social Security rejected the petition before the Argentinean Supreme Court of Justice finally heard the case. Before the Supreme Court of Justice reached a decision, however, the National Social Security Agency decided to reverse its position and recognize the right to social security (pensions) for same sex couples.

Another interesting case the Palermo PIHR Clinic handled dealing with discrimination was the submission of a claim to the Court of Appeals of Buenos Aires against the Instituto Superior de Educación Física N° 1, Dr. Jorge Romero Brest. The Institute, under the administrative control of the Council of the City of Buenos Aires, provided continuing sports education to residents. The Clinic argued that the student selection system, which established different quotas for the number of women and men who could access programs on continuing sports education (morning: ninety women/sixty men; afternoon: sixty women/ninety men; evening: sixty men/thirty women), was discriminatory on the basis of sex. Despite the Institute’s “historical justification” for the distinction, the Court of Appeals of Buenos Aires declared the selection system to be discriminatory. In doing so, the Court remarked not only upon the negative character of the non-discrimination clause (i.e., the requirement not to discriminate) but also highlighted the positive obligations that derived from it.

52. Id.
53. Id.
54. Id.
56. Id.
57. Id.
58. Id.
59. Id.
2. Chile

Since its creation in 1997, the Public Interest Law Clinic at Diego Portales University (DPU Clinic) has developed a strategy of litigation firmly based on the connection between the use of judicial remedies for access to justice and the empowerment of civil society organizations.\textsuperscript{60} Consumer rights organizations, sexual minorities, local communities, members of the police, and student and women's rights associations all developed joint ventures with the Clinic, enhancing the capacity of the former to interact with the system of justice. Particularly within its first ten years of existence, the DPU Clinic was able to play a paramount role in shaping public opinion on human rights issues; at the same time, the DPU Clinic ignited several legal and political debates on highly sensitive issues, such as police abuse, homophobia, and gender domination, in a legal community not unfamiliar with these forms of strategic litigation.\textsuperscript{61}

Among the most successful cases litigated by the DPU Clinic was one demanding free diagnosis and access to medical treatment for people living with HIV/AIDS. Forming an alliance with a prominent NGO representing people with HIV/AIDS (\textit{Vivo Positivo}), the Clinic sustained a long-term process of submitting constitutional cases against the Ministry of Health, in addition to simultaneously requesting precautionary measures before the Inter-American Commission on Human Rights.\textsuperscript{62} Although the Chilean Supreme Court ultimately rejected all the cases—including some which had received favorable rulings from the Santiago Court of Appeals—the wider political strategy convened with \textit{Vivo Positivo} created the

\textsuperscript{60} Felipe Viveros, \textit{La Participación de la Sociedad Civil en Acciones de Interés Público \textit{[Civil Society Participation in Public Interest Actions]}}, in \textit{CIUDADANÍA E INTERÉS PÚBLICO: ENFOQUES DESDE EL DERECHO, LA CIENCIA POLÍTICA Y LA SOCIOLOGÍA \textit{[Citizenship and Public Interest: Approaches from Law, Political Science and Sociology]} 151, 151–212 (Felipe González Morales & Felipe Viveros eds., 1998).


necessary conditions for the adoption of a national policy that granted all Chileans the right to free medication for HIV/AIDS treatment.\textsuperscript{63}

The DPU Clinic also has litigated a crucial case involving lesbian mothers’ custody rights. In \textit{Atala v. Chile},\textsuperscript{64} litigated before the Inter-American Commission on Human Rights, the Clinic submitted a petition against the Chilean Government for the violation of the right to equality before the law.\textsuperscript{65} The Chilean Supreme Court had denied a lesbian mother (also a judge) custody over her daughters because the Court found that the public expression of the mother’s sexual identity was not in the best interests of her children.\textsuperscript{66} Challenging a misplaced interpretation of the principle of the “best interest of the child,” the DPU Clinic obtained a ruling against the Chilean Government from the Inter-American Commission for a violation of the right to equality before the law and the right to special protection of children, under the American Convention on Human Rights.\textsuperscript{67} The case is currently pending before the Inter-American Court of Human Rights.\textsuperscript{68}

Ignited by a progressive concern for clinical legal education in Chile, other universities have also developed PIHR clinics in some specific areas.\textsuperscript{69} Since 2003, the School of Law of Universidad de Chile has successfully run its Environmental Law and Conflict Resolution Clinic.\textsuperscript{70} Located within a traditional school of law, this Clinic is based on a methodology that incorporates both the

\textsuperscript{63} \textit{Id.} at 150, 152.


\textsuperscript{66} \textit{Id.} \textit{¶} 13.

\textsuperscript{67} \textit{Atala}, 12.502 \textit{RTS} 1–6.

\textsuperscript{68} \textit{IACHR Takes Case Involving Chile to the Inter-American Court}, INTER-AMERICAN COMMISSION HUM. RTS. (Sept. 20, 2010), http://www.cidh.oas.org/Comunicados/English/2010/97-10eng.htm.

\textsuperscript{69} Almost all well-established law schools in Chile have legal clinics as part of their formal curricula. Nonetheless, just a few of them have been able to design and put into place PIHR legal clinics as described in this paper. The Universidad Central de Chile, in Santiago, has decided to create a new PIHR legal clinic in the field of children’s rights by 2011.

promotion of research as well as legal assistance on environmental law matters. In this latter capacity, the Clinic has provided legal services in several public interest law cases by using established administrative procedures to obtain results in the local communities’ favor. One case the Clinic worked on involved a factory in a poor and marginalized comuna of the Quinta Normal neighborhood of Santiago which processed animal fat (grasas) and which was in breach of water disposal rules and other administrative regulations. The Clinic succeeded in obtaining a decision in their favor from the urban and environmental administrative bodies in which the factory was ordered to be shut down.

Also concerned with PIHR litigation is the Legal Clinic on Access to Information established by the School of Law of Universidad Alberto Hurtado in consortium with Fundación Pro- Acceso, an NGO committed to the promotion and protection of access to information. Sponsored by the Open Society Foundation and established in 2009, this Clinic was created as a way to strengthen the enforcement of the new legal framework on access to information in Chile, as sanctioned by the Constitutional Reform of 2005 and the Law of Access to Public Information of 2008. After


72. Curso Clínico de Derecho Ambiental y Resolución de Conflictos, supra note 71.


two years of work, the Clinic has litigated, among others, cases concerning immigration authorities denying information to civil society organizations regarding new migratory legislation and the representation of the main journalistic organizations in Chile who were seeking key government data on issues of public importance held by state authorities.75

3. Colombia

The first PIHR clinic in Colombia was the Grupo de Acciones Públicas (Public Action Group) (GAP) at the Universidad Colegio Mayor de Nuestra Señora del Rosario in Bogotá, which was established in 1999. The GAP has a special focus on the judicial protection of vulnerable groups (ethnic minorities, displaced communities, and persons with disabilities, among others) and has developed highly innovative strategies for use in collective actions.76

Among the many successful cases litigated by the GAP, a few stand out in particular. In May 2001, the GAP filed a constitutional writ known as a “group action” on behalf of residents of the municipality of La Gabarra who were forcibly displaced by a paramilitary terror campaign, carried out there in May 1999 with the support of the Colombian police and armed forces.77 The administrative tribunals charged with hearing the case found the Colombian State responsible for the harm inflicted on the displaced residents due to the unlawful actions and omissions of its agents.78 In 2004, the tribunals ordered the collective compensation of the victims or their beneficiaries to be distributed through a special fund established for that purpose.79 In another case, the GAP, through one of its professors, lodged an action challenging the constitutionality of several articles of the Colombian Civil Code making reference to

77. See generally Adriana del Pilar Chacón Pinto et al., Grupo de Acciones Públicas, in ACCIONES DE GRUPO Y DE CLASE EN GRAVES VULNERACIONES A DERECHOS HUMANOS [CLASS ACTIONS AND CLASS IN CASES OF SERIOUS HUMAN RIGHTS VIOLATIONS] (Beatriz Londoño Toro & Arturo J. Carrillo eds., 2010).
78. Id.
79. Id. at 122–25.
mentally ill persons or mental illness using pejorative language which the GAP alleged “violate[d] the principles of human dignity and equality” guaranteed by the Colombian Constitution. The Constitutional Court agreed, pointing out that the development of international human rights law had produced a conception of human dignity that embraces all persons, including those with mental or physical handicaps, and ensures them equal protection under the law. The offending provisions were accordingly excised from the Code.

The Universidad de los Andes in Bogotá has similarly developed a series of highly effective projects related to the promotion and protection of human rights and the public interest. One of those projects is the so-called Public Interest Law Group (PILG), which conducts its work in three specific areas: (a) legislative counseling, (b) human rights education, and (c) strategic litigation. Among others, the PILG has successfully litigated cases dealing with:

- Colombian legislation that denies the right to conscientious objection to military service, obtaining a ruling in 2009 from the Colombian Constitutional Court which recognized the right to reject forced military training for religious, philosophical, and moral reasons.

81. Id.
82. Id. at 250–51.
• Colombian criminal rules on libel and slander, obtaining in 2010 a decision from the Colombian Constitutional Court which declared those rules unconstitutional, based on the right to due process and freedom of expression;\(^{86}\) and

• Colombian legislation that denies the rights of same-sex couples in the field of social security, migration, and civil law, obtaining three rulings from the Colombian Constitutional Court (2007, 2008, 2009) which recognized the equal treatment of heterosexual and homosexuals couples under the law.\(^{87}\)

E. PIHR Clinics in Latin America: Towards A Global Perspective

Though PIHR clinics are our chosen model for illustrating a particular perspective on human rights clinical work, we are aware that the PIHR clinics are not themselves immune from improvement through comparative evaluation. For instance, although consciously based on international human rights law, PIHR clinics have not fully conceived their role as part of a global agenda for legal action in the field of human rights. With few exceptions, PIHR clinics in Latin America have tended to act based on domestic forms of enforceability of international human rights law, avoiding

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86. Corte Constitucional [C.C.] [Constitutional Court], Sala Plen. junio 26, 2009, M.P: J. Pérez, Sentencia C-417/09, Expediente D-7483 (pp. 1, 2, 92–93) (Colom.), available at http://gdip.uniandes.edu.co/archivos/sentencia_libertad.pdf. This case was litigated in conjunction with the Foundation for Free Press (Fundación para la Libertad de Prensa or FLIP). Id. at 14.

complementary regional agenda on human rights matters that could be defined as strategic priorities. At the same time, PIHR clinics have not always been able to fully grasp the complexity of new human rights and public problems accompanying globalization—e.g., transnational migration and associated humanitarian crises, trafficking in persons and drugs, and economic colonialism and development—that, because of their inherently transnational character, affect a wider range of peoples and individuals. In that sense, it would seem natural to envision PIHR clinical development in Latin America as drawing on the experiences of their counterparts in North America and moving toward a more global agenda for the teaching and practice of human rights law in those countries.

III. RE-IMAGINING THE HUMAN RIGHTS LAW CLINIC: LESSONS FROM LATIN AMERICA

As we have seen, the early Latin American legal clinics were created during critical junctures in the history of their respective countries. The return to democracy in Argentina and Chile after years of authoritarian rule and repression represented not just an overhaul of the countries’ respective political systems, but also a complete re-conceptualization of the function and role of law in post-conflict democratic society generally. Indeed, the notion of civil society itself was drastically reformulated, becoming that of a critical (in both senses of the word) change agent in the creation and consolidation of good democratic governance. Similarly, the adoption in Colombia of a new social democratic constitution in 1991 ushered in an unprecedented era of democratic consolidation that brought with it an invigorated social activism on public interest and human rights issues. To some extent, the democratic spaces created by the political transitions in Argentina and Chile, and the new constitution in Colombia, were filled by non-governmental actors and organizations. But, as explained in the previous section, a handful

88. For a thorough discussion of the transformative role of law during periods of political transition, see Ruti Teitel, Transitional Justice 11–26 (2000).
89. Constitución Política de Colombia [C.P.].
90. See, e.g., Pinto et al., supra note 77, at 110, 113; Londoño Toro, supra note 80.
91. See, e.g., In Argentina, a Bahá’í-inspired NGO Works to Strengthen Civil Society in a Time of National Crisis, One Country, http://www.onecountry.org/e141/e14106as UNIDA story.htm (last visited Apr. 2, 2011); Yianna Lambrou, The Changing Role of NGOs in Rural Chile After Democracy, 16 BULL. LATIN AM.
of university law schools, guided by progressive U.S.-educated professors, took up the challenge as well, seeking to train students to be better lawyers by using clinical methods that engaged with and impacted local realities.

A. Lessons for U.S. Human Rights Law Clinics

The success of the PIHR clinics in their home countries is evident from both the pedagogic and advocacy perspectives. We do not mean to suggest by the foregoing, however, that human rights clinics are generally best configured as PIHR clinics, in Latin America or elsewhere. Rather, our purpose has been to provide a snapshot of a well developed and successful external clinical model in the realm of human rights that offers us a number of general insights on the work we do in the United States. What, then, are some of the lessons that U.S. clinicians working on human rights issues can take away from the PIHR clinic experience? In our opinion, there are at least four, outlined below.

1. Context Matters

Human rights clinics are best configured as a function of the contexts in which they operate. Some context can be created, such as the areas of law in which one chooses to specialize; some cannot, such as the fact that these clinics are, by definition, university- and law school-based (more on this below). The observation that “context matters” has many permutations, but the one that we would highlight is the significance of working on human rights issues in your home country, whether locally, regionally, or nationally. PIHR clinics view human rights issues first and foremost as those affecting their communities and their country. And they do something about it by “thinking globally but acting locally.” This approach is in sharp contrast to that favored by many U.S. clinical programs, which tend


92. There are, of course, a number of important challenges faced by U.S. law school clinics (and clinicians) that wish to engage in public interest or strategic litigation. See Cummings & Rhode, supra note 35, at 625–28 (describing as likely impediments limitations on clinician status such as law school resources and clinic capacity).

93. Clínica de Interés Público, supra note 76; Grupo de Derecho de Interés Público, supra note 83. Of course, as noted already, such a clear definition of purpose may entail tradeoffs and possible limitations. See supra Part II.
to focus on human rights issues abroad, though this practice in recent times has begun to change.

All PIHR clinics tackle primarily, if not exclusively, local problems or institutional dynamics that negatively impact the human rights of their co-citizens. There are several reasons why ensuring a significant degree of domestic focus in human rights clinical work is important. First, it provides students with concrete opportunities to apply in practice much of what they have learned elsewhere in law school, making their clinical experience more relevant to their legal education generally. Second, it affirms for students the message that good human rights practice begins at home, and that human rights abuses are as much a U.S. problem as one faced by citizens of other countries. Third, by working on human rights issues through domestic legal and political systems, a human rights clinic and its students will be better situated to promote the internalization and eventual enforcement of basic rights than when they operate in a foreign country. Last, but certainly not least, addressing domestic human rights issues confers upon U.S. clinics that also work abroad an enhanced legitimacy when responding to skeptical counterparts in other countries who (rightfully) complain of U.S. moral imperialism and hypocrisy in the area of human rights.

2. Client-Based Lawyering is Human Rights Lawyering

Justice writ large starts with justice for individuals. PIHR clinics are thriving examples of how the benefits of pursuing justice through the direct representation of individual clients can be maximized when combined with other forms of strategic advocacy such as lobbying, legislative reform, media and educational campaigns, and academic study. A good example is provided by the GAP in Colombia, which not only litigates group actions on behalf of victims of human rights abuses, but at the same time advocates for strengthening the constitutional remedies invoked in their cases through

94. See, e.g., Hurwitz, supra note 12, at 42–45; see also supra note 13 and accompanying text.
96. See supra Part II.D 1–2; CELS, supra note 35 (detailing the different strategies involved in strategic litigation in Argentina).
complementary academic research and publication. Though not all PIHR clinic projects involve clients—as when unconstitutional norms are challenged—most do. Indeed, the teaching methodology of most PIHR clinics is centered on such an approach. Whether it be persons infected with HIV/AIDS or victims of paramilitary violence displaced from their homes, strategic litigation and advocacy on behalf of vulnerable sectors of society is the touchstone of the PIHR clinic.

As noted already, the predominant model of human rights clinical work in the U.S. emphasizes primarily non-client, non-litigation advocacy techniques. In our experience, however, the pursuit of legal redress for victims of human rights abuses at the local, national, and international levels is an integral part of what human rights lawyers in most countries outside of the United States do on a regular basis; a fact which is often downplayed by U.S. human rights clinicians. And while human rights advocates—a category that includes but is not limited to lawyers—also engage in the non-litigation advocacy emphasized by their colleagues such as monitoring, fact-finding, and reporting, that fact alone is an insufficient basis in our view for responding in any definitive manner to the questions of what and how we should teach the law students who take our clinics. In other words, we view the PIHR experience as a call for putting the practice of law back at the heart of the definition of “human rights lawyering,” rather than making the term synonymous and co-extensive with all human rights advocacy, regardless of who carries it out.

In so doing, neither we nor the PIHR clinicians we draw our inspiration from ignore the impact of various critiques of the function of law in the international human rights context. There are indeed legitimate bases from which scholars can criticize the role of law in

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97. See supra Part II.D.3; Pinto et al., supra note 77; Londoño Toro, supra note 80.
98. See supra Parts II.D.1–3.
99. Akram, supra note 11; Hurwitz, supra note 12, at 38–39; see also supra note 13 and accompanying text.
101. See Bettinger-Lopez et al., supra note 95.
the promotion and protection of human rights generally, and we share the view that conscientious advocates must reflect upon the potential consequences of their actions. But we do not agree that the solution is to reject, "trash," or otherwise dilute the human rights discourse or legal strategies involved in this work. On the contrary, the PIHR experience vindicates what other activist scholars have recognized: as a practical matter, the interests of victims' grave human rights violations may be better served by taking strategic advantage of the opportunities that national, regional, and international legal norms can provide to promote human rights protections than by any realistic alternative offered by the critics of such discourse. Which brings us to the third lesson.

3. Train Good Lawyers First and the Rest Will Follow

What then should be the pedagogic objective of a human rights law clinic? Recall the issues identified in the introduction and reflected in the question: Are we in the business of training lawyers or human rights activists? By now it should be evident that PIHR clinics suggest a different approach to addressing these issues than the one that currently prevails in the United States.

102. Id.; Kennedy, supra note 5.
103. See Bettinger-Lopez et al., supra note 95 (applying critical legal theory to ambivalent advocacy).
104. Id. (citing critics of human rights strategies that deal with abuses directly as opposed to attacking the structural inequities and hegemonic ideologies that underlie them); see Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1356, 1357 (1988).
105. Crenshaw, supra note 104. In a debate with obvious parallels, Kimberlé Crenshaw questions the "unrealistic" analysis of legal scholars critical of the civil rights movement's reliance on rights discourse and "liberal legal ideology:"

[1] In addition to exaggerating the role of liberal legal consciousness and underestimating that of coercion, Critics also disregard the transformative potential that liberalism offers. Although liberal legal ideology may indeed function to mystify, it remains receptive to some aspirations that are central to Black demands, and may also perform an important function in combating the experience of being excluded and oppressed. This receptivity to Black aspirations is crucial given the hostile social world that racism creates. The most troubling aspect of the Critical program, therefore, is that 'trashing' rights consciousness may have the unintended consequences of disempowering the racially oppressed while leaving the white supremacy basically untouched.

Id. at 1357–58 (citation omitted).
PIHR clinics rely on case and litigation-based methodologies to teach their students basic lawyering skills, while enabling life-changing experiences through the promotion of social justice domestically.\textsuperscript{106} Indeed, the social activist credentials of the PIHR clinic professors are beyond reproach. Yet their primary educational mission is not to create carbon copies of their activist selves, but to train capable and ethical attorneys whose legal skills will transfer across, and ensure success in, the legal profession. To be sure, the strategic litigation methodology favored by PIHR clinics is multifaceted and draws upon complementary non-legal activities to promote the causes being litigated.\textsuperscript{107} But by acting locally (and sometimes internationally) to promote, defend, and vindicate fundamental rights through such strategies, these clinics have demonstrated that high-impact human rights work can be married to traditional clinical methodologies such as case-based teaching and individual client representation to achieve heightened degrees of pedagogic and advocacy success.\textsuperscript{108}

This approach tends to confirm our view that “human rights lawyering” that relies primarily on non-legal means such as monitoring, fact-finding, community education, reporting, and lobbying is better described as human rights advocacy done by lawyers (or law students), because it does not, strictly speaking, require legal skills. This difference in perspective about the nature of our work as human rights clinicians is more than semantic, since it determines the nature of the skills-building enterprise that takes place in our clinics. Human rights “lawyering” understood primarily as advocacy through non-legal means will (and does) translate into a clinical skills focus on a diverse range of non-legal activities—and thus non-legal skills—such as public relations and media strategies,

\textsuperscript{106} See supra Part II.B–D.  
\textsuperscript{107} CELS, supra note 35.  
organizing, fact-finding and reporting, and lobbying. Human rights lawyering understood primarily as client representation and litigation, supported or complemented by non-legal advocacy, will correlate to a more traditional “tool kit” of professional skills such as legal interviewing and counseling, negotiation, oral advocacy, and the like. And in our view, a number of good reasons exist in the context of clinical legal education to favor the latter definition over the former.

First, as law professors teaching law students in a law school setting, it would seem we are tasked with the training, first and foremost, of competent, ethical lawyers, not human rights activists, per se. Second, students interested in becoming human rights activists as well as lawyers can get specialized training in human rights advocacy elsewhere more appropriately. Third, in our experience, good lawyering skills in the classical sense are wholly transferable and provide an effective baseline for developing and exercising other non-legal human rights advocacy skills; conversely, the transferability of the non-legal skills emphasized by most human rights clinics to the conventional practice of law is less clear. Fourth, while it is undoubtedly true that a percentage of the human rights clinic students who take the course do so to learn more about

109. See supra note 12 and accompanying text. The authors recognize that some sorts of reporting may engage in legal analysis, though it is not necessary that lawyers conduct it.

110. See supra note 108 and accompanying text.


112. In today’s competitive market, it could be argued (at least with respect to the vast majority of law schools) that we do our students a disservice by emphasizing non-legal advocacy skills in a human rights clinic that make them no more attractive to most traditional legal employers. See Hurwitz, supra note 12, at 44–45 (describing how students complain that such human rights work is “not legal enough”).
how human rights work is conducted, and may have an interest in going into the field, many do not. Putting the “law” (and the client) back into human rights “lawyering” by emphasizing pedagogical goals that integrate human rights work with traditional clinical methodologies is likely to be of more value to most students after graduation. Finally, there is a significant comparative advantage to conducting human rights legal work from a law school clinic that is lost when we engage in other types of advocacy that neither require nor benefit from having lawyers—or law school clinics—conduct it. Which brings us to the final lesson.

4. University Human Rights Clinics are Unique Social Actors with Comparative Advantages (and Disadvantages)

The success of PIHR clinics in Latin America illustrates at once their important role in the human rights movement of their respective countries, as well as their distinctiveness from other actors who populate that movement, particularly NGOs.\(^{113}\) Human rights clinics are typically pedagogic entities anchored in academic institutions from which they inherit a penchant for marrying theory with practice, as well as for rigor, reflection, and innovation.\(^{114}\) Moreover, another part of their distinct comparative advantage is that, of course, they operate out of university law schools with access to substantial intellectual, human, and, sometimes, economic resources. They can be, in other words, better suited to conducting effective legal advocacy than any other actor. And their work carries an aura, if not an actual “stamp,” of academic legitimacy that in most societies carries an influence not easily replicated by their NGO counterparts.\(^{115}\) Of course, human rights clinics have significant limitations as well, such as the inability to take on large case or project loads.\(^{116}\) For better or worse, these also distinguish such clinics from their non-governmental brethren.

PIHR clinics in Latin America are not without their critics, including traditional academics and practitioners who are resistant to changing conventional teaching methodologies and skeptical of the

\(^{114}\) Id. at 580–85.
\(^{115}\) Id. at 577.
\(^{116}\) Id. at 579.
value of non-hierarchical experiential learning for students. Nevertheless, the consolidation of university-based PIHR clinics in various countries around the region has ensured human rights abuse victims and the human rights movement in general a unique and important new partner.

From an advocacy point of view, the distinct comparative advantage of having university legal clinics work on legal causes through judicial and political channels is evident from the case studies summarized in the prior section. For example, the fact that a well-respected private law school clinic was the group responsible for litigating the first cases on access to medical treatment for HIV/AIDS in Chile was of enormous material and symbolic importance for the persons living and working with HIV/AIDS in the country.117 The same thing can be said for the case of the judicial and quasi-judicial (Inter-American Court of Human Rights and Committee on the Elimination of Racial Discrimination, respectively) representation of ethnic minorities by Colombian PIHR clinics. By making use of their legal capacity, public image, and domestic and international networks, PIHR clinics have substantially helped some of these people to be known, heard, and considered by the system of justice. The fact that two highly-valued law schools in Bogotá (Rosario and Los Andes) represent these people adds political significance to the cases and has a symbolic impact within the legal community (e.g., lawyers, academia, and the judicial system). Finally, the establishment of PIHR clinics by traditional Argentinean law schools (largely self-marginalized from the evolution of legal education) has granted them a particular status within the legal system. The experience of the UBA-CELS Clinic, in this sense, is probably the most solid example of this symbiosis between human rights activism and legal education and practice.

IV. CONCLUDING OBSERVATIONS

There is much we in the United States can learn from the Latin American PIHR clinics as we confront the basic questions highlighted in the introduction about how best to configure a human rights clinic. While there is no one right way to do so, and there seem to be as many approaches as there are human rights clinicians, the Latin American experience described offers important insights into the process through which we define our pedagogical values and

priorities in this country. In reality, this experience represents not so much an alternative to prevailing practices as a variation, a difference of pedagogic emphasis within the range of subjects and skills comprising human rights activism that we choose to teach. For this reason we find that PIHR clinics routinely rely on non-legal advocacy to support their clients’ causes in court, while many (though not all) of the U.S. human rights clinics that favor non-litigation advocacy may nonetheless pursue or assist in domestic or international cases.

The idea, we submit, is not to promote one approach over the other, but to surface the debate around the pedagogic choices we make in choosing one or the other and the implications of those decisions. In so doing, we view this exercise as part of an open and honest dialogue between law clinics from the Global South and the North. This is a dialogue that aims at recognizing the early and permanent contribution of U.S. clinical legal education on Latin American law schools, while taking into account the way in which the latter have evolved to create through the PIHR clinics a rich, new educational and professional experience for future lawyers that should be of interest to U.S. human rights clinicians.

As noted already, differences in where you place the pedagogic accent within a given human rights law clinic will translate into differences in what you teach. This is particularly true with respect to the question of what professional skills to teach students—a constant bugbear of many human rights clinicians. In this regard, we firmly believe, based on the PIHR model and our own experience in the field, that the same core skill set promoted by most traditional law clinics in the United States—legal interviewing, counseling, negotiation, and oral advocacy—does have an important role to play in U.S. human rights law clinics, more than is generally recognized. Whether these skills are taught is a pedagogic choice made by the clinical professor, not a limitation inherent in human rights clinics per se or a function of any particular definition of human rights “lawyering.” Our experience and that of the PIHR clinics have shown repeatedly that these basic legal skills are highly transferable and thus invaluable to all kinds of advocacy, human rights included, and not just in the litigation context.

118. See supra note 11 and accompanying text.
I. Introduction

This text explores the differences between the free legal assistance services provided by universities, and human rights law clinics, which are the main models for clinical work at the university level today. To begin, the task requires the definition of a few basic concepts related to clinical legal education in Latin America. Once the definitions are on the table, we will be able to begin diagnosing those differences.

II. Definitions

First, we must establish what we understand “university-based clinical work” to be. Generally speaking, according to the interpretation of

* Professor of The George Washington University School of Law and Director of the Human Rights Clinic at that institution of higher education.
Argentinian professor Victor Abramovich, a clinic is “a legal work environment that tends to guarantee the applicability of some rights and the access to justice by certain sectors of the population and, at the same time, [is] a teaching space dedicated to the preparation of students for the practice of the legal profession.”¹ This definition provides the general framework for the discussion.

Two types of legal clinics prevail in the Latin American experience: one that provides free legal services, known in different places as the legal aid clinic or university “law-firm”; and the public interest law clinic, whose most pertinent expression is the human rights clinic.

Regarding the first model, what does providing free legal assistance or services mean under this framework? It means serving the basic legal needs of low-income individuals – the clinic’s users – through the services or counseling of Law students, who work under the supervision of experienced practicing attorneys. The emphasis of these clinics is, on one hand, in providing an important social service to the community, and on the other hand, in offering the participating students, a practical experience in the legal profession during their university education.

¹ ABRAMOVICH, Victor E. “La enseñanza del derecho en las clínicas legales de interés público. Materiales para una agenda temática,” in González Morales, Felipe (ed.) Defensa Jurídica del interés público: Enseñanza, estrategias, experiencias. Santiago, School of Law of the Universidad Diego Portales, 1999, page 61. While professor Abramovich is referring mainly to public interest legal clinics, in my opinion, this general definition would also include other models of clinical activity.
Now then, with respect to human rights clinics – the second model –, it is worth asking: what does it mean to perform clinical work in this field? In my opinion, it means carrying out any activity within the framework of international human rights law (IHRL), whether through national actions, constitutional or otherwise, or through international procedures such as the ones offered by the Inter American Human Rights System. The common thread in such activities is, always, achieving the goal of expanding the protective scope of the Law, as well as promoting, at the domestic level, the effective implementation and compliance by the State of a guaranteeing regulation in accordance with IHRL.

Before analyzing some of the differences between the two models, I think it is appropriate to make a clarification regarding the so-called “public interest” law clinics and the so-called “human rights” law clinics. They are frequently treated as synonyms, but in fact, the defense of public interests is broader and includes other important social impact activities that do not strictly fit under the human rights category. An example of this are actions on behalf of consumers’ rights; another example could involve certain environmental protection measures. In other words, “human rights initiatives can be

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understood to be public interest initiatives but, strictly speaking, not all public interest initiatives are related to human rights issues.”

III. Diagnosis of the Differences

In the following exercise, I proceed to contrast the two types of legal clinics by identifying their adherence to the five axes that I derive from the main features of the clinics in general. I would like to highlight that my scheme shows an assortment of nodal issues that I think are enough to make a feasible comparison, although it is possible, of course, for there to be others. Likewise, I acknowledge that, in practice, not all clinical experiences fit into one or the other of the types under study; instead, hybrid models arising from a range of university-based clinical work possibilities, rather than two exclusive options, are implemented.

Even so, if we accept the definitions of free legal service clinics, as well as of public interest and human rights legal clinics commonly offered, we get five axes that guide our comparative analysis: the clinic’s focus, number and type of clients, the beneficiaries, methods employed, and goals sought.

\[3\] Ibidem, page 12.
1. Focus

From the definitions offered, it can be easily gathered that free legal service clinics have an aid-oriented focus. In fact, they are frequently called “aid clinics” because of their focus in providing free legal assistance or services, usually in the areas of civil, criminal, labor, family, or administrative law. By contrast, human rights clinics tend to focus mainly on strategic litigations and lobbying aimed at achieving an expansion of the protective scope of the Law, as well as influencing public policy on the matter; and while they do work with ordinary law, they usually focus on their constitutional and international law dimensions. Before moving forward, it is worth specifying what strategic litigation is:

“[Public interest] litigation in human rights seeks to generate an impact at the intersection of the legal and political spheres, building on the constitutional recognition of [those] rights and new procedural mechanisms for representing [social] interests. The assertion of strategic litigation in the judicial sphere with respect to “public interest” cases, as opposed to individual disputes, serves a number of purposes. One is to introduce topics into [public] debates on the social agenda. Another is to question the way that State policies are defined and implemented, as well as the content of those policies and their social impacts. Sometimes, when the State fails to act, [strategic litigation] seeks to activate decision making processes in the realm of
public policy, or to generate the reform of the institutional and legal frameworks within which these policies are developed.\textsuperscript{4}

2. Clients

As already stated, aid clinics serve low-income people with basic legal needs. Given its university-based social service focus, it seeks to serve the largest number of clients or users possible. By contrast, human rights clinics serve people whose legal issues tend to represent systematic violations to domestic and international human rights standards, imprinting upon the legal representation of the client in question a more qualitative, rather than quantitative, approach. In other words, to the human rights clinics, the number of people served is not nearly as important as the projection and transcendence of their respective causes before the regulatory and structural deficiencies they are trying to fix.

3. Beneficiaries

The beneficiaries of the public interest clinics are the clients themselves. But when talking about human rights clinics, there is a scale of potential beneficiaries that transcends those receiving the aid—the clients, center of strategic litigation. Thus, in addition to these, others who have been equally or similarly harmed by the

\textsuperscript{4} Centro de Estudios Legales y Sociales (CELS), \textit{Litigio estratégico y derechos humanos. La lucha por el derecho}, Buenos Aires, Siglo XXI, 2008, page 17.
alleged harmful conducts or State structures, benefit as well. Through this litigation of certain “witness” or paradigmatic cases, what is being sought is to extend the benefit to the population and social sectors affected. Therefore, when the legal system so allows, human rights clinics tend to rely on class action suits to promote the violated interests of such groups or communities.

In order to better illustrate this, imagine the case of an undocumented alien who arrives to a university legal practice because the local civil authorities have refused repeatedly to issue a birth certificate to her son, who was just born in the country, alleging that he has no right to receive citizenship because his parents are undocumented migrants in transit, in spite of the *ius solis* principle consecrated in the Constitution. Likewise, let’s assume that such practice is not only common, but it is also well documented and there are thousands of children affected from among the considerable immigrant population.

A legal practice or aid clinic would seek to solve the specific problem of the client with a legal action aimed at registering the child before the office of vital statistics, by means of, for example, an amparo or protection suit. Likewise, it would also appeal to arguments of equity aimed at having the Judge order the civil authorities to issue the documentation needed. Once this purpose is achieved, regardless of the means employed to achieve it, the case would close and the following would occur: the clinic would have added one more case to the record of users successfully served, according to the quantitative accounting used to illustrate its efficacy as a social service. Of course,
there is nothing wrong with this. It is just a matter of the focus given to the work performed under this legal clinic modality.

By contrast, a human rights clinic would contemplate more ambitious challenges: how to eradicate the generalized practice of denying birth certificates—and citizenship—to the children of undocumented immigrants? How to respond to the socio-political dynamics that enable such an aberrant practice in legal terms? How to leverage the case to attack the legal, social, and political grounds that support it?

As can be appreciated, for these types of clinics, the central point of the strategy would be to litigate the case: to denounce not only what happened to one woman, but rather the documented practice of denying fundamental rights to an entire sector of the population. If possible, they would seek a judicial response to repair the effect of such generalized practice—perhaps through an action on the grounds of unconstitutionality against the immigration regulation that supports said practice—, and not just to proceed against the local authorities that applied the regulation to deny the birth certificate to the specific client. And even if the specific client’s case is successful, a human rights clinic would not stop fighting until such time as the national authority adopts regulations and policies to remedy the discrimination and the practice denounced ceases once and for all.

4. Methods

In order to examine the differences regarding work methods and modalities that tell the two models of university-based clinics apart,
let’s continue with the example of the undocumented woman and her child. The legal aid clinic would limit itself to processing a solution to the specific problem through ordinary resources, and extraordinary resources just in rare occasions. The human rights clinic would undertake, in addition, a series of complementary measures with social and political projections, aimed at achieving significant changes in the public policies and practices objected to.

For example, a human rights clinic could carry out a socio-legal investigation about the right to citizenship in domestic and international law, whose publication would influence not only the legislative and legal debates, but also the social debates. A PR strategy would be designed for managing the media, intended to denounce the aberrant practices confirmed and incite public opinion. Likewise, this contributive investigation, public denunciation, dissemination, and lobbying work would be carried out hand in hand with human rights non-governmental organizations or organized victims groups. In fact, the strong tendency to establish partnerships with social players for strategic litigation and lobbying on behalf of social causes is a defining –and differentiating– feature of human rights clinics.

Lastly, this type of clinic does not hesitate in resorting to international standards and instances in order to promote its causes, especially within the framework of the Inter American Human Rights System. On one hand, strategic litigation and lobbying would be used to allege the need to harmonize domestic legislation with the obligations
imposed on the State by international human rights law (IHRL); on the other hand, when all internal resources have been exhausted or have failed to produce adequate or effective results, the next step would be to resort to individual petition or denunciation procedures.

5. Objectives

It seems obvious that these clinic models are markedly different from each other, not only due to their legal goals, but also to the methods employed by each of them in order to fulfill their mission. The only thing left to discuss relates to their respective educational goals.

Even though at the regional level the experiences vary vastly, it is possible to observe differences of varying degrees in the educational goals of each model. While both offer the opportunity to practice law while still attending law school in order to promote professional training, legal aid clinics usually dedicate their financial and human resources more to the social service provided, seeking to increase the number of users served, than to the educational dimension of their work. Thus, for example, they tend to have few supervising attorneys and many practicing students (who can serve more clients). In most cases, the supervisors are not full-time professors or professors with a prominent academic profile, but rather practicing attorneys who divide their time between their private legal practice and the clinic work.
Public interest clinics specializing in human rights tend to be configured differently. The supervisors are usually university professors or researchers; and even if they are not full-time professors or researchers, they at least tend to have an academic appointment at the Law school. In addition, the proportion between the number of students and instructors is much more balanced due to, among other things, the fact that fewer students are accepted into the clinics and they work with fewer cases. They proceed intentionally in this manner in order to reinforce both the quantity as well as the quality of the supervision and shadowing that the students receive throughout their clinic work. Following this same train of thought, said clinics frequently adopt specialized clinical teaching methodologies aimed at developing the professional skills and abilities of ethical and competent lawyers. Thus, for example, role-playing and other specialized exercises are used in order to prepare the students prior to assigning them to represent clients or work on real cases.

IV. Conclusion

Generally speaking, legal aid clinics are based on ordinary rules and procedures to provide free legal assistance to individual clients or to

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5 In some countries, such as in Colombia, participating in a legal aid clinic is mandatory for students; while human rights clinics, if any, are a faculty alternative to the predominant legal aid clinics.
represent them in individual actions brought before the courts or other local authorities. Human rights clinics also seek *pro bono* legal cases in the domestic order, but with greater strategic projection and social impact, often using extraordinary recourses and international procedures, as well as extralegal tactics intended to advance socio-legal causes. The table shown below summarizes the main differences between these two types of university-based legal clinics. But they may be summarized very simply by noting that while legal aid clinics educate through the exercise of the Law, human rights clinics do so through fighting for the Law.  

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6 For the origins of the concept of clinic work and strategic litigation as *fighting for the Law*, see CELS, *Litigio estratégico y derechos humanos. La lucha po el derecho*, op. cit., note 4.
V. Table depicting the differences between clinics that provide free legal aid services and public interest and human rights clinics

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<thead>
<tr>
<th>Features</th>
<th>Free Legal Aid Services Clinic</th>
<th>Human Rights Clinic</th>
</tr>
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<tbody>
<tr>
<td>Main focus of the services provided</td>
<td>Free legal assistance to people in various fields, such as civil, criminal, labor, and family law, among others</td>
<td>Strategic litigation and activism both domestically and internationally, aimed at expanding basic rights and influencing human rights public policy.</td>
</tr>
<tr>
<td>Number and type of clients</td>
<td>Low-income individuals who have legal needs; it aims at serving as many people as possible.</td>
<td>People whose suits are typical of systematic violations to human rights or corresponding domestic laws; the number of clients is not as important as the projection and scope of their cause before regulatory or public action deficiencies.</td>
</tr>
<tr>
<td>Beneficiaries</td>
<td>The clients themselves</td>
<td>In addition to the clients, populations or sectors of society who suffer from the regulatory deficiencies and violation patterns denounced in the test case.</td>
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<tr>
<td>Methods employed</td>
<td>Legal rules and procedures in individual actions brought before the courts or other competent authorities through legal representation or direct legal assistance to the client.</td>
<td>Also legal actions in the domestic order, but often including collective dimensions, such as class action lawsuits, along with complementary social strategies with socio-</td>
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<tr>
<td>Features</td>
<td>Free Legal Aid Services Clinic</td>
<td>Human Rights Clinic</td>
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<tr>
<td>Methods employed</td>
<td>Legal rules and procedures in individual actions brought before the courts or other competent authorities through legal representation or direct legal assistance to the client. (continued)</td>
<td>political influence; partnerships with social organizations; accompanied by international litigation and advocacy, such as the Inter American Human Rights System; with strategic management of the media, coordinated with academic research that complement or advance the objectives of strategic litigation.</td>
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<td>(continued)</td>
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<tr>
<td>Legal and teaching goals</td>
<td>To resolve the specific problem or problems of the users. In addition to a general orientation, (minimal) practical supervision is exercised around the specific legal procedures and documents created by the students, due to the high student to instructor ratio.</td>
<td>To effect the modification or strengthening of legal guarantees and public policies relevant to the affected sector through the issuance of a favorable legal judgment in the test case. Fewer students per instructor; more and better supervision of the clinic work.</td>
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### Differences between free legal service clinics…

**Arturo Carrillo**

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<td>Likewise, specialized clinical teaching methodologies aimed at developing the</td>
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<td>(continued)</td>
<td>In addition to a general orientation, (minimal) practical supervision is exercised around the</td>
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