

BRINGING INTERNATIONAL LAW HOME: THE INNOVATIVE ROLE OF HUMAN RIGHTS CLINICS IN THE TRANSNATIONAL LEGAL PROCESS

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[I]f the goal is to create greater obedience to international norms, then the challenge is to bring international law home.¹

INTRODUCTION

The objective of this Article is to explore the deepening convergence of international law and clinical legal education in the United States. The claim seems unusual: The two are rarely mentioned in the same breath. But the respective trajectories of international law and clinical education overlap in at least one important domain: international human rights.² The burgeoning number of international human rights clinics at American law schools is a novel and significant development; conversely, the relatively recent integration of international law into the hermetic world of clinical legal education has been no less revolutionary.³ This Article, while addressing both phenomena, focuses primarily on the former.

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1. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Human Rights Home*, 35 Hous. L. Rev. 623, 642 (1998) (emphasis omitted) [hereinafter Koh I].

2. International environmental law may be another such area.

3. See Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 Yale J. Int'l L. 505, 532–33 (2003); see also Claudio Grossman,

At issue is the impact that U.S.-based human rights clinics have had—and are having—on the promotion and enforcement of international law.⁴ This is not the first exploration of the role of human rights clinics in advancing international law.⁵ Although others have addressed the issue, Professor Harold Koh of Yale Law School may have initiated the inquiry by announcing the “transnational revolution” and positing a related theory of compliance, “transnational legal process,” in which state and non-state actors promote respect for the international rule of law through complex institutional interaction.⁶ A number of years ago, Professor Koh drew on his pioneering work in Yale’s Allard K. Lowenstein International Human Rights Law Clinic to affirm

the value and the imperative of clinical work in international law. Transnational legal process forces states to become more law-abiding by incorporating international law into their domestic legal and political structures. When such a state violates international law, that violation creates frictions and contradictions that disrupt its ongoing participation in the transnational legal process. Transnational public law litigation brought by non-governmental organizations [including law clinics] is designed precisely to provoke judicial action that will create such frictions, thereby helping shape the normative direction of governmental policies.⁷

As Koh’s theory suggests, transboundary lawyering is the order of the day. Yet surprisingly few law school clinics (or courses, for that matter) in the United

Building the World Community: Challenges to Legal Education and the WCL Experience, 17 *Am. U. Int’l L. Rev.* 815, 827–28 (2002) (arguing that this innovative form of education provides students with necessary practical lawyering skills and links students with “an ever more intertwined global-oriented system”).

4. Though focused on human rights clinics, this is not, strictly speaking, an article on clinical legal issues. For a clinical perspective on human rights lawyering, see Hurwitz, *supra* note 3, which provides an analysis of the development of human rights-based clinical education at American law schools and related issues. My focus is on the advocacy component of these clinics; even so, this Article should not be construed as downplaying or minimizing the critical pedagogic function they fulfill.

5. See, e.g., Richard J. Wilson, *Using International Human Rights Law and Machinery in Defending Borderless Crime Cases*, 20 *Fordham Int’l L.J.* 1606 (1997).

6. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2655–56 (1997) [hereinafter Koh II]; see also Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council*, 35 *Harv. Int’l L.J.* 1 (1994) [hereinafter Koh III] (criticizing the Supreme Court decision in *Sale v. Haitian Centers Council*, which upheld the forcible return of fleeing Haitian refugees to their persecutors).

7. Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 *Neb. L. Rev.* 181, 206 (1996) [hereinafter Koh IV].

States address this phenomenon in any depth.⁸ Indeed, developing clinical methodologies to fit the exigencies and idiosyncrasies of practicing law on a global level continues to be one of the primary challenges facing contemporary American legal education.⁹ Various commentators, this author included, believe that the best answer to the challenge of preparing law students for practice in a globalized world is the human rights clinical paradigm.¹⁰ Indeed, a number of law schools in the United States have responded effectively to evolving “demands for relevance” in their curriculum by establishing international law clinics dedicated to training students through human rights litigation and advocacy.¹¹ Others are sure to follow. The present Article touches upon the increasing prevalence of such programs before exploring how human rights clinics, once constituted, are equally significant from an international legal perspective.

In other words, the Article assesses the potential of human rights clinics as transnational actors.¹² It does not engage in the broader debate around competing theories of states’ compliance with international law obligations generally.¹³ The questions I will answer are much narrower: How should a human rights clinic be defined for purposes of this analysis? What is the human rights clinic’s function in the transnational legal process? How are these clinics different from other transnational actors? What is innovative about the human rights clinical paradigm and why does it matter? The answers to these questions depend on a deeper inquiry into “the value and the imperative of clinical work

8. See Hurwitz, *supra* note 3, at 526–27; Grossman, *supra* note 3.

9. See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 *Clinical L. Rev.* 1, 57–62 (2000).

10. See Hurwitz, *supra* note 3, at 509, 548; Grossman, *supra* note 3, at 827–28.

11. See *infra* notes 15–36 and accompanying text. Responding to contemporary issues arising from the practice of law is one of the pillars of clinical legal education. “The growth of clinical legal education beginning in the 1970’s was spurred in part by ‘student demands for relevance in the law school curriculum.’” Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 *Clinical L. Rev.* 109, 115 (2001).

12. The definition of the term “transnational” is “[r]eaching beyond or transcending national boundaries.” American Heritage Dictionary of the English Language 1834 (4th ed. 2000). It is almost identical to the definition provided for the word “international.” *Id.* at 914. Definitional nuances may exist nonetheless between the two, especially when discussing transnational legal process theory, where domestic dynamics are as essential to the “internalization” of international norms as those that take place exclusively between states or on a purely international plane. See *infra* Section I.B.1.

13. For a comprehensive overview and analysis of this debate, see Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 *Mich. J. Int’l L.* 345 (1998); Koh II, *supra* note 6.

in international law.”¹⁴ Accordingly, this Article seeks to refine received conceptions of the role that human rights clinics play as transnational public law advocates. In doing so, it challenges the underlying assumption that human rights clinics are just another kind of non-governmental organization (NGO). At the heart of this challenge is a new definition of the human rights clinic that highlights its profile as a distinct transnational non-governmental actor. The argument is simple: Due to the unique combination of characteristics they introduce into the transnational legal process, human rights clinics possess a novel and under-appreciated potential to contribute to the progressive enforcement of international law.

My analysis is divided into three parts. In Part I, I propose a working definition of human rights clinics and then examine it through the lens of liberal international law theory. Once the paradigm’s parameters have been established, I present a case study in Part II, drawn from litigation in the Inter-American human rights system that I have conducted through Columbia Law School’s Human Rights Clinic over the past several years. This case study provides fresh input for the analysis of issues relating to the role of human rights clinics in the international legal process. Part III assesses the potential that these clinics possess as agents for positive change within the realm of international law and human rights.

I. SETTING THE STAGE

A. Defining Human Rights Clinics (HRCs)

Most human rights clinics have been around for less than a decade, yet they have already contributed significantly to advancing the human rights agenda within American law schools.¹⁵ The recent case study examined in the

14. See Koh IV, *supra* note 7, at 206.

15. Hurwitz, *supra* note 3, at 527–30; see generally Grossman, *supra* note 3, at 828–40 (citing the International Law program at American University’s Washington College of Law as an example of a clinic which recently expanded to increase awareness of international human rights issues). No standard definition of the human rights clinic has been promoted until now. According to knowledgeable sources, the first “modern” human rights clinics still active today are American University’s International Human Rights Law Clinic, founded in 1990 by Professor Richard Wilson, and Yale’s Clinic, founded in 1989 by Professor Koh and Michael Ratner. It is worth noting that Professor Rhonda Copelon started the first International Women’s Human Rights Clinic at CUNY Law School in 1992. Even though other law school programs were active in the field before then, the clinics at American University, CUNY, and Yale were the first formally constituted “human right clinics,” as I have defined them, still in operation today. See *infra* note 31 and accompanying text.

next section is part of a natural progression of clinical work in international law initiated by pioneer clinics, especially the Lowenstein International Human Rights Law Clinic at Yale and the International Human Rights Law Clinic at American University, under the direction of Professors Harold Koh and Richard Wilson, respectively.¹⁶ These clinics and their groundbreaking initiatives during the 1990s provide landmark examples of the type of transnational public law litigation and advocacy to which many human rights clinics today are dedicated.

Despite the growing popularity of these clinics, there is no commonly accepted definition of “human rights clinic” in circulation. Rather, the term is used broadly to refer to any law school program or clinic that incorporates some dimension of human rights-based experiential learning.¹⁷ One reason there is no set definition is because, relatively speaking, human rights clinics are so new. Of the approximately 144 law schools in the United States that have a clinical program, only a handful—around a dozen—include some form of human rights clinic.¹⁸ Another is their diversity. Some, like those at Yale and George Washington University, are free-standing in-house clinics dedicated to international human rights litigation and advocacy.¹⁹ Others do not rise to the level of a full-blown clinic, such as Harvard’s clinical seminar, which emphasizes research over litigation.²⁰ A few are thematically specialized, such

16. See *infra* Part II.

17. See, e.g., Richard J. Wilson, *Clinical Legal Education for Human Rights Advocates*, in Human Rights Education for the Twenty-First Century 261, 261 (G.J. Andreopoulos & R.P. Claude eds., 1997) (surveying methods of clinical legal education).

18. The International Human Rights Section of the Association of American Law Schools is conducting a survey of human rights services, institutions, and programs, including clinics, currently in place at U.S. law schools. Though the final results have not yet been published, a preliminary edition of the research suggests that by 2004, some version of what I am calling a “human rights clinic” will exist at the following law schools: American University’s Washington College of Law, Columbia Law School, CUNY Law School, Georgetown Law Center, George Washington University Law School, Harvard Law School, New York University School of Law, Seattle University School of Law, University of California at Berkeley (Boalt Hall), University of Illinois College of Law, University of San Francisco Law School, University of Virginia School of Law, and Yale Law School. Once finalized, the survey will be available at <http://www.aals.org/sections/ih.html>.

19. See Yale Law School, The Orville H. Schell, Jr. Center for International Human Rights homepage, at <http://www.law.yale.edu/outside/html/Centers/cen-schellctr.htm> (last visited Apr. 18, 2004); George Washington University Law School, International Human Rights Clinic homepage, at <http://www.law.gwu.edu/IHRC/default.asp> (last visited Apr. 18, 2004).

20. See New York University Law School, Clinics homepage, at <http://www.law.nyu.edu/clinics/semester/index.html> (last visited Apr. 18, 2004). For information on Harvard’s clinical seminar, see Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 Harv. Hum. Rts. J.

as Georgetown's and CUNY's respective International Women's Human Rights Clinics.²¹ Several law schools with human rights clinics prefer a "mixed" model, like the one at American University, which combines political asylum and immigration cases with other largely unrelated projects built around international human rights.²²

All law clinics, regardless of their substantive focus, combine simulated and real-life practice in a substantive area of law with conventional classroom teaching in an effort to provide students with the direct client representation and/or hands-on skills and values training not offered by traditional legal education.²³ Law school clinics are formal, credit-bearing courses that operate within one or more legal fields or subject areas, which provide the substantive context for experiential learning.²⁴ Traditional pedagogical goals of the clinical method include the following: exposing students to the challenges and skills of acting in the role of an attorney in the sort of unstructured situations that lawyers confront in practice; providing opportunities for collaborative learning; imparting the obligation for service to clients; and critiquing the capacities and limitations of lawyers and the legal system.²⁵

Substantive areas traditionally mined by clinical programs have included civil and administrative practice, criminal defense and advocacy, appellate practice, negotiation and mediation, juvenile justice, landlord-tenant, small business and nonprofit organizations, and bankruptcy and poverty law, to

301, 311–12 (2002). Another good example of a clinical program that does not rise to the level of a full-blown in-house clinic is Fordham Law School's Joseph R. Crowley Program in International Human Rights. See Fordham Law School, Crowley Program homepage, at <http://law.fordham.edu/htm/cr-home.htm> (last visited Apr. 18, 2004).

21. See Georgetown Law School, The International Women's Human Rights Clinic homepage, at <http://www.law.georgetown.edu/clinics/iwhrc/> (last visited Apr. 18, 2004); CUNY's website is under construction. CUNY School of Law, Clinic homepage, at <http://www.law.cuny.edu/OurPrograms/clinics/index.html> (last visited Apr. 18, 2004).

22. For information on American University's clinic, see Wilson, *supra* note 17. The paradigm favored by these "hybrid" clinics has recently attracted criticism because it emphasizes immigration activities that do not fall, strictly speaking, within the ambit of traditional human rights per se. See Hurwitz, *supra* note 3, at 534–36.

23. See Wilson, *supra* note 17, at 261–65. For a detailed discussion of the components that make up a law school clinic, see Philip G. Schrag's seminal work, *Constructing a Clinic*, 3 *Clinical L. Rev.* 175 (1996).

24. See Hurwitz, *supra* note 3, at 527.

25. *Id.* See also Section on Clinical Legal Education, Association of American Law Schools, *Report of the Committee on the Future of the In-House Clinic*, 42 *J. Legal Educ.* 511, 511–16 (1992) (detailing the nine principal goals of the in-house, live-client clinic).

name just a few. In theory, however, clinical methodology—an eclectic pedagogy that includes classroom teaching, simulations, and live advocacy—can be married to just about any area of law through which the public interest is served by the rendering of gratuitous or low-cost legal services.²⁶ Indeed, the social justice mission is at the very heart of the clinical legal education movement in the United States.²⁷ Since international human rights advocacy can rightfully be construed as the social justice mission gone global, human rights clinics are simply clinical legal education's natural response to the transnational exigencies of lawyering in the twenty-first century.²⁸

It should be evident from the foregoing that a human rights clinic is one that predominantly relies on international human rights law and advocacy to teach students lawyering skills and values.²⁹ But such clinics share a number of other unique characteristics as well. Primary among these is their definitive connection to what I call the “human rights context,” a dynamic ecosystem comprised of the formal and informal rules, procedures, mechanisms, and actors that continuously interact at myriad levels to apply, promote, defend, or develop human rights principles.³⁰ Teaching a clinic in the human rights context means employing international human rights norms *and* practice to train students who, in addition to classroom-based work, actively participate in supervised litigation or advocacy before a range of national, regional, and international fora.

For purposes of this Article, then, a “human rights clinic” (“HRC”) is defined as a law school-based, credit-bearing course or program that combines clinical methodology around skills and values training with live case-project

26. Schrag, *supra* note 23, at 180, 191–96; *see also* Wilson, *supra* note 17, at 263–65 (discussing the mechanics of experiential learning and why the clinical method is appropriate for training human rights advocates).

27. *See* Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *Fordham L. Rev.* 1929, 1931 (2002); *see also* Hurwitz, *supra* note 3, at 523, 527–28 (describing the importance of the “fundamental concern for social justice” to clinical legal education).

28. *See* Hurwitz, *supra* note 3, at 508–09, 548.

29. International human rights law “consists of the body of international rules, procedures, and institutions developed to implement [national and international human rights obligations,] and to promote respect for human rights in all countries.” Richard B. Bilder, *An Overview of International Human Rights Law*, in *Guide to International Human Rights Law Practice* 3, 3 (Hurst Hannum ed., 3d ed. 1999).

30. For an excellent description of lawyering in the human rights context, *see* Richard J. Wilson & Jennifer Rasmussen, *Promoting Justice: A Practical Guide to Strategic Human Rights Lawyering* (2001); *see also* Hurwitz, *supra* note 3, at 510–23 (describing a broad practice of human rights lawyering).

work, all or most of which takes place in the human rights context.³¹ Under this definition, any law school program with a clinical component will be covered only to the extent that the students receive some degree of in-house skills and values training in addition to faculty supervision and feedback on live case-project work.³²

By narrowing in this functional way the range of entities that can be labeled human rights clinics, I have set the stage for a discussion of the theoretical framework within which HRCs operate. Under this working definition, for instance, externships are excluded.³³ Similarly, most asylum and immigration clinics, despite the international dimension of their important services, and in some cases, the inclusion of “human rights” as part of their title, would not qualify as HRCs.³⁴ U.S. immigration and asylum law and practice are exclusively domestic, and as a general rule, limited in the extent to which they admit international norms.³⁵ The same may be true of constitutional law or civil rights law clinics, despite the fact that international human rights law is making significant in-roads into those areas as well.³⁶ The point is that, operationally speaking, a clinic that does not make international human rights law per se the focus of its substantive teaching and practice agenda is probably more

31. The International Human Rights Law Clinic at American University is a good example, despite the fact that it is a “hybrid” clinic that undertakes political asylum cases as well as “pure” human rights projects. See Wilson, *supra* note 17, at 261–62, 266–71.

32. See *supra* notes 18–22 and accompanying text.

33. See Wilson, *supra* note 17, at 265.

34. Two examples are the Seton Hall University Law School’s Immigration and Human Rights Clinic and the University of Connecticut Law School’s Asylum Human Rights Clinic which dedicate their efforts exclusively to immigration issues. See Seton Hall University Law School, “Immigration and Human Rights Clinic,” at http://law.shu.edu/cs/immigration_human_rights_clinic.html (last visited Apr. 26, 2004); University of Connecticut Law School, “Asylum Human Rights Clinic,” at <http://www.law.uconn.edu/clinics/asylum-human-rights/> (last visited Apr. 26, 2004). For a detailed analysis of the ambiguous position of asylum practice in the human rights context from a clinical perspective, see Hurwitz, *supra* note 3, at 534–36.

35. I recognize that this may not be so in every case. Some clinics, like Berkeley’s International Human Rights Law Clinic, effectively combine asylum practice with international human rights litigation and advocacy, though the extent of each component is constrained by the parallel exercise of the other. The links between refugee and asylum law and international human rights have been the subject of significant academic study. See, e.g., Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 Harv. Hum. Rts. J. 133 (2002); Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 Harv. Hum. Rts. J. 155 (2002).

36. Professor Penny Venetis and the Constitutional Law Clinic at Rutgers Law School, for example, have been litigating constitutional claims alongside international law claims in U.S. federal courts for years. (Author’s note.)

accurately defined by another label (e.g., an immigration clinic, a constitutional law clinic, etc.).

B. The Conceptual Framework

This section lays the theoretical foundation for the remainder of the Article. Before turning to the case study and addressing the queries set out in the Introduction, it is necessary to summarize the theory of transnational legal process within which human rights clinics operate. Having done so, it similarly becomes important to explore how and why HRCs are distinguishable from other transnational actors, especially conventional human rights NGOs. Only by differentiating among non-governmental transnational organizations is it possible to fully appreciate the contributions of the HRC model to the development and enforcement of international law. I return to this question in the final sections of the Article.

1. Transnational Legal Process

The theory of transnational legal process is Professor Harold Koh's answer to the overarching question: "Why do nations obey international law, and why do they sometimes disobey it?"³⁷ It seeks to explain how and why international norms shape the conduct of states when, as a rule, states cannot be coerced into obeying them. Professor Thomas Franck has famously put the question in slightly different terms: "Why do powerful nations obey powerless rules?"³⁸ The search for satisfactory answers to these questions continues to occupy the attention of many international law and international relations scholars, who have already produced a vast literature on the subject.³⁹

In a nutshell, transnational legal process refers to the "theory and practice of how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."⁴⁰ Although it is not the only answer posited by scholars to the question of state obedience, transnational legal process is arguably the most comprehensive approach, and certainly the

37. Koh I, *supra* note 1, at 623–24.

38. See Koh II, *supra* note 6, at 2628.

39. See *id.* (canvassing the history and current state of affairs with respect to the much-debated question of state compliance with international law and reviewing two of the more recent books on the subject).

40. Koh IV, *supra* note 7, at 183–84.

most appropriate, from the point of view of international human rights law.⁴¹ In this regard, few knowledgeable observers would dispute the affirmation that human rights law stands out as an area in which state compliance is best pursued through “vertical strategies of interaction, interpretation, and internalization” that depend on the enlightened action of engaged non-state actors.⁴²

A detailed discussion or analysis of transnational legal process is beyond the purview of this Article. However, several facets of the theory are directly relevant to understanding how HRCs contribute to expanding the frontiers of international law, not to mention American legal education. The remainder of this section will focus on outlining these key aspects.

Essential to transnational legal process theory is the tripartite dynamic of “interaction, interpretation and internalization” that leads to state obedience.⁴³ Transnational legal process describes how international law norms are interpreted through the interaction of transnational actors in a variety of law-declaring fora, and then internalized or implemented within a nation’s domestic legal and political system.⁴⁴ “Instead of focusing exclusively on the issues of ‘horizontal jawboning’ at the state-to-state level as traditional international legal process theories do, a transnational legal process approach focuses more broadly upon the mechanisms of ‘vertical domestication,’ whereby international law norms ‘trickle down’ and become incorporated into domestic legal systems.”⁴⁵ The result of this internalization is increasing compliance and eventual obedience on the part of the affected state vis-à-vis its international law obligations.

The process of internalizing international norms can itself be divided into three forms: social, political, and legal internalization. Social internalization results when a norm gains sufficient public legitimacy so as to produce widespread general adherence. Political internalization occurs when the political elites of a given state accept an international norm and promote its adoption as part of government policy. Legal internalization is the channel

41. See Koh II, *supra* note 6, at 2655–56; see also William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 Harv. Int’l L.J. 129 (2000) (employing transnational legal process analysis to argue for a universal system of transnational human rights-based litigation in domestic courts).

42. See Koh II, *supra* note 6, at 55–56.

43. Koh I, *supra* note 1, at 626.

44. *Id.*

45. *Id.* at 626–27.

through which international norms are incorporated into a domestic legal system as law through executive and legislative action, or through judicial interpretation.⁴⁶ Through any one of a combination of these forms, international law principles can become part of the social, political, and legal fabric of a state, leading to a heightened compliance with the internalized norms.

Despite the dense complexity of the transnational legal process, which in practice will necessarily vary from case to case, the basic dynamic remains the same:

Normally, one or more transnational actors provokes an interaction, or series of interactions, with another in a law declaring forum. This forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to force the other party to internalize the new interpretation of the international norm into its normative system.⁴⁷

This brings us to the cardinal inquiry of this section: Who (or what) are the transnational actors whose interactions are instrumental to the interpretation and eventual internalization of international norms? Professor Koh has divided transnational actors into two basic categories: transnational norm entrepreneurs and governmental norm sponsors.⁴⁸ Transnational norm entrepreneurs (“TNEs”) are non-state actors, either non-governmental transnational organizations or individuals, who fulfill a wide range of essential functions.⁴⁹ Through a variety of means at their disposal, TNEs can, among other activities, mobilize public opinion at home and abroad; stimulate and assist in the creation of like-minded organizations in other countries; and carry out efforts toward persuading foreign audiences and elites that certain norms reflect a widely-shared or even universal moral sense, rather than the particular moral code of one society.⁵⁰ Governmental norm sponsors are government officials and agencies that seek

46. See *id.* at 642–43 (explaining that executive action refers to orders or decisions of the President or head of state and his agencies; legislative internalization is the process by which international law rules are integrated into binding domestic legislation or constitutional law that officials must follow; and judicial incorporation of such rules occurs when litigation in local courts results in the integration of international law norms into domestic law, statutes, or constitutional norms).

47. *Id.* at 644 (emphasis omitted).

48. *Id.* at 646–49.

49. *Id.* at 647–48.

50. *Id.* at 647 (citing Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 *Int'l Org.* 479, 482 (1990)).

TNEs as allies, and are active sponsors for the norms or principles that the latter are promoting.⁵¹

A great deal has been written about non-state actors generally, especially in the human rights field, and their controversial but undisputed contributions to promoting international norms and state compliance at the local level.⁵² Certainly there is no doubt about the critical functions that engaged non-state actors or TNEs fulfill in the transnational legal process: They act as agents of “norm internalization” by triggering, promoting, and invigorating the process of transnational legal enforcement.⁵³ One effective way in which TNEs fulfill their mission is by creating broad advocacy networks, or “transnational issue networks.”⁵⁴ TNEs join forces with other fellow norm entrepreneurs and governmental norm sponsors to “discuss and generate political solutions among concerned individuals on the same issues at the global and regional levels, among government agencies, intergovernmental organizations, international NGOs, domestic NGOs, academics, and private foundations.”⁵⁵ Transnational advocacy or issue networks built by and around TNEs are an essential part of transnational legal process.⁵⁶

One example of an effective TNE-sponsored advocacy network is network created in response to the U.S. government’s policy and practice of returning Haitian refugees intercepted on the high seas to their country in the 1990s.⁵⁷ In early 1992, the administration of President George Bush Sr. began intercepting Haitians fleeing their country on the high seas and returning them, in violation of, among other things, the “nonrefoulement” requirement of

51. *Id.* at 648.

52. *See, e.g.*, H. Ranjeva, *Non-governmental Organizations and the Implementation of International law*, in 270 *Collected Courses of the Hague Academy of International Law* 1 (1997); Julie Mertus, *Considering Nonstate Actors in the New Millenium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 *N.Y.U. J. Int’l L. & Pol.* 537 (2000) (discussing participation of non-state actors in forming international norms and how these norms shape non-state actor identities).

53. Koh I, *supra* note 1, at 645.

54. *Id.* at 649.

55. *Id.*

56. *See* Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* 939 (2d ed. 2000) (defining “transnational advocacy networks” from a broad, interdisciplinary perspective).

57. Koh IV, *supra* note 7, at 196–99. For a detailed analysis of this case study, see Koh III, *supra* note 6. *See also* Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 *Yale L.J.* 2391 (1994) [hereinafter *Haiti Paradigm*] (detailing the *Haitian Centers Council* litigation, brought in response to the United States’ violation of internationally-recognized human rights standards regarding refugees).

Article 33 of the 1951 U.N. Refugee Convention Relating to the Status of Refugees (Refugee Convention).⁵⁸ This policy was maintained by President Bush's successor in office, President William Jefferson Clinton. An "ad hoc coalition" of human rights lawyers and activists, including Yale's Lowenstein International Human Rights Clinic, vigorously but unsuccessfully challenged the policy in a series of court battles that culminated at the Supreme Court in 1993.⁵⁹ The "coalition" had expanded as the case progressed to encompass "a broad array of intergovernmental organizations (IGO's), international human rights NGOs, domestic civil rights groups, 'rule of law' proponents, refugee advocates, and members of Congress."⁶⁰ The point is that, although the coalition lost the legal battle in the end, it may have won the advocacy war. After years of mounting domestic and international pressure that grew out of the coalition's efforts, the Clinton Administration in 1994 replaced its policy of extraterritorial return of refugees with one that was more in line with the dictates of the Refugee Convention.⁶¹

This example shows how transnational actors interact on a series of public and private stages. These revolve around governmental and non-governmental law-declaring fora, which can be defined as those

competent to declare both general norms of international law . . . and *specific interpretation* of those norms in particular circumstances Such law declaring fora thus include treaty regimes; domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities; commissions of international publicists; and non-governmental organizations.⁶²

By invoking and exploiting such fora to promote the authorized interpretation and subsequent internalization of international norms, thereby generating increased levels of voluntary state compliance or obedience, transnational norm entrepreneurs and their governmental allies become engines for the non-coercive enforcement of international law.

58. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, art. 33, 19 U.S.T. 6259, 6278, 189 U.N.T.S. 150, 176 (entered into force Apr. 22, 1954). Article 33 states that "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his . . . political opinion." *Id.*

59. See Koh III, *supra* note 6. For a student perspective on the clinic's role in litigating this case, see Symposium, *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 Yale L.J. 2337 (1994).

60. See *Haiti Paradigm*, *supra* note 57, at 2399 (footnotes omitted).

61. Koh IV, *supra* note 7, at 196-99.

62. Koh I, *supra* note 1, at 649-50 (emphasis added).

To summarize, transnational legal process theory permits a functional, nuanced analysis of the state and non-state forces that contribute to international norm enforcement, particularly in the human rights context. It is for this reason that I have chosen this theory as the conceptual framework for analyzing the advent of human rights clinics as significant new players on the field of international law and relations. But this will not be possible until human rights clinics are distinguished from the ubiquitous NGO, a term-category whose widespread and indiscriminate use hampers, rather than facilitates, our study of HRCs.

2. HRCs as Transnational Actors: Beyond the NGO⁶³

Making the case that, contrary to popular belief, human rights clinics are not just another kind of NGO is a difficult but necessary exercise. Since HRCs in the United States are essentially “non-governmental” in character and an “organization” in structure, they have to be, in the broadest sense of the term, “human rights NGOs.”⁶⁴ In essence,

[NGOs] are often defined by what they are not. They are *not* part of government . . . , and thus have some sort of independence from government control. They are *not* businesses Because they are not part of the two dominant sectors of most industrial societies, government and business, they are sometimes referred to as the “third sector.”⁶⁵

Given this prevailing view, it is no surprise to find that most practitioners, commentators, and scholars assume without question that any not-for-profit group of a non-governmental nature working in the field, including law school

63. It is important to note that for many traditional clinical practitioners, the closest comparable paradigm to a law clinic is not the NGO but the public interest law firm, in testimony to the legal service roots of the clinical education movement in the United States. *See, e.g.,* Barry et al., *supra* note 9, at 5–16. The distinctive nature of lawyering in the human rights context, however, together with the fundamental role of the non-governmental organizations in the human rights movement, make the NGO the more appropriate model for this analysis.

64. A recent in-depth study of these organizations by the Geneva-based International Council on Human Rights Policy (ICHRP) confirms the complexity of defining human rights “organizations” or “NGOs” in today’s world. *See* ICHR, *Deserving Trust: Issues of Accountability for Human Rights NGOs* (Draft Report for Consultation) 19–35 (2003), <http://www.hri.ca/docCentre/docs/DeservingTrustMay2003.html>; Steiner & Alston, *supra* note 56.

65. *See* ICHR, *supra* note 64, ¶ 88.

clinics, is a “human rights NGO.”⁶⁶ They make little or no effort to differentiate between or among particular sets of non-governmental actors, especially where their functions are viewed as being similar.⁶⁷ The fact that most institutions, organizations, and groups that identify with the label *themselves* have found no reason or interest to contest it further perpetuates the terminological hegemony.⁶⁸

Yet there are disadvantages (and even dangers) in applying the “human rights NGO” label *all* of the time to describe *all* transnational actors working in the field who are not governments, businesses, or individuals. The very term “NGO” defies precise definition, and it has been accurately criticized as over-inclusive⁶⁹ as well as subject to manipulation.⁷⁰ Its currency in the human rights context flows from historical, technical, and practical considerations having very little—if anything—to do with the characteristics or function of the diverse and distinct actors that comprise this thematic “sub-set of NGOs.”⁷¹ There is no escaping the utility and convenience of having terms like “human rights movement” or “human rights NGO” available. But the difficulties encountered in trying to define them suggest that an undifferentiated use of these general terms may, under certain circumstances, limit a commentator’s capacity to

66. See *supra* notes 7, 49, 53–55 and accompanying text; see also Kenneth Roth, *Human Rights Organizations: A New Force for Social Change*, in *Realizing Human Rights: Moving From Inspiration to Impact* 225, 228–29 (S. Power & G. Allison eds., 2000) (exemplifying this assumption).

67. See, e.g., Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. Int’l L. & Pol. 567, 570 (2000) (“This realignment of individual loyalties has translated into a surge of institutions other than the nation-state, including corporations, religions, and other non-governmental organizations (NGOs) . . .”). A recent example of this practice of generalization is Mertus, *supra* note 52, at 554–55. A gross generalization in a similar vein is used to criticize an undefined and undifferentiated concept of “human rights movement.” See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 Harv. Hum. Rts. J. 101 (2002). *But cf.* ICHRP, *supra* note 64, ¶¶ 58–111 (identifying and distinguishing the diverse motives, characteristics, and methods of human rights NGOs).

68. Henry Steiner, *Diverse Partners: Non-Governmental Organizations in the Human Rights Movement* (1991), reprinted in Steiner & Alston, *supra* note 56, at 943–45. “Human rights NGOs. . . find it easy to categorise [sic] the work they do, [but] in general they have been reluctant to declare what a human rights NGO is—and therefore is not—because they have not wished to judge the claim of others to the title.” ICHRP, *supra* note 64, ¶ 79.

69. Steiner & Alston, *supra* note 56.

70. ICHRP, *supra* note 64, ¶ 81.

71. Steiner & Alston, *supra* note 56; see also ICHRP, *supra* note 64, ¶¶ 63–91 (making a similar argument).

provide insight into the evolving nature of the work they carry out. Indeed, such generalizations at times may not only be imprecise, but misleading.⁷²

Take human rights clinics, for instance. Human rights clinics, as I have defined them, are not NGOs in the conventional sense described above. As a practitioner in the field for over a decade, I have worked with several dozen national and international human rights NGOs. As noted already, NGOs tend to be public interest groups made up of private individuals who, as a rule, adopt non-profit corporative or organizational structures through which to operate.⁷³ These public interest activities are financed on the whole through philanthropic grants or donations, institutional or individual largesse, and, in some regions of the world, commercial activity.⁷⁴ Though the nature and scope of their activities may vary, their unifying characteristic (aside from being non-governmental) appears to be that, in their own estimation, human rights NGOs promote, defend, or define the same values and principles in some capacity.⁷⁵ It is also true that they can be hierarchical and undemocratic, prone to personality cults and wed to specific, narrow agendas that they advocate above all other priorities.⁷⁶ In any event, it is no coincidence that a reference to NGOs in the U.S. context will immediately conjure up a well-worn laundry list of the best known civil rights or human rights organizations that fit this bill: NAACP, ACLU, Human Rights Watch, Amnesty International, Human Rights First (formerly Lawyers Committee for Human Rights), and so on.

72. See, e.g., Kennedy, *supra* note 67; see also Rosenblum, *supra* note 20, at 303 (“[T]he critics [of the human rights movement and NGOs like Kennedy] consistently caricature the movement and render it two-dimensional.”).

73. See ICHRP, *supra* note 64, ¶ 87.

74. See Harvard Law School Human Rights Program and Center for the Study of Developing Countries at Cairo University, *International Aspects of the Arab Human Rights Movement* (2000), reprinted in Steiner & Alston, *supra* note 56, at 960–62; see also *infra* note 237 and accompanying text (discussing relationship of NGOs and philanthropists).

75. See ICHRP, *supra* note 64, ¶¶ 111–53 (stating that the values include respect for human dignity, the universality and indivisibility of human rights, independence and impartiality, and non-violent methods); see also Steiner & Alston, *supra* note 56, at 944 (noting that while groups such as the ACLU and NAACP do not base their claims on international human rights law, they are clearly human rights organizations).

76. See Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 Am. U. Int’l L. Rev. 1335, 1372–78 (1999) (describing the operations of NGOs as often opaque and closed to outside or minority voices); Steiner & Alston, *supra* note 56, at 945–47, 951–53 (internal citations omitted); see also *infra* note 239 (discussing criticism of NGOs as “undemocratic, hidebound, and resistant to change”).

By comparison, a human rights clinic is a different beast altogether. HRCs, by definition, are set up within a university, normally as a component of the law school's clinical or human rights program. Accordingly, they are taught or "directed" by law professors and comprised of law students. (Some clinics will hire attorneys to assist in the supervision of cases.) It is well-settled that academics' approaches to, and functions within, the field of human rights are significantly different from those that characterize other institutional entities carrying out similar activities from a non-academic standpoint or environment.⁷⁷ In particular, academic freedom and the educational mission establish the primary operational framework for HRCs, with at least two consequences of immediate import.

First, human rights clinics are intrinsically part of the university ethos and critical dialectic. Professor Henry Steiner has aptly described the university's role in the human rights movement as one that best focuses on interdisciplinary teaching and scholarship.⁷⁸ Moreover, by naturally favoring this academic focus, the university guarantees that the teaching and scholarly activities carried out in the university setting will include a "significant critical component."⁷⁹ Professor Steiner defines this critical dimension of university teaching in human rights as "an approach that challenges and problematizes some fundamental aspects of the movement rather than remains securely within its basic choices or dominant assumptions."⁸⁰ Thus, unlike many NGOs, HRCs tend to be more "open to rethinking [human rights] norms and institutions in light of a half century's experience and evolving conditions, ideas and needs."⁸¹ This is not intended as a criticism per se of the NGO movement, but rather an acknowledgment that many conventional human rights NGOs, especially those operating at the grassroots level, do not have either the time or the wherewithal to engage in extended academic reflection and critique.

77. See Henry J. Steiner, *The University's Critical Role in the Human Rights Movement*, 15 Harv. Hum. Rts. J. 317, 318 (2002); see also Henry J. Steiner & Jonathan Mann, *International Human Rights and the University*, reprinted in Symposium, *Human Rights at Harvard: Interdisciplinary Faculty Perspectives on the Human Rights Movement* 7, 8-12 (1995), available at <http://www.law.harvard.edu/programs/hrp/Publications/Hrathar12.html#anchor84919> (discussing the different perspective which the university, in its role as critic and educator, can bring to the human rights movement); Stanley H. Hoffman, *Universities and Human Rights*, 6 Hum. Rts. Q. 5, 5-13 (1984) (discussing three different conceptions of the university, which relate to the question whether universities should engage in human rights issues overseas).

78. Steiner, *supra* note 77, at 318.

79. *Id.*

80. *Id.*

81. *Id.*

Second, human rights clinics are typically one component of a wider university curriculum and play a unique and complementary role. On the one hand, as we have seen, they form part and parcel of the university's general educational mission and share in its critical role vis-à-vis the human rights movement.⁸² On the other hand, human rights clinics advance an additional objective: training law students to become skilled, ethical, and responsible advocates in the exercise of their profession.⁸³ This objective is central to the clinic's mission. In this setting, other considerations are largely subjugated to the clinical goal of training lawyers to do well, while teaching them to do good.⁸⁴ HRCs do not differ from other law school clinics in this fundamental respect. They tend to draw their basic format, materials, and methodology to a significant extent from a defined set of shared experiences and sources. By and large, the central variable in clinical legal education is the substantive context or field within which a given clinic will operate.⁸⁵

By viewing human rights NGOs and HRCs in a comparative perspective, the qualitative differences between the two become more readily apparent. These differences will come into sharper focus as this Article progresses, especially in Part III, where I examine the HRC paradigm's distinct contributions to international law. For now, I wish only to underscore the importance for the reader of challenging his or her initial assumption that a human rights clinic is simply a variation on the NGO theme, a new wrinkle in the fabric of the NGO-dominated human rights movement. In reality, as we shall see, the advent of the human rights clinic portends a qualitative step forward in the way human rights are defended and promoted in today's world.

82. *Id.* at 326.

83. *See* Wilson, *supra* note 17, at 263–65.

84. *See generally* Wizner, *supra* note 27, at 930 (arguing that “the law school clinic is the primary place in the law school where students can learn to be competent, ethical, socially responsible lawyers”).

85. *See generally* Schrag, *supra* note 23, 191–97 (discussing the ways in which choice of specialization can affect the nature of the clinic). *But see* Hurwitz, *supra* note 3, at 532–34 (highlighting other distinguishing characteristics of HRCs “besides the distinct area of law,” such as their broad definition of “client” and their reliance on non-traditional fora and methods).

II. THE HRC IN ACTION: AN INTER-AMERICAN CASE STUDY⁸⁶

A. Introduction

To illustrate the HRC dynamic at work, this section examines a project drawn from the docket of the Columbia Law School Human Rights Clinic (“Columbia Clinic” or “CLS Clinic”). I have selected for the case study an action against the Dominican Republic currently pending before both the Inter-American Court and the Inter-American Commission of Human Rights.⁸⁷ This action is based on ground-breaking litigation brought on behalf of a group of ethnic Haitians arbitrarily expelled from the Dominican Republic, commonly referred to as the “Mass Expulsions Case.”⁸⁸ The issues raised by this case were deemed by the President of the Inter-American Court to represent “one of the greatest challenges facing International Human Rights law at the outset of the 21st Century.”⁸⁹ Before initiating our study, a brief word about the CLS Clinic is in order.

86. For a variety of reasons summarized below, the case study analyzed here revolves around litigation in the Inter-American human rights system. It is necessary to underscore, however, that not all HRCs litigate as a primary, or even secondary, method of carrying out their human rights advocacy. For a comprehensive overview of the subject and a discussion of the problems that arise in this context, see Hurwitz, *supra* note 3, at 533–48.

87. *Charles v. Dominican Republic (Expulsions of Haitians and Dominicans of Haitian Origin in the Dominican Republic)*, Case 12.271, Inter-Am. C.H.R. (initiated 1999) (case pending).

88. Though this case provides new elements and insights into the role of human rights clinics in the transnational legal process, it is not the first time that a human rights clinic has successfully availed itself of the Inter-American Court and Commission of Human Rights. Most notably, Professor Richard Wilson and the International Human Rights Law Clinic at American University have pioneered such work by litigating a series of cases in the Inter-American system, most of which deal with the imposition of the death penalty in the United States and the corresponding violations under the American Declaration. For a discussion of these issues, see Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 Santa Clara L. Rev. 1159 (2002); see also Richard Wilson et al., *The Work of the International Human Rights Law Clinic at American University* 15 (2002) (unpublished manuscript, on file with author) (describing litigation and appearances before Inter-American Court and Commission of Human Rights).

89. Order of the Inter-American Court on Human Rights, Provisional Measures requested by the Inter-American Commission of Human Rights with Respect to the Dominican Republic: Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic, ¶ 1, Aug. 18, 2000 (Cançado, Trindade, J., concurring) (cited in I/A Court H.R., Provisional Measures Compendium: July 2000–June 2001, Ser. E No. 3) (translation by author) [hereinafter Cançado Concurrence].

The Columbia Clinic was founded in 1998. Though modeled in part on the Yale Clinic, the Columbia Clinic nonetheless pioneered a new configuration of human rights education that combined rigorous in-class instruction in human rights law with actual practice around live advocacy projects.⁹⁰ In the fall of 2002, I was appointed Acting Director of the CLS Clinic, which permitted me to concentrate on, among other things, litigating before international human rights tribunals and treaty bodies, especially in the Inter-American Human Rights System. For over two and a half years before becoming its director, I had worked with students in the Clinic as a lecturer and supervising attorney primarily dedicated to prosecuting the Mass Expulsions Case.

The study begins by presenting the relevant background to the Mass Expulsions Case. It then turns to describing the efforts to date of the CLS Clinic and its co-counsel to vindicate the rights of the victims and their families. The section concludes with an analysis of how the Mass Expulsions Case exemplifies the transnational public law litigation that is a constituent dynamic of the transnational legal process addressed in Part I. In doing so, it highlights the active role played by HRCs throughout this process.

B. HRCs and the Mass Expulsions Case

1. Background to the Mass Expulsions Case

The clients in the Mass Expulsions Case are more than two dozen ethnic Haitians (Haitian migrants and persons of Haitian descent born in the Dominican Republic) who, due primarily to racial and ethnic discrimination, have suffered (and are suffering) the consequences of summary expulsion from the Dominican Republic to Haiti. They represent, however, only a sampling of the tens of thousands of ethnic Haitian victims subjected to the widespread expulsions and deportations carried out by the Dominican authorities in recent

90. The CLS Clinic was founded by Louis Henkin and Catherine Powell, who had been a member of the International Human Rights Law Clinic at Yale. One of the characteristics of the Yale Clinic assumed by Columbia's Clinic was the "pure" nature of its international human rights focus. The CLS Clinic did not follow the mixed immigration-human rights model of other clinics. Instead, it expressly situated its activities within the post-Cold War context and concentrated its activities in three thematic areas: human rights and constitutional rights, the impact of global economic restructuring on human rights, and transitional justice. Students pursued litigation and advocacy in these areas in both domestic and international fora. Early projects included advocating at the United Nations to press for protections in the International Criminal Court, challenging labor rights violations under the NAFTA labor side agreement, and promoting international human rights standards in U.S. courts and legislation.

years.⁹¹ The tragic history of the mass expulsions phenomenon in the Dominican Republic dates back to the turn of the last century. This makes it one of the most pervasively prejudicial dynamics characterizing the frequently tense relations between the Dominican Republic and Haiti, its counterpart country on the Caribbean island of Hispaniola.⁹²

The Dominican government has implemented massive expulsion and deportation operations of ethnic Haitians on at least three occasions since 1990—in 1991, 1997, and 1999—each time generating at least 20,000 victims within a few months. Conservative estimates place the number of Dominicans of Haitian descent and Haitian workers residing in the Dominican Republic at approximately 700,000, or almost twelve percent of a general population of eight million.⁹³ Even when massive sweeps were not being carried out, the “ordinary” rate of expulsions and deportations in the 1990s hovered at around 24,000 to 30,000 per year, or 2,000 to 2,500 per month.⁹⁴ Estimates by officials and other observers show that expulsions and deportations were carried out at a rate of some 2,000 per month during 2000.⁹⁵ This rate increased significantly at the outset of 2001.⁹⁶

91. See Columbia University School of Law Human Rights Clinic et al., Report on the Situation of Haitians and Dominicans of Haitian Descent in the Dominican Republic, and Reply to the Dominican Government Response to the Commission, Mar. 10, 2000, at 2–5 (on file with author). See also Human Rights Watch, *Illegal People: Haitians and Dominican-Haitians in the Dominican Republic 15–17* (2002) (documenting due process violations of the mass expulsion of Haitians under international law) [hereinafter Human Rights Watch Report].

92. See Michele Wucker, *Why the Cocks Fight: Dominicans, Haitians, and the Struggle for Hispaniola 1–115* (1999).

93. *Report on the Situation of Human Rights in the Dominican Republic*, Inter-Am. C.H.R., OEA/ser. L/V/II.104, doc. 49 rev. 1, ¶ 350 (1999) [hereinafter 1999 IACHR Report].

94. Juan O. Tamayo, *Border Barriers: A Dominican Crackdown on Illegal Immigration Keeps Desperate Haitians out, Expels Thousands Already In*, Miami Herald, Feb. 6, 2000; David Abel, *Haitians See Hope Across the Border; Dominican Republic's Hardships Still Better than Life in Homeland*, Hous. Chron., Jan. 9, 2000, at A26, reprinted in Petitioner's pleading, Record of Oral Arguments and Supporting Documents app. (submitted to the Inter-American Commission on March 1, 2001, during the formal hearing with the Dominican government held on the merits of Case 12.271).

95. See *Plus de 3000 Haïtiens déportés de la République Dominicaine vers Haïti pendant ces deux dernières semaines*, Sept. 1, 2000 (on file with author) [hereinafter *Plus de 3000 Haïtiens déportés*]; J. Jesús Aznarez, *Soldados Dominicanos maltratan y deportan a votantes de origen haitiano*, El País, May 15, 2000; *Dominican Government Admits Confiscation of Blacks' Voting Cards*, EFE, May 15, 2000 (on file with author).

96. See, e.g., *Près de 4.000 haïtiens rapatriés en deux semaines de la République Dominicaine*, Jan. 25, 2001 (Feb. 20, 2001) (on file with author); Fior Gil, *Autoridades*

In 1991, President Joaquín Balaguer adopted severe measures that triggered the first wave of mass expulsions of the decade, largely in response to increasing international pressure in favor of Haitian workers' rights. The expulsions were triggered by a presidential decree issued in June of that year.⁹⁷ Estimates of the number of expulsions run as high as 35,000 within a few months, while many thousands more fled the country voluntarily.⁹⁸ The Inter-American Commission concluded in 1991 that President Balaguer's decree had "imposed a mass expulsion [and] unleashed an indiscriminate persecution against Haitians and their descendants, whether or not born in the [country], to remove them from the country."⁹⁹

A second wave of mass expulsions began in 1996 and carried over into early 1997. During the 1996 presidential elections, Dominican authorities carried out round-ups throughout the country, destroying the identification cards and documents of Haitian workers and Dominicans of Haitian descent while deporting or expelling them, respectively.¹⁰⁰ In January and February of 1997, this persecution escalated, leading to what the Inter-American Commission again recognized as "massive expulsions and deportations of Haitians and even . . . Dominicans of Haitian origin," affecting approximately 25,000 victims.¹⁰¹ The Inter-American Commission carried out an on-site visit to the Dominican

Migración Repatriar Haitianos Ilegales Con Enfasis en Pedigüenos, Hoy, Jan. 25, 2001 (stating that the Migration Office has stepped up its "repatriation" of undocumented Haitians).

97. In June 1991, President Balaguer issued a presidential decree ordering the "repatriation" of foreigners, mostly Haitian cane cutters, under the age of 16 and over the age of 60. Decreto No. 233-91 que dispone la repatriación de todos los trabajadores extranjeros menores de 16 años y mayores de 60 que trabajan como braceros en la siembra, corte y cultivo de la caña de azúcar, en el país, Gaceta Oficial, Núm. 9810, Año CXI (1991). This decree was not repealed until October of 1996. See Decreto No. 560-96, que deroga el Decreto No. 233-91, del 13 de junio de 1991, Gaceta Oficial, Núm. 9937, Año CXLV (Oct. 31, 1996). Five days later, the government began the widespread and systematic expulsions of Haitians and their descendants from the Dominican Republic. See generally Americas Watch/Nat'l Coalition for Haitian Refugees, *A Troubled Year: Haitians in the Dominican Republic* (Oct. 1992) (detailing forced expulsions throughout the year 1991).

98. 1999 IACHR Report, *supra* note 93, ¶ 332. For a detailed, narrative description of the events of this period, see Michele Wucker's excellent study, *supra* note 92, at 115-40 (1999).

99. *Report on the Situation of Haitians in the Dominican Republic*, 1991 Annual Report to the OAS General Assembly, Inter-Am. C.H.R., Sec. 7, 275 (1992) [hereinafter 1991 IACHR Report]. The IACHR found that the 1991 mass expulsions by the Dominican Republic were in flagrant violation of numerous rights enshrined in the American Convention, including articles 20(3), 2(5), 22(6), 8(1), 17, and 19. *Id.*

100. 1999 IACHR Report, *supra* note 93, ¶ 329.

101. *Id.* ¶¶ 325, 329.

Republic in June of 1997 and concluded in its 1999 *Report on the Situation of Human Rights in the Dominican Republic* that the Dominican government's practice of deporting and expelling Haitians violated numerous provisions of the American Convention.¹⁰² The Commission underscored its deep concern by observing that the Dominican Republic's policy and practice of "[c]ollective expulsions are a flagrant violation of international law that shocks the conscience of all humankind."¹⁰³

Despite the Dominican government's longstanding practice of summarily expelling ethnic Haitians, a legal challenge in the Inter-American system was not brought until the end of 1999. In November of that year, the International Human Rights Law Clinic at the University of California at Berkeley Law School ("Berkeley Clinic"), with its co-counsel, filed an urgent petition on behalf of tens of thousands of victims of yet another wave of mass expulsions.¹⁰⁴ This initiative was undertaken because then President Leonel Fernández, in apparent response to the publication of the Inter-American Commission's critical report in October 1999, had unleashed the Dominican Army with orders to round up and expel suspected Haitians *en masse*.¹⁰⁵

So serious was the 1999 expulsion campaign against the ethnic Haitian population that the Inter-American Commission, in response to the Berkeley Clinic's petition, issued precautionary measures urging the Dominican government to "cease the mass expulsions of aliens" and to guarantee that

102. *Id.*; American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978) [hereinafter American Convention].

103. 1999 IACHR Report, *supra* note 93, ¶ 366. There is reason to believe, as the Commission suggests, that the Dominican authorities engaged in the policy and practice of mass expulsions have committed crimes against humanity. Article 7(1)(d) of the Rome Statute for the International Criminal Court recognizes that the "[d]eportation or forcible transfer of population," when committed as a part of a widespread or systematic attack directed against civilians, is a crime against humanity. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art.7(1)(d), 2187 U.N.T.S. 90, 94 (entered into force July 1, 2002). This is not new law; mass deportations as crimes against humanity have deep historical roots reaching back to the Second World War. See Roy Gutman, *Deportation, in Crimes of War: What the Public Should Know* (1999).

104. See *infra* note 118 and accompanying text.

105. See Petitioners' March 28, 2000 Report on the Situation of Haitians and Dominicans; Reply to the Dominican Government Response to the Commission (*Informe sobre la situación de los Haitianos y los Dominico-Haitianos en República Dominicana, y comentario a la respuesta del gobierno dominicano ante la Comisión Inter-Americana*), at 2–3 [hereinafter March 2000 Pleading]. It is estimated that as many as 20,000 Haitians and Dominicans of Haitian descent were expelled in less than two months at the end of 1999, with thousands more suffering the same fate throughout 2000.

individual deportees were afforded some measure of legal process.¹⁰⁶ All the victims comprising the group of individual petitioners in the Mass Expulsions Case were directly or indirectly prejudiced by the 1999 wave of mass expulsions, as evidenced by the subsequent protections ordered in their favor by the Inter-American Court in 2000.¹⁰⁷ Such practices did not escape international attention and censure.

In April of 2001, the U.N. Human Rights Committee (“Committee”) condemned the Dominican Republic’s longstanding practice of mass expulsions. The Committee expressed grave concern “at the continuing reports of mass expulsions of ethnic Haitians, even when such persons are nationals of the Dominican Republic.”¹⁰⁸ The Committee found the Dominican Republic in violation of the International Covenant on Civil and Political Rights¹⁰⁹ because:

[N]o account is taken of the situation of individuals for whom the Dominican Republic is their own country . . . nor of cases where expulsion [entails] the risk of subsequent cruel, inhuman or degrading treatment, nor yet of cases where the legality of an individual’s presence in the country is in dispute and must be settled in proceedings that satisfy the requirements of [due process].¹¹⁰

Similarly, the Committee lamented “the failure to protect Haitians living and working in the Dominican Republic from serious human rights abuses,” including their working conditions and restrictions on their freedom of movement.¹¹¹

106. Letter from Hernando Valencia-Villa, Deputy Executive Secretary, Department of Foreign Affairs, Dominican Republic, to Eduardo Latorre, Secretary of State for Foreign Affairs, Dominican Republic (Nov. 22, 1999) (on file with author).

107. See *infra* notes 121–30 and accompanying text. According to official Dominican government statistics (which tend to underreport), a total of 14,007 persons were deported in 2000, of which 8,598 were expelled between August and December 2000. See Director of the Office of Migration, Dep’t of the Interior and the Police, *Estadísticas para noviembre* (Dec. 30, 2000); Director of the Office of Migration, Dep’t of the Interior and the Police, *Estadísticas para diciembre* (Dec. 30, 2000).

108. *Concluding Observations of the Human Rights Committee: Dominican Republic*, U.N. GAOR, Hum. Rts. Comm., 71st Sess., 1921st mtg., ¶ 16, U.N. Doc. CCPR/CO/71/DOM (2001) [hereinafter 2001 HRC Concluding Observations].

109. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, arts. 7, 12, 13, S. Exec. Doc. E, 95-2, at 25, 27 (1978), 999 U.N.T.S. 171, 175–76 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

110. 2001 HRC Concluding Observations, *supra* note 108, ¶ 16.

111. *Id.* ¶ 17. The Human Rights Committee was guided in its deliberations by two reports submitted by Amnesty International and the Columbia Clinic during the periodic review of the Dominican Republic’s fourth report on compliance with the ICCPR. See

The collective expulsions since 1990 have been characterized by consistent patterns of arbitrariness.¹¹² Foremost among these was the use of racial profiling and inherently discriminatory criteria by the Dominican authorities for the selection of victims.¹¹³ Other patterns have also occurred with bureaucratic regularity, such as the collective nature of most deportations and expulsions, and the total absence of legal process, including: advance notice, an adequate hearing before a competent authority, and the right to appeal.¹¹⁴

Amnesty International, Dominican Republic: United Nations Human Rights Committee's Recommendations Must Be Implemented (June 2001); Columbia Law School Human Rights Clinic, *The Situation of Haitians and Dominicans of Haitian Descent in the Dominican Republic* (Mar. 20, 2001). In addition, the Columbia Clinic showed a video documentary to the Committee that it had produced especially for the occasion with WITNESS, a New York-based human rights organization specializing in video advocacy. *See infra* notes 125, 245 and accompanying text; Videotape: Mass Expulsions of Suspected Haitians in the Dominican Republic: Recent Episodes in a Recurring Practice (WITNESS & Human Rights Clinic, Columbia Law School 2001) (on file with author).

112. Between March 29 and April 2, 2000, a group of researchers composed of representatives of the Columbia Clinic, the Center for Population and Development Studies at Harvard University (CPDS), the Support Group for Refugees and Repatriated Persons (GARR), and the Platform of Haitian Human Rights Organizations (POHDH) met in Anse-à-Pitre, Haiti, with dozens of victims of the Dominican Republic's expulsion policy. The Anse-à-Pitre Committee for Support and Defense of Repatriated Persons' and Refugees' Rights, a local organization, gathered these persons for interviews. Most of these persons were expelled during the 1999 wave of mass "repatriations." The investigation carried out by the research group led by the Columbia Clinic included qualitative analyses of the deportation experiences of the 30 people interviewed. In addition to the interviews, the group collected written and video testimony from the expulsion victims, including several petitioners, in an effort to document the arbitrary policies. The themes that emerged from this study empirically confirm the aberrant nature of the practice of collective expulsions by Dominican officials that the Inter-American Commission identified in its 1991 and 1999 reports.

113. These racial profiling tactics were sometimes taken to extremes. In September of 2000, immigration officials detained a black American student and nearly expelled her to Haiti despite her protests, mistakenly assuming she was Haitian because of her dark skin. *See* Jacques Viau, *Red de Encuentro Dominico-Haitiano: Políticas Migratorias en los Primeros Meses de Gobierno* (Nov. 10, 2000) (describing the Dominican Republic's migratory policies) (on file with author). Another stark example of the racial discrimination underlying immigration officials' selection of victims is that of Pedro Leonel Espinal, a young black Dominican student from Gurabo. Immigration officials picked him up and detained him because they mistakenly "took him for being Haitian," due to the color of his skin. When Mr. Espinal protested, the official hit him in the head with a revolver. *See* Photograph: *Golpiza por ser Negro! [Beaten for Being Black!]*, *El Listín Diario*, (Santo Domingo, Dominican Republic) Oct. 22, 2000; Angel Perarita, *Un militar hiere a un estudiante negro que quería deportar a Haití*, *El Listín Diario* (Santo Domingo, Dominican Republic) Jan. 30, 2001.

114. *See* Record of Oral Arguments and Supporting Documents app., *supra* note 94; *see also supra* note 112 (describing practices of expulsion by Dominican officials).

Verbal and physical abuse was common, and families continued to be torn apart.¹¹⁵

2. The Mass Expulsions Case¹¹⁶

The Mass Expulsions case began in late 1999 when the Dominican Republic expelled huge numbers of ethnic Haitians in apparent response to a critical report by the Inter-American Commission on Human Rights (IACHR).¹¹⁷ In November 1999, the Berkeley Clinic, along with the Center for International Law and Justice (CEJIL) and the National Coalition for Haitian Rights (NCHR), filed an urgent request for precautionary measures with the Inter-American Commission.¹¹⁸ In the same month, the Commission issued precautionary measures calling on the Dominican Republic to suspend its expulsion and deportation of suspected Haitians and Dominicans of Haitian descent because this practice posed a serious threat to the fundamental rights of the victims and their families.¹¹⁹

In January 2000, the Columbia Clinic was invited to join the legal team composed of the Berkeley Clinic, CEJIL, and NCHR. Soon afterward, Columbia assumed the lead in litigating the question of mass expulsions. By June of 2003, the combined legal team represented twenty-eight victims (five families and a few individuals) of Haitian origin who were arbitrarily expelled from the Dominican Republic between 1994 and 2000. The procedural posture of this litigation in the Inter-American Human Rights System is divided along two tracks: provisional measures and merits. The first is a form of injunctive

115. See *supra* note 112 and accompanying text.

116. All information presented in this section is non-confidential and public. Much of it can be accessed on the website erected by the National Coalition for Haitian Rights, at http://www.nchr.org/hrp/dr/report_overview.htm (last visited Mar. 29, 2004). This website is dedicated to creating awareness about the ongoing litigation as well as the causes underlying the plight of the ethnic Haitian minority in the Dominican Republic. All citations to pleadings will be in the document's original language or to the English translation where one exists. Copies of cited pleadings are on file with the author.

117. See *supra* note 105 and accompanying text.

118. Request for Precautionary Measures filed on behalf of the Haitians and Dominico-Haitians residing in the Dominican Republic subject to deportation and expulsion, Nov. 17, 1999. This was the first pleading filed by Petitioners in what subsequently became the Mass Expulsions Case. See also Rules of Procedure of the Inter-American Commission on Human Rights, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4, rev. 8, art. 25 (2001) (stating that the commission may, of its own or a party's request, order the state to adopt precautionary measures in serious and urgent cases) [hereinafter Rules of Procedure of the Inter-American Commission].

119. See *supra* note 106 and accompanying text.

relief ordered by the Inter-American Court of Human Rights (the “Court”). The latter is a proceeding of first instance before the Inter-American Commission of Human Rights (the “Commission”).¹²⁰ The two tracks have evolved separately and continue to advance at different paces. This Article will provide an overview of the provisional measures, proceedings, and pending activities, before turning to a general account of our case on the merits.

a. IACHR Case 12.271: Provisional Measures

In March of 2000, the Columbia Clinic filed a motion on behalf of co-counsel requesting, *inter alia*, that the Inter-American Commission petition the Inter-American Court for a set of provisional measures.¹²¹ In May 2000, the Commission officially opened Case 12.271 on the mass expulsions of Haitians and Dominicans of Haitian descent from the Dominican Republic. The Commission moved to petition the Court for provisional measures on behalf of persons in danger of being arbitrarily expelled from the Dominican Republic, including several named individual victims.¹²² That same month, in an unusual procedural step, the Court convened the parties to hear oral arguments on the Commission’s request for provisional measures before ruling on the matter.¹²³

At the hearing, which took place on August 8, 2000, before the Court in San José, Costa Rica, the Commission appeared with members of the Columbia Clinic, CEJIL, and the Berkeley Clinic as advisors. The Dominican government sent a high level delegation that included the Dominican Republic’s ambassador to the Organization of American States. The Commission presented two witnesses and oral arguments in support of its request for provisional measures. The Dominican government submitted its arguments against the motion.¹²⁴ Notably, the Columbia Clinic also offered as evidence a video documentary in Spanish prepared especially for the hearing, entitled *El*

120. See Rules of Procedure of the Inter-American Commission, *supra* note 118.

121. March 2000 Pleading, *supra* note 105.

122. See Order of the Inter-American Court of Human Rights of August 7, 2000, Provisional Measures Requested by the Inter-American Commission of Human Rights with Respect to the Dominican Republic: Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic, Case 12.271, Inter-Am. C.H.R. 23, OEA/ser.L/V/III.50, doc. 4, ¶¶ 1–3 (2001) [hereinafter August 18, 2000 Order]. In June 2000, the Commission filed an amended petition in which it identified individual petitioners and requested that special measures be ordered to protect them as “representative” of the broader class. *Id.*

123. *Id.*

124. *Id.* ¶¶ 9–13.

Apartheid del Caribe ["The Apartheid of the Caribbean"].¹²⁵ To the best of my knowledge, the Columbia Clinic was only the second law school HRC to appear before the IACHR, and the first to use video documentary evidence.¹²⁶

On August 18, 2000, the Court issued the first of a series of orders (*resoluciones*) in the case, ordering the Dominican Republic to desist from expelling two of the individual petitioners residing there.¹²⁷ The decision ordered further protective measures for three other petitioners who had already been expelled to Haiti, with special consideration for their families and children. The Court also requested additional information on the remaining two individual petitioners named in the Commission's pleadings. The Court asked the parties to report regularly on the steps taken to implement its decision, as well as on the living conditions of Haitians and Dominicans of Haitian descent living in the border "shantytowns" or *bateyes*. Central to the Court's landmark August 18 resolution was a set of protective measures for the two witnesses who testified on behalf of the Commission, Father Pierre Ruquoy and Solange "Sonia" Pierre, Director of the *Movimiento de Mujeres Dominicano-Haitianas* or "MUDHA," a grassroots human rights NGO based in Santo Domingo, Dominican Republic.

On September 14th, 2000, in a second order, the Court granted provisional measures to cover the two remaining petitioners, and insisted that the Dominican Republic report on the steps taken to comply with both resolutions.¹²⁸ In the end, the Inter-American Court granted protection to every one of the seven persons named in the Commission's amended petition.

125. This video documentary was produced in conjunction with WITNESS, a New York based human rights organization specializing in video advocacy. A copy is on file with the author. See *infra* notes 245–46 and accompanying text.

126. Only American University's International Human Rights Law Clinic seems to have litigated cases prior to the Columbia Clinic's participation in the August 8, 2000 hearing. See Wilson et al., *supra* note 88, at 15. The director and staff of WITNESS indicated that this was the first occasion in which they had co-produced video evidence for the Inter-American Court.

127. These Orders included a series of Provisional Measures requested by the Inter-American Commission of Human Rights. See Order of the Inter-American Court on Human Rights, Provisional Measures requested by the Inter-American Commission of Human Rights with respect to the Dominican Republic: Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic, May 26, 2001, Case 10, Inter-Am. C.H.R. 27, OEA/ser.L/V/III.54, doc. 4 (2001) [hereinafter May 26, 2001 Order]; Provisional Measures requested by the Inter-American Commission of Human Rights with respect to the Dominican Republic: Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic, Nov. 12, 2000, Case 3, Inter-Am. C.H.R. 29, OEA/ser.L/V/III.50, doc. 4 (2001) [hereinafter November 12, 2000 Order]; August 18, 2000 Order, *supra* note 122.

128. Provisional Measures requested by the Inter-American Commission of Human Rights with respect to the Dominican Republic: Case of Haitians and Dominicans of Haitian

The Dominican government responded for the first time to the Court's decisions in November 2000.¹²⁹ Soon thereafter, on November 12, 2000, the Court issued a third order in which it affirmed its preceding resolutions, especially that of September 14. The Court also reiterated its order that the Dominican authorities take steps to implement the protective measures issued with respect to the seven named petitioners, as well as the two witnesses who had testified in the August 8 hearing.¹³⁰

This ground-breaking triumvirate of orders has dictated the substantive parameters of the provisional measures regime in Case 12.271. This case represents the first time that the Inter-American Court issued provisional measures to protect rights *other* than those to life and personal integrity (Articles 4 and 5 of the American Convention). This jurisprudential shift has enormous implications for increasing the scope of the American Convention's protections.¹³¹ The Court's orders were directed at protecting the beneficiaries from further violations of their rights to personal liberty, freedom of movement and residency, as well as their rights to special protection of children and their families (Articles 7, 19, and 22 of the Convention).¹³² This broadening of the Court's substantive tutelage under Article 63(2) of the Convention represents "a qualitative step in [the Court's] jurisprudence" that has led to increased protection for the victims in the case at hand, and which has opened the door to expanding the Courts' injunctive powers in positive new directions.¹³³

Six months after the November decision, the Inter-American Court issued a fourth order on May 26, 2001 in response to the Government's

Origin in the Dominican Republic, Sept. 14, 2000, Case 3, Inter-Am. C.H.R. 29, OEA/ser.L/V/III.50, doc. 4 (2001).

129. See November 12, 2000 Order, *supra* note 127, ¶ 4.

130. See *id.*

131. Cançado Concurrence, *supra* note 89, ¶¶ 14–15. Article 63(2) of the American Convention reads in relevant part as follows: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration." American Convention, *supra* note 102, art. 63(2), 1144 U.N.T.S. at 159.

132. Cançado Concurrence, *supra* note 89, ¶ 15.

133. See *id.* ¶ 23. It is important to point out that the Court's August 18 Order has been rightfully criticized on other grounds. The Court in this case affirmed prior decisions in which it insisted on the names of specific persons before granting the requested provisional measures. See Dinah Shelton, *The Legal Status of the Detainees at Guantanamo Bay: Innovative Elements in the Decision of the Inter-American Commission on Human Rights of March 12 2002*, 23 Hum. Rts. L.J. 13 (2002) (arguing that the Court's broad statement that individual identification is "indispensable" in order to obtain provisional measures is not only unfortunate but unnecessary and out of touch with human rights reality in the region).

apparent lack of progress toward compliance.¹³⁴ The Court reaffirmed all the provisional measures and demanded detailed information from the Dominican government regarding both the state's compliance and the situation of all protected persons, including the witnesses. In addition, the Court adopted two new innovative measures designed to better protect the victims; first, calling for the issuance of special documentation identifying the beneficiaries named in its resolutions as persons under its protection, and second, ordering the Commission and the Government of the Dominican Republic to establish an "appropriate mechanism" for monitoring the implementation on the ground of all the provisional measures.¹³⁵ Finally, the Court tightened the reporting schedule for both the Government and the Commission to respond to its latest order, thereby exercising closer oversight of the process.

A major breakthrough in this regard was finally reached in early 2002. The Dominican government convened the parties to meetings in Santo Domingo in March, 2002, at which a historic agreement was reached.¹³⁶ The dual objective of these meetings was: (1) to provide the persons named in the resolutions with the special documents of "safe passage" ordered by the Court, and (2) to establish a follow-up or supervisory committee proposed by the Commission, the *Comité de Impulso*.¹³⁷

On March 18, 2002, in Santo Domingo, representatives of the petitioners met with their counterparts from the Dominican government under the auspices of the Inter-American Commission in the local offices of the Organization of American States (OAS). Petitioners were represented by a delegation from the Columbia Clinic, as well as representatives from the NCHR, MUDHA, and *Groupe d'Appui aux Réfugiés et Repatriés* (GARR).¹³⁸ The Government's delegation was comprised of high-ranking officials from the Ministry of Foreign Relations and the National Immigration Office (*Dirección General de Migración*), along with a number of technicians and support staff.¹³⁹

134. See May 26, 2001 Order, *supra* note 127.

135. *Id.*

136. For a detailed accounting, see National Coalition for Haitian Rights, Dominican Government Formalizes Agreement According to its International Obligations, at http://www.nchr.org/hrp/dr/iachr_agreement.htm (last visited Apr. 27, 2004). For the full text of the agreement, see National Coalition for Haitian Rights, *infra* note 145.

137. National Coalition for Haitian Rights, Dominican Government Formalizes Agreement According to its International Obligations, *supra* note 136.

138. GARR is the local partner of the Columbia Clinic and co-counsel in Haiti.

139. Presiding for the Government was the Dominican Republic's ambassador to the OAS in Washington D.C. (Author's note.)

On the appointed day, the petitioners' representatives accompanied two of the clients residing in the Dominican Republic to the offices of the OAS. After they had provided basic background information, including their fingerprints and signatures, the clients received their official documents, known as "*salvoconductos*," or safe passage documents. The *salvoconductos* are official documents issued by the Dominican National Immigration Office that expressly authorize the beneficiaries to live, circulate, and work legally in the Dominican Republic until the Mass Expulsions Case before the Inter-American Court is resolved.¹⁴⁰ The second phase of the documentation was successfully completed two days after the first, on March 20, 2002, when the petitioners' representatives and a special delegation of government officials traveled several hours to the Dominican-Haitian border to issue *salvoconductos* to a number of clients and their families residing in Haiti.

During the CLS Clinic's March 2002 visit to the Dominican Republic and Haiti, *salvoconductos* were issued to a total of thirteen clients: two in Santo Domingo, and eleven on the Dominican-Haitian border. In July of 2002, during a subsequent round of documentation spearheaded by the Berkeley Clinic, nine more of our clients and their families received their government sponsored *salvoconductos*.¹⁴¹ This was the first time that official legal documents were issued by a state party in compliance with a provisional measures order.¹⁴² Equally significant is the fact that of the twenty-two total beneficiaries, only six were named in the original Inter-American Court decisions; the rest are either family members of the original named victims, or members of an expelled family that joined the litigation in February of 2002, after the Court's protective orders were issued.¹⁴³ Best of all, despite some initial misgivings, the official safe passage documents issued to our clients have worked exceedingly well to date; the beneficiaries have relied on them to travel safely between the two

140. These terms are printed in Spanish on every *salvoconducto*, along with a color photograph of the authorized holder of the document. Copies of the petitioners' *salvoconductos* are on file with the author.

141. The third and final phase of the documentation process took place under the auspices of the *Comité de Impulso* a few months later in July 2002, when most of the remaining clients (nine) received their *salvoconductos*. One family separated by the expulsion of the mother and her two daughters was reunited in the Dominican Republic after eight years.

142. This is due, not surprisingly, to the unprecedented nature of the decision itself. *See supra* note 131 and accompanying text. Indeed, redressing the forced separation of family members as a result of the expulsions was one of the primary motivations behind the idea of issuing *salvoconductos*.

143. Because the Court had expressly protected the rights to special protection of families and children in its orders, the government most likely felt compelled to accommodate Petitioners "demands" in this respect. *See supra* notes 131–33 and accompanying text.

countries, to reunite families that were separated, and to reside and work legally in the Dominican Republic.¹⁴⁴ These achievements were made possible thanks to the successful signing by the parties of the proposed Memorandum of Understanding that created the *Comité de Impulso*.¹⁴⁵

b. The *Comité de Impulso*

On the afternoon of March 18, 2002 (after the documentation of our first two clients), the petitioners met with government officials in the offices of the Foreign Ministry in Santo Domingo to establish the *Comité de Impulso* based on a draft proposal of the Memorandum of Understanding developed jointly by the parties. The Dominican government was represented by a number of high-ranking officials from the Foreign Ministry, as well as high-level representatives from other executive offices, such as the National Office of Immigration and the Armed Forces. Members of the Columbia Clinic, CEJIL, and NCHR represented Petitioners.¹⁴⁶

The resulting agreement was signed by the Dominican Deputy Foreign Minister, as well as by representatives of the Inter-American Commission, the Columbia Clinic, NCHR, and CEJIL. It was the first time that a tripartite follow-up mechanism was created in this manner to facilitate and monitor the implementation of provisional measures ordered by the Inter-American Court.¹⁴⁷ The agreement itself was innovative for a number of reasons. First, it bound the Government to provide *salvoconductos*, i.e., provisional legal

144. In June of 2002, the Columbia Clinic, in conjunction with its local partner GARR and the clients living in Anse-à-Pitre, carried out an experiment, sponsoring the travel of several of the clients into the Dominican Republic to test the effectiveness of the *salvoconductos*. Without exception, the official documents were respected at the border and at the numerous military checkpoints that dot the highways between the border and various cities within the country.

145. See National Coalition for Haitian Rights, *Acta de Entendimiento entre la Comisión Interamericana de Derechos Humanos, el Estado de la República Dominicana y los Peticionarios del caso 12.271 Sobre las Medidas Provisionales a favor de los Haitianos y Dominicanos de origen Haitiano de la República Dominicana* (Mar. 18, 2002), at http://www.nchr.org/hrp/dr/iachr_entendimiento.htm (last visited Mar. 24, 2004) [hereinafter *Memorandum of Understanding*].

146. Petitioners were accompanied during the sessions by representatives of MUDHA and GARR, our local partners, and by one of our clients.

147. For a detailed account of the meeting, the participants and the outcome, including descriptions of the *Memorandum* and the *Comité de Impulso*, see Juan O. Tamayo, *Corte Vigila Actos RD Sobre Migración Haití*, *Hoy* (place of publication), Mar. 20, 2002, at 1. Unfortunately, the *Comité* has not met since its installation in March 2002, and is currently facing a constitutional challenge in the Dominican Courts. (Author's note.)

documents, to all of our clients, especially those named in the Inter-American Court's resolutions, as well as their families. Second, the accord established a practical, operational framework for protecting the rights of our clients and their families, by governing the procedure for issuing (or replacing, if necessary) their *salvoconductos*.¹⁴⁸ Finally, the agreement's framework guaranteed permanent monitoring of the implementation of all the provisional measures and provided for periodic meetings to be convened by any of the signing parties upon request. As a consequence, a substantial level of compliance with the Court's provisional measures order was eventually achieved.

c. IACHR Case 12.271: Merits

Between April 2000 and January 2002, while actively litigating the provisional measures track of the case, the Columbia Clinic, in consultation with co-counsel, prepared and translated into Spanish the merits petition on behalf of the twenty-eight clients.¹⁴⁹ During this period, the merits track of Case 12.271 was overshadowed by the more active provisional measures track. Since January 2002, however, the merits track and its pleadings began more formally to assume their place at the center of the litigation. Currently, the case on the merits is pending before the Inter-American Commission on the question of admissibility.

Officially, the merits case began when the Inter-American Commission opened Case 12.271 in May 2000 in order to allow the Commission to move before the Court with a request for provisional measures. Yet, the next procedural event on the merits did not take place until March 2001 when the Inter-American Commission granted Petitioners' request for a public hearing. A team from the Columbia Clinic appeared before the Commission and representatives of the Dominican government in Washington, D.C., on March 1, 2001,¹⁵⁰ and submitted detailed information on the Dominican authorities' continued practice of arbitrarily expelling persons suspected of being Haitian

148. See *supra* note 141 and accompanying text.

149. See *Addendum of Points and Authorities in Support of Petition*, Case 12.271, Inter-Am. C.H.R.: Expulsion of Haitians and Dominicans of Haitian Descent in the Dominican Republic (Jan. 29, 2002) [hereinafter *Addendum*]; March 2000 Pleading, *supra* note 105; see generally National Coalition for Haitian Rights, *Haitian Expulsion Case Backgrounder*, at www.nchr.org/hrp/dr/iachr_backgrounder.htm (last visited Mar. 28, 2004) (describing generally the course of litigation) [hereinafter *Haitian Backgrounder*].

150. See Susannah A. Nesmith, *Columbia Students Push Dominican Republic to Stop Haitian Deportations*, Associated Press, Mar. 7, 2001.

from the Dominican Republic.¹⁵¹ It is important to underscore that until early 2002, when the Columbia Clinic and co-counsel filed the amended complaint, the merits of Case 12.271 dealt only with the *general* situation of mass expulsions.¹⁵²

Much of the data presented to the Commission at the March 2001 merits hearing was collected during the Columbia Clinic's visit to the Dominican Republic and Haiti in January of that year. The Columbia Clinic, with the help of its local partners, had compiled extensive information on the current Dominican government's widespread practice of systematically expelling persons suspected of being Haitian from the national territory, and submitted this information to the Commission at the March hearing.¹⁵³ During the Columbia Clinic's second on-site visit, in January 2001, recent victims of the expulsions that had taken place in late 2000 were identified and interviewed, rounding out the client base to its current configuration of four families and two individuals, for a total of twenty-eight Dominicans of Haitian descent and Haitian migrants.¹⁵⁴

Petitioners eventually filed an amended complaint on the clients' behalf in early 2002. The underlying petition to which reference is made is the general pleading presented in March 2000 by the Columbia Clinic on the provisional measures track. Whereas the March 2000 pleading only alleged a general pattern of widespread and systematic violations by the Dominican State, the amended complaint denounces specific violations of domestic and international law by Dominican agents on behalf of the twenty-eight clients. The new complaint amends the original petition to incorporate individual claims of violations under Dominican law as well as the American Convention. It describes the specific facts of each individual petitioner's case, and sets out the pertinent legal analysis and petitions with respect to admissibility, substantive violations, and reparations. Finally, it seeks not only redress for individual

151. Record of Oral Arguments and Supporting Documents, Case 12.271, Inter-Am. C.H.R.: Expulsion of Haitians and Dominicans of Haitian Descent from the Dominican Republic (Mar. 1, 2001) (containing written summary of Petitioner's oral arguments and compilation of supporting documentation).

152. See March 2000 Pleading, *supra* note 105.

153. The Columbia Clinic had already carried out an on site visit once before in March 2000. During its initial visit to the Dominican Republic and Haiti, the Clinic located and interviewed the majority of the original clients living in Haiti.

154. See Haitian Backgrounder, *supra* note 149.

harms, material and moral, but also satisfaction through guarantees of non-repetition and provisions for legal and structural reform.¹⁵⁵

d. Summary of Amended Complaint

The amended complaint alleges that individual petitioners were all victims of collective and arbitrary expulsions carried out by agents of the Dominican Republic, most of which took place from 1998 to 2000. Petitioners and/or their family members were arbitrarily expelled by Dominican authorities without notice, hearing, or opportunity to collect their belongings or to contact their families. They all experienced great harm as a result, including extensive material losses and intense personal suffering. It should be emphasized that the amended petition raises several issues of first impression in the Inter-American human rights system, especially with regard to the American Convention's provisions on non-discrimination, freedom of movement and residence, due process, and equal protection, as well as judicial protection and the rights of children and their families.¹⁵⁶

The amended complaint demonstrates how the victims' expulsions were part and parcel of the Dominican government's long-standing practice of systematically and collectively deporting persons presumed to be of Haitian origin. This ongoing practice is patently race-based and inherently discriminatory. Moreover, Dominican authorities keep segments of the affected population permanently undocumented through their persistent denial of legal papers to Dominicans of Haitian descent and Haitians residing in the Dominican Republic. This phenomenon underlies the arbitrary policy and practice of collective expulsions that the Dominican government has carried out for decades.

This petition alleges that the acts and omissions of the Dominican government constituted egregious violations of Dominican law and of the American Convention. Under the American Convention, the expulsion and deportation of petitioners produced a violation of their rights to freedom of movement and residence (Article 22), nationality (Article 20), juridical personality (Article 3), and equal protection under the law (Articles 1 and 24).¹⁵⁷ The manner and circumstances of Petitioners' deportation and expulsion by the Dominican government violated their rights to humane treatment

155. For a similar description of the amended complaint in general terms and related links, see *id.*

156. See generally Cançado Concurrency, *supra* note 89 (highlighting several areas of first impression raised by the litigation).

157. *Addendum*, *supra* note 149, ¶¶ 16–17.

(Article 5), privacy (Article 11), personal liberty (Article 7), fair trial (Article 8), domestic legal effects and judicial protection (Articles 2 and 25), and property (Article 21). Finally, the actions of the government of the Dominican Republic violated Petitioners' rights of the family and child (Articles 17 and 19). As a result, the actions of the Dominican Republic constituted a violation of its duty under Article 1(1) to respect the rights and freedoms recognized in the Convention, and to ensure the full and free exercise of the aforementioned rights.¹⁵⁸

The amended complaint concludes with a prayer for full reparation, including restitution and compensation for material and moral damages. Petitioners ask to be restored to their status before they were illegally expelled to the greatest extent possible. At the same time, Petitioners ask for full and fair compensation for the material losses they incurred and continue to incur as a result of their illegal expulsions. They also request that the harm and suffering that they and their families have experienced and continue to endure, be adequately compensated. Finally, Petitioners ask for moral damages, including guarantees of non-repetition. Primary among these is to require the Dominican Republic to adopt the legal and institutional reforms necessary to prevent such violations from recurring in the future.

3. Transnational Legal Process in Action

In a broad sense, the Mass Expulsions Case reflects transnational legal process at its best. It boasts a diverse cast of transnational norm entrepreneurs (TNEs) that includes the Berkeley and Columbia human rights clinics, as well as traditional NGOs operating at both the international (CEJIL, NCHR) and domestic (MUDHA, GARR) levels.¹⁵⁹ Though encountering staunch resistance from the Dominican government, Petitioners nonetheless established critical ties with certain officials in their quest for compliance with the Court's provisional measures orders. Together, the TNEs and their government "allies" utilized a spectrum of intergovernmental and domestic law declaring fora to generate over time increased levels of voluntary state compliance, thereby becoming an engine for the non-coercive and, at times, creative enforcement of international human rights law. Though somewhat simplified, this synopsis suggests that the

158. *Id.* ¶¶ 18–19.

159. Due to restrictions on space and content, I will not address the underlying interaction between and among the constituent organizations that make up the co-counsel group representing individual petitioners, which has been fundamental to prosecuting the case. Of particular interest would be the relationships between the U.S.-based NGOs and clinics, and the local partners in the Dominican Republic and Haiti, but this is beyond the purview of the Article.

goal of transnational legal process—to bring international law home—is being met in this case.

Certain aspects of the process merit further comment. The first relates to the constant interaction of the parties, especially the human rights clinics or HRCs, with the different law-declaring fora, and the positive consequences of this interaction.¹⁶⁰ Governmental and non-governmental law-declaring fora have been instrumental in constructing the foundation upon which the Mass Expulsions Case is built. In particular, critical reports published by the Inter-American Commission in 1991 and 1999, and by Human Rights Watch in 1992 and 2002, provided detailed denunciations of the widespread and systematic human rights violations produced by the Dominican Republic's longstanding anti-Haitian policies, especially those underlying the mass expulsions.¹⁶¹ These reports (with the exception of Human Rights Watch's 2002 study) have been key sources for the pleadings presented by Petitioners in the case, especially the merits petition, and undoubtedly influenced the Inter-American Court's deliberations in the provisional measures case.¹⁶²

The interaction between transnational actors and law-declaring fora is frequently a two-way street. The Berkeley Clinic was among the many non-governmental sources consulted by the Commission for its 1999 Report, which subsequently was the basis for the precautionary measures petition presented by Berkeley to initiate the Mass Expulsions Case.¹⁶³ Another example of this constructive two-way interaction is the Human Rights Committee's condemnation of the Dominican Republic's policies and practices under the International Covenant on Civil and Political Rights, which has been used since by Petitioners to argue the illegality of the abuses against the ethnic Haitian minority occurring in that country.¹⁶⁴ Among the factors contributing to the Human Rights Committee's critical position were the detailed oral and written submissions on this subject presented to it by the Columbia Human Rights

160. Under the pertinent definitions, it is possible for an intergovernmental or non-governmental body to function either as a transnational norm entrepreneur or a law-declaring forum, depending on the nature and objective of the relevant activity. *See supra* notes 48–50, 62 and accompanying text.

161. *See supra* notes 91, 93, 97, 99.

162. This is especially true of the Inter-American Commission's 1999 Report, which was the primary source for the written and oral submissions made to the Court by the Commission and Petitioners. *See supra* notes 93, 123–26 and accompanying text.

163. *See* 1999 IACHR Report, *supra* note 93, ¶ 330.

164. *See supra* notes 108–11 and accompanying text. The 2001 Concluding Observations of the U.N. Human Rights Committee were cited by Petitioners in ¶ 96 of the *Addendum*, *supra* note 149.

Clinic.¹⁶⁵ Finally, both the Berkeley and the Columbia clinics were primary sources for Human Rights Watch's most recent report "Illegal People," published in 2002, which describes the situation of Haitians and Dominicans of Haitian origin in the Dominican Republic and provides a necessary update on the situation in light of pertinent international human rights standards.¹⁶⁶

The purpose of this illustration is to "connect the dots" and show how in the Mass Expulsions Case, the permanent, two-way interaction between transnational norm entrepreneurs and a range of law-declaring fora has led directly to the progressive interpretation of international norms. We have seen that the function of the law-declaring forum, whether governmental or non-governmental, is to "declare both general norms of international law . . . and *specific interpretation* of those norms in particular circumstances."¹⁶⁷ These authoritative interpretations are then internalized by a state via the dynamic of transnational legal process to produce progressive compliance with the underlying international norms. In the Mass Expulsions Case, the central law-declaring forum around which all others tend to revolve has been, for obvious reasons, the Inter-American Court of Human Rights. It is the only such non-domestic forum that can issue a declaratory judgment that is legally binding on the Dominican Republic and order redress for the victims.

The Inter-American Court's groundbreaking provisional measures orders were the direct result of this transnational legal process. The Court was presented with, and relied upon, information prepared by the Inter-American Commission based on the findings in its 1999 Report. The Commission's 1999 Report was premised in part on, and updated by, the analytical interpretations issued by other law-declaring fora, especially local and international human rights organizations such as MUDHA and Human Rights Watch. The related but distinct role of the Berkeley and Columbia clinics as the engine behind the legal case has been described above in detail. It seems evident that the function of the non-governmental actors in this case provides a textbook example of transnational legal process in action.

Another aspect worth highlighting in the ongoing process is the extensive transnational networking and advocacy carried out by Petitioners in support of their legal crusade. In addition to their work on the Mass Expulsions Case, Petitioners, as committed TNEs, have consistently participated in non-litigation advocacy efforts both in the Dominican Republic and abroad to promote public awareness of the human rights principles underlying the

165. See *supra* note 111 and accompanying text.

166. See Human Rights Watch Report, *supra* note 91.

167. Koh I, *supra* note 1, at 649 (emphasis added).

litigation. Perhaps the clearest example of this is the seminal report, *Unwelcome Guests: A Study of Expulsions of Haitians and Dominicans of Haitian Descent from the Dominican Republic to Haiti*, published and widely distributed in 2002 by the Berkeley Clinic.¹⁶⁸ The Berkeley Clinic produced the report in English, Spanish, and French, and submitted it directly to high-ranking officials in both the Haitian and Dominican governments.¹⁶⁹ The Columbia Clinic organized a fundraising event in New York City in May of 2002 to support the efforts of its local partner in the Dominican Republic, MUDHA, working on behalf of the ethnic Haitian minority. The event featured artists from the Haitian and Dominican communities speaking to issues of racism and xenophobia in the Dominican Republic.¹⁷⁰ Such efforts have served to mobilize public opinion both in the United States and on the island of Hispaniola, an ingredient essential to propelling the transnational legal process.

Through their litigation and advocacy efforts, the Berkeley and Columbia Clinics have strengthened the pre-existing international movement against the Dominican Republic's anti-Haitian policies and increased the pressure this movement exerts on the Dominican authorities.¹⁷¹ That the Mass Expulsions Case and related advocacy have been spearheaded by HRCs from the University of California at Berkeley and Columbia University—two of the United States' premier universities—has reinforced the legitimacy and impact of these efforts within both the Dominican Republic and the Inter-American system. This is so because the universities' participation is widely perceived as

168. International Human Rights Law Clinic, Boalt Hall School of Law, *Unwelcome Guests: A Study of Expulsions of Haitians and Dominicans of Haitian Descent from the Dominican Republic to Haiti* (2002) [hereinafter *Berkeley Expulsions Study*].

169. *Id.* See also Boalt Hall, University of California Berkeley, International Human Rights Law Clinic: Projects and Cases, at http://www.law.berkeley.edu/cenpro/ihrhc/social_rights.html (last visited Apr. 27, 2004) (describing the study and providing links to text in three languages).

170. Invitation letter to the Tenth Year Celebration of MUDHA from the Committee in Support of MUDHA, June 27, 2002, New York, NY (copies on file with author). Member organization sponsors included: the Center for Economic and Social Rights (New York); Center for Justice and International Law (Washington D.C.); National Coalition for Haitian Rights (New York); Human Rights Institute, Columbia Law School (New York); Association of Haitian Educators (New York); Partners in Health, Institute for Health and Social Justice, Harvard Medical School (Massachusetts); Berkeley Clinic (California).

171. Until the Berkeley Clinic joined the fray in 1998, advocacy around these issues was limited to activities by grass-roots organizations and the occasional international report. For a representative report, see Americas Watch, *supra* note 97. Most of the focus internationally, which began in the late 1970s, centered on the labor rights of Haitian immigrant workers. See Wucker, *supra* note 92, at 109–14 (describing the plight of Haitian cane cutters in the Dominican Republic and the involvement of international human rights organizations).

imparting an aura—if not an actual “stamp”—of academic approval to both the advocacy and the underlying cause it promotes. In the eyes of many, this academic aura transmits an impression of neutrality and rigor that tends to legitimize the movement’s resistance to the problem addressed, while enhancing the trustworthiness of the surrounding advocacy.¹⁷² As a result, the transnational network built around the issue is better able to persuade target audiences in the Dominican Republic and the United States that norms relating to the fundamental rights of the ethnic Haitian minority in the Dominican Republic reflect not just legally binding obligations but also universal moral imperatives shared by civilized nations.

In this way, the Berkeley and Columbia clinics have carried out functions central to the role of an effective transnational norm entrepreneur with singular success. Indeed, the convergence of transnational forces to which the HRCs have contributed has begun to persuade political elites in the Dominican Republic that their approach to Haitian immigration is out of line with universal standards, to the increasing detriment of their nation’s international standing. This, in turn, has led to an important degree of political and social internalization of the relevant human rights standards in the Dominican Republic, and to progress on their legal internalization as well.

Already there are signs that international standards promoted by the Mass Expulsions Case are being internalized in the Dominican Republic’s political and normative systems. The constructive role played by certain officials in the Mejía Administration during the implementation of the Inter-American Court’s orders is prime evidence of a growing political internalization.¹⁷³ The intense public debate carried out within Dominican society, viewed through the media, is a further indication of increasing internalization on a broader social level.¹⁷⁴ While it is true that deep-rooted

172. My experience interacting with government and non-governmental representatives in the Dominican Republic around the Mass Expulsions Case amply confirms this perception. For instance, local partners involved in the case have insisted on the critical importance of the continued participation of Columbia University, emphasizing that the university’s participation has been a decisive factor in the levels of success achieved to date. Interview involving local partners and Jane Spinak, Director of Clinical Programs at Columbia Law School, New York, N.Y. (Mar. 31, 2003).

173. See discussion *supra* Part II.B.2 (describing the *Comité de Impulso*).

174. See, e.g., Leo Reyes, *RD Defiende el Derecho a Repatriar Haitianos Ilegales*, *El Siglo* (Panama), Aug. 9, 2000; Pedro Ruquoy, *Gobierno de RD presentó buena defensa en la Corte Interamericana*, *El Siglo* (Panama), Aug. 9, 2000; Radhames Gonzalez, *Pelegrin Castillo culpa EU y a Europa*, *Hoy* (Dominican Republic), Mar. 21, 2002, at 11; *Corte vigila actos RD sobre Migración Haití*, *Hoy* (Dominican Republic), Mar. 20, 2002, at 1; Fior Gil, *Culpa al Gobierno PLD por sentencia de Corte*, *Hoy* (Dominican Republic), Mar. 21, 2002,

opposition remains within the Dominican political and social establishments, there is no denying that important progress has been made on both fronts, and that the Mass Expulsions Case has been a primary factor in compelling this change.¹⁷⁵ To date there have been no further waves of mass expulsions like those carried out by prior governments in 1997 and 1999,¹⁷⁶ though the underlying discriminatory policies and practices are still far from eradicated.

Nowhere is the “vertical domestication” of international norms more evident than in the Dominican government’s initiative to reform immigration law and practice. In 2001, the administration of President Hipólito Mejía presented to the Dominican Congress a much-anticipated draft law on immigration that seeks to modernize the Dominican Republic’s legal regime governing immigration.¹⁷⁷ The enactment of legislative reform overhauling the outdated immigration law and regulations, which date back to 1939, was and continues to be a priority for President Mejía.¹⁷⁸ Foreign Minister Hugo Tolentino Dipp, an important figure in the Mass Expulsions Case,¹⁷⁹ was personally committed to the reform and lobbied vigorously on behalf of the government’s proposal until his resignation in March 2003 for reasons unrelated to the case.¹⁸⁰ The Dominican Congress has continued to debate and modify the draft immigration law with input from civil society groups and NGOs.¹⁸¹

at 1; German A. Ornes, *Se Oponen Extranjeros Supervisen Asuntos RD*, Hoy (Dominican Republic), Mar. 21, 2002, at 10.

175. See, e.g., German A. Ornes, *Fallo de Corte no obliga crear comité*, Hoy, Mar. 21, 2002, at 11 (describing how the Deputy Foreign Minister attributes the creation of the follow-up committee—which is not required by the Inter-American Court’s Orders—to “negotiations” with the Court with a view to compliance with those Orders).

176. See *supra* notes 92–107 and accompanying text.

177. Secretaría de Estado de Relaciones Exteriores de la República Dominicana, *Propuesta de Ley General de Migración* (2001) (copy on file with author) [hereinafter *Draft Immigration Law*]; see also Claudia Mejía-Ricart, *Proyecto de Ley General de Inmigración*, [A]HORA, June 24, 2002, <http://www.ahora.com.do/Edicion1260/colaboradores/mejia.html> (commenting on aspects of the proposed legislation).

178. See *Hugo deja Cancillería sin política migratoria*, El Nacional (Venezuela), Mar. 27, 2003; see also *Presidente Mejía lamenta nadie ha ayudado en situación haitiana*, Terra (Dominican Republic), Apr. 2, 2003, <http://www.terra.com.do/noticias/articulo/html/act143373.htm> (on file with author).

179. See *infra* notes 192–93 and accompanying text.

180. See *Hugo deja Cancillería sin política migratoria*, *supra* note 178.

181. Oné Respe, *El descalabro del proyecto de ley de migración*, Boletín de la Red de Encuentro Dominicano Haitian: “Jaques Viau,” Feb. 28, 2003, at 2; Rubén Silié, *Principales aportes del nuevo anteproyecto de ley de migración al debate nacional*, Boletín de la Red de Encuentro Dominicano Haitian: “Jaques Viau,” Apr. 30, 2002, at 1; Mejía-Ricart, *supra* note 177.

Regardless of its outcome, the ongoing reform process promises to transform the legal and political landscape in the Dominican Republic concerning immigration and the treatment of the ethnic Haitian minority.

Modernization of the Dominican immigration regime has meant greater attention to international law and human rights protections. According to sources involved in the drafting of the proposed legislation, the “friction” created by the international campaign on behalf of Haitian immigrants and their descendents in the Dominican Republic, with the Mass Expulsions Case as its centerpiece, was an influential factor in shaping the text of the draft immigration law presented by the Government, especially with respect to the new international human rights protections it contemplates.¹⁸² In this regard, the law as originally presented to the Dominican Congress by the President reflects a fundamental shift in thinking about immigration policy and practice by certain important political sectors. Local non-governmental organizations specializing in immigration have recognized this shift and lauded the Government’s draft law for demonstrating, in contrast with similar initiatives under prior governments, a “healthy, democratic respect for the rights of the immigrant population residing in the country.”¹⁸³

a. Transnational Public Law Litigation

The relative success of the Mass Expulsions Case to date is nonetheless qualified by the protracted and unpredictable litigation still to come. Most of the major legal issues raised by the mass expulsion of ethnic Haitians from the Dominican Republic have yet to be judicially resolved. In this regard, the Columbia Clinic and its co-counsel in the Mass Expulsions Case have consciously adopted the role of “transnational law litigants” in the Inter-American system by seeking “redress, deterrence, and reform of national governmental policies through [the] clarification of rules of international conduct.”¹⁸⁴ The transnational law litigant is an especially relevant variation on the figure of the transnational norm entrepreneur or TNE examined in Part I.B.1.¹⁸⁵ While the legal literature on transnational public law litigation to date

182. Interview, New York, N.Y. (July 17, 2001). The person interviewed served as a consultant to the Dominican government in the drafting of the draft immigration law. *See also* Draft Immigration Law, *supra* note 177, pmb., arts. 24–25 (providing basic protection for immigrants’ rights).

183. Oné Respe, *supra* note 181, at 3 (translated by author).

184. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *Yale L.J.* 2347, 2348 (1991) [hereinafter Koh V].

185. *See supra* notes 7, 48–51 and accompanying text.

tends to revolve around Alien Tort Claims Act suits in United States federal court, it is not necessarily restricted to that, or any other forum.¹⁸⁶

The hallmark of transnational public law litigation is its focus on practical results, measured by “the norms declared [or interpreted], the political pressure generated, the government practices abated,” and, ultimately, the impact on human lives.¹⁸⁷ By and large, such lawsuits display the following characteristics:

(1) a *transnational party structure*, in which states and nonstate entities equally participate; (2) a *transnational claim structure*, in which violations of domestic and international . . . law are alleged in a single action; (3) a *prospective focus*, fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes; (4) the litigants’ strategic awareness of the *transportability of those norms* to other domestic and international fora for use in judicial interpretation or political bargaining; and (5) a subsequent process of *institutional dialogue* among various domestic and international, judicial and political fora to achieve ultimate settlement.¹⁸⁸

Although far from over, the Mass Expulsions Case, especially the provisional measures track, can be subjected to a preliminary evaluation under these standards. Indeed, based on the foregoing criteria, it is evident that the case has been, and will continue to be, a successful transnational public lawsuit. The transnational party structure of litigation in the Inter-American system is apparent, as is the mix of domestic and international public law violations comprising the transnational claim structure.¹⁸⁹ Petitioners, led by the Columbia and Berkeley Human Rights Clinics, have succeeded in utilizing Inter-American human rights fora to challenge a longstanding and egregious state practice in flagrant violation of domestic and international norms to the direct (if provisional) benefit of a large number of individual victims. At the same time, the case is expressly prospective in its efforts to obtain declaratory relief

186. “Transnational public law litigation merges . . . two classical modes of litigation. Private individuals, government officials, and nations sue one another directly, and are sued directly, *in a variety of judicial fora, most prominently domestic courts.*” Koh V, *supra* note 184, at 2348 (emphasis added). See, e.g., Aceves, *supra* note 41, at 150, 162–70 (advocating for the “development of a universal system of transnational law litigation” and discussing the Pinochet case, which involved proceedings in Spain and England).

187. *Haiti Paradigm*, *supra* note 57, at 2399.

188. Koh V, *supra* note 184, at 2371 (emphasis in original) (internal citations omitted).

189. See *supra* notes 149–58 and accompanying text.

and far-reaching reparations, including institutional change and legal reform.¹⁹⁰ Already it has succeeded in prying open the doors of the Inter-American Court's restrictive jurisprudence on provisional measures and expanding the American Convention's protective ambit in this respect.¹⁹¹ If early experiences are any indication, the positive impact of the Mass Expulsions Case on Dominican politics and society, already significant, will undoubtedly deepen as the case progresses.

What is most intriguing about the case, in addition to the transnational nature of the issues addressed, may be the ongoing *institutional dialogue* among the different domestic and international fora, both governmental and non-governmental in character. Though much of this interaction has been described above, one component in particular is worth emphasizing: the constructive role of Dominican officials in the implementation of the Inter-American Court's provisional measures orders. Certain officials took important initiatives that resulted in the landmark agreement signed by the parties and the issuance of safe passage documents (*salvoconductos*) to a range of beneficiaries that went beyond those expressly covered by the orders themselves.¹⁹² Such substantial compliance simply would not have been possible without the existence of a determined political will at high levels of the Mejía Administration. Thus, in a formal sense, the officials who participated in the internalization process functioned, albeit to a limited extent, as "governmental norm sponsors," i.e., the institutional "allies" of the TNEs who are essential to achieving state compliance with international norms through the internalization dynamic described above.¹⁹³

The purpose of this section is not to engage in a definitive accounting of the Mass Expulsions Case or its merits. My point has been to illustrate by way of example an innovative, high-impact transnational public lawsuit initiated, developed, and led by human rights clinics within the regional human

190. See *supra* notes 156–58 and accompanying text.

191. See *supra* notes 131–33, 143 and accompanying text.

192. See *supra* Part II.B.2.

193. The Dominican officials who collaborated in the implementation of the Court's orders were instrumental in achieving the internalization (i.e., implementation) of the provisional measures. Given the intense opposition to the ongoing dialogue with the Court and Petitioners within the same government, the outcome was by no means a foregone conclusion. However, I would hesitate to call them "governmental norm sponsors" in the sense that they were inherently committed to the same goals and objectives to the same extent as were Petitioners. See Koh I, *supra* note 1, at 647–48.

rights system.¹⁹⁴ The final balance sheet, of course, will have to wait. But at least one other major achievement is already apparent; the Mass Expulsions Case will continue to propel the specific transnational legal process generated in response to the systematic violation of the ethnic Haitian minorities' rights in the Dominican Republic.¹⁹⁵ In this respect, the ongoing litigation will someday provide answers to one of the primary "challenges facing International Human Rights Law at the outset of the 21st Century"¹⁹⁶: the profound human consequences of economic globalization and the resulting flow of migrant workers and their families across borders.¹⁹⁷ Inevitably, new Inter-American jurisprudence will define the rights of migrant workers and ethnic minorities across the region as whole. The nature of transnational public litigation ensures that the resulting legal standards will be transportable, applicable directly in a range of domestic and international fora for purposes of judicial interpretation, as well as political bargaining.¹⁹⁸

A final conclusion to be drawn from the foregoing analysis is the palpable need for other similar initiatives aimed at vindicating novel human rights issues in domestic, regional, and international fora. For a number of reasons analyzed below, human rights clinics are especially well-suited to bring such actions.

III. THE INNOVATIVE ROLE OF HUMAN RIGHTS CLINICS

A. Clinical Legal Education's Contribution to International Law

At the outset of this Article I asked, in essence, what can clinical legal education do for international law? The obvious answer is that because the transnational legal process offers the best explanation of why States "obey" international law, and human rights clinics can function as effective transnational norm entrepreneurs within this process, clinical education's first contribution to the field of international law is simply the creation of these clinics. The burgeoning presence of HRCs at American law schools expands the

194. For an analysis of a different transnational public lawsuit under these criteria, see *Haiti Paradigm*, *supra* note 57.

195. See also *Haiti Paradigm*, *supra* note 57, at 2394–95 (discussing another example of transnational legal process, holding former dictator of Haiti liable for human rights abuses against Haitian citizens).

196. Cançado concurrence, *supra* note 89, ¶ 1.

197. *Id.*

198. See *supra* note 188 and accompanying text.

number of TNEs struggling to promote and enforce international human rights norms in the United States and around the world, which is in itself a virtue. As the Mass Expulsions Case amply demonstrates, HRCs can engage actively and effectively in the transnational legal process alongside other non-governmental actors, thus roundly reaffirming “the value and the imperative of clinical work in international law.”¹⁹⁹

The real question, however, is what makes the HRCs substantially *different* from other transnational non-governmental actors. In many ways HRCs and conventional human rights NGOs are functionally indistinguishable. Human rights clinics, like NGOs, operate successfully as transnational norm entrepreneurs through their relationships with other transnational actors, including states. HRCs in both the Haitian Refugee and the Mass Expulsions cases spearheaded the respective litigation and successfully carried out a range of other conventional NGO functions, such as human rights monitoring, fact-finding, verification and reporting, public awareness advocacy, as well as coalition building.²⁰⁰ In both cases, this activity contributed to the interpretation and eventual internalization of human rights norms.²⁰¹ Given their similarity in function and effect, in what ways do HRCs represent a distinct departure from conventional NGOs?

The answer lies in the human rights clinics’ constitution. What distinguishes human rights clinics from all other non-governmental actors, especially human rights NGOs, is the distinctive combination of pedagogy and practice. Human rights clinics marry the substantive framework of international law and process to the methodology of clinical legal education to create a qualitatively distinct addition to the roster of transnational non-state actors. This symbiosis ensures that HRCs not only participate in, but also reinforce transnational legal process in ways other non-governmental actors do not. In other words, the HRC’s unique composition not only differentiates, it innovates.

Human rights clinics possess a number of singular virtues emanating from their university pedigree that not only distinguish them from other non-governmental actors, but also enhance the HRC’s novel contribution to the transnational legal process over the long term in a number of significant ways.

199. Koh IV, *supra* note 7, at 206. This value has not gone unnoticed by other academic commentators, such as Harvard’s Henry Steiner: “The unmistakable value of clinical human rights work stems partly from its leading students to experience the dilemmas in and sheer obstacles to the realization of human rights norms.” Steiner, *supra* note 77, at 326.

200. See Mertus, *supra* note 52, at 554 (discussing the role of more traditional NGOs in human rights advocacy).

201. See Koh IV, *supra* note 7 (describing outcome of Haitian Refugee Case); *supra* Part II.B.3.

First, HRCs ensure a “multiplier effect” through the deployment and training of human rights advocates. Second, they are liberated and empowered by the tradition of academic freedom at U.S. universities. Third, human rights clinics tend to be more reflexive, innovative, and interdisciplinary in their advocacy practice than other transnational actors. And finally, these clinics bridge the theory and practice of international human rights law in ways that contribute to the active development of both. This is not intended to be an exhaustive list, nor is it a definitive one with respect to the characteristics described. The cited virtues are discussed further below in more detail and examined in a critical light to encourage academic debate around the HRC paradigm. It is my hope that this debate will contribute to developing further the HRC’s capacity to meet its pedagogic and advocacy goals.

1. HRCs Train the Troops

Since HRCs operate within university law schools and, as a rule, apply clinical methodology, their primary mission is to train skilled and ethical legal advocates. To do so while promoting justice and the rule of law is a parallel objective, which I have addressed above.²⁰² What is relevant here is that members of a human rights clinic are expressly prepared to be *transnational* legal advocates, many of whom will work as public interest or human rights lawyers over the course of their careers. My experience, confirmed by that of others, has been that many of the students who participate in HRCs express a desire to continue working in the human rights field after law school.²⁰³ Some end up choosing human rights as a career path and are fortunate enough to find positions after graduation as public interest/human rights lawyers with intergovernmental or non-governmental organizations, frequently as fellows or interns.²⁰⁴ Others collaborate from the private sector through pro bono projects or other charitable work. In any case, it is indisputable that many HRC graduates will work as public interest/human rights attorneys, activists, or teachers—or some combination thereof—at some point in their professional careers.

202. See *supra* text accompanying notes 23–27.

203. HRC students are frequently self-selecting, gravitating toward this model of clinical education because of the subject matter and their own personal and professional convictions. This fact tends to explain why many of them subsequently enter or work in some capacity in the human rights field. “Many students doing human rights work become absorbed in it because of their deep moral commitment to the field. They wish both to understand the world and to change it.” Steiner, *supra* note 77, at 326.

204. For a discussion of the interrelationship between “public interest law” and “human rights” in the United States, see Steiner, *supra* note 77, at 319–22.

But human rights clinics participate directly in the “struggle,” as well as train the “troops” that will, in a variety of ways, carry it forward over the long term. Although precise figures do not exist, the engagement of HRC students and their contributions to civil and human rights advocacy are undeniable and essential consequences of the university’s active role in the human rights movement.²⁰⁵

The value of students participating in a pro bono movement that provides “access to justice for marginalized groups [and] fill[s] in the gaps in legal services” should not be underestimated In the same manner, by providing assistance via a cadre of students, human rights clinics serve institutions, organizations, and individuals that play important, if undervalued, roles in promoting and protecting human rights.²⁰⁶

Thus, HRCs are especially effective at generating a “multiplier effect” in terms of both actual and future advocates that is unrivaled by that of any other transnational actor working in the human rights context.²⁰⁷

It is true that other law school and university human rights courses increasingly possess clinical components, thus serving a similar function similar to HRCs.²⁰⁸ Similarly, some conventional NGOs may claim that training human rights advocates is a goal or consequence of their work, i.e., through the placement of interns, fellows, etc. Neither of these alternatives, however, is expressly configured to systematically train students in the practical skills and values required by legal advocates generally, and by public interest/human

205. See Rita Maran, *Teaching Human Rights in the Universities: Paradoxes and Prospects*, in *Human Rights Education for the Twenty-First Century* 194, 207 (George J. Andreopoulos & Richard Pierre Claude eds., 1997).

206. Hurwitz, *supra* note 3, at 530 (quoting Martha Davis, *Our Better Half: A Public Interest Lawyer Reflects on Pro Bono Lawyering and Social Change Litigation*, 9 *Am. U. J. Gender Soc. Pol’y & L.* 119, 126 (2001)).

207. This multiplier effect relates not only to future practitioners but also to future professors and even to clinics. It is worth noting in this regard that the founding director of the Columbia Human Rights Clinic was a former student of Professor Koh in Yale’s International Human Rights Law Clinic. See *supra* note 90 and accompanying text. I myself left Columbia in 2003 to found and direct the International Human Rights Clinic at George Washington University Law School.

208. For example, Reed Brody and Michael Ratner taught a seminar course at Columbia Law School in the spring of 2003 entitled, “International Human Rights Litigation: Advocacy and Legal Action.” The seminar had a clinical component, and students worked with their instructors on live litigation and advocacy projects that the instructors were conducting for the human rights organizations for which they worked (Human Rights Watch and the Center for Constitutional Rights, respectively).

rights lawyers specifically. Unlike the alternatives, HRCs by definition possess a backbone of clinical methodology that primarily emphasizes legal skills training and fosters professional, as well as ethical development, in the human rights context.²⁰⁹ Like all law clinics, they tend to require a greater commitment and involvement from students, not least because of the credit hours required.²¹⁰ Some clinics are taught over the course of an entire academic year;²¹¹ others are only a semester long, but provide opportunities for students to continue on for at least another semester.²¹² In any event, it is clear that the experiential learning dimension of clinics—their “engagement” with the human rights movement—is both qualitatively and quantitatively superior to that offered by any other type of law school or university course.²¹³

2. HRCs Benefit and Contribute Based on a Tradition of Academic Freedom²¹⁴

As suggested already, the university setting encourages HRC participants—instructors, attorneys, and students—to approach human rights advocacy with the critical detachment and technical rigor that characterize serious academic inquiry.²¹⁵ This is the essence of academic freedom. Academic freedom is formally defined as a longstanding accord between members of the academic profession and the society in which they operate: “Society and members of a profession form an unwritten social compact whereby the members of a profession agree to restrain self-interest, to promote ideals of

209. *See supra* Part I.A.

210. *See, e.g.,* Wilson, *supra* note 17, at 271 (discussing the case and classroom components of American University’s IHRL Clinic). Most clinics represent four to seven credits per semester, which can translate into 15 to 30 hours of class and project work a week.

211. *Id.*

212. This was the system employed by the Columbia Law School Human Rights Clinic through the spring of 2003. Students could stay on as teaching assistants in the Clinic once they had completed the semester long course, albeit for less credit.

213. *See* Wilson, *supra* note 17, at 262–65 (describing the strengths of the clinical method vis-à-vis non-clinical legal education).

214. It is important to keep in mind that my approach to this subject is that of an international human rights advocate and not that of a U.S. lawyer per se. A lawyer dedicated to litigating civil rights or other human rights cases in state or federal courts, for instance, will approach the subject of academic freedom with much greater reserve than one like myself, whose litigation practice largely revolves around non-regulated intergovernmental bodies like the Inter-American Commission on Human Rights and the U.N. Human Rights Committee. This difference plays out primarily with respect to the ethical constraints that apply (or do not apply) in practice and how the transition to academia “feels” to the international advocate.

215. *See supra* notes 74–85 and accompanying text.

public service, and to maintain high standards of performance, while society in return allows the profession substantial autonomy to regulate itself through peer review.”²¹⁶ Historically, one of the central features of the learned professions subject to this social compact, including the academic profession, has been that they require entrants into the profession “to commit themselves to a distinctive ideal of public service that imposes ethical demands, *to which ordinary citizens are not subject*, to restrain self interest and to use the special knowledge and skills gained for the common good.”²¹⁷ Whether or not academic practitioners realize that these principles exist or apply them consciously, they remain at the heart of academic freedom as it is understood in the United States today.²¹⁸

Academic freedom distinguishes and enriches the work of HRCs in at least two ways: It guarantees “full freedom”²¹⁹ of choice in teaching, research and related activities, and it adds legitimacy “by association” to conventional human rights litigation and advocacy. In the human rights context, the tradition and commitment of U.S. universities to academic freedom

permits many choices about the terms of professors’ engagement with the [human rights] movement . . . [The professor] may take a formal position about issues in the field[,] . . . concentrate on one or another human rights issue, stress a particular methodology, or engage in a particular way with the movement’s inter-governmental and non-governmental institutions.²²⁰

In practice, academic freedom means that clinical professors and their students are largely free to canvass the situation of human rights at home and abroad for unchampioned, underdeveloped, or controversial issues that other non-governmental actors, for whatever reason, cannot or will not address to the

216. Neil W. Hamilton, *Academic Ethics: Problems and Materials on Professional Conduct and Shared Governance* 3 (2002).

217. *Id.* (emphasis added).

218. See 1940 AAUP Principles on Academic Freedom and Tenure, *reprinted in* Hamilton, *supra* note 216, at 195 (Appendix C) [hereinafter Principles on Academic Freedom] (discussing the public value of providing professors with academic freedom and tenure, and the rights and responsibilities that accompany such freedom). Skeptics and cynics will argue that academic practitioners can be as biased and unfettered in their work as any NGO operative, especially in those areas such as clinical legal education where the two may operate concurrently. While this may be true to some extent, the duties incumbent on university professors vis-à-vis their academic institutions, peers and students, nonetheless represent an important source of ethical principles for professional conduct distinct in significant ways from others that may apply to non-academic colleagues, especially those who are not lawyers and/or who practice in a jurisdiction with clearly defined rules of professional responsibility.

219. *Id.* at 196.

220. Steiner, *supra* note 77, at 321.

same extent.²²¹ HRCs, in their work on the issues selected in exercise of their largely unrestricted pedagogic discretion, are similarly free to employ a wide range of methodologies.²²²

In part because human rights instructors and their clinics, unlike their NGO counterparts, are understood to be subject to the rights, privileges, and responsibilities of the academic profession, they enjoy enhanced levels of credibility with the general public and state authorities. This implicit credibility stems from the real and perceived independence and integrity of the academy that imbues the work of the HRC with a unique legitimacy on all levels.²²³ It is difficult to overstate the importance of independence and credibility in human rights work; these are the defining virtues of any successful human rights organization, generally reinforced by an underlying commitment to impartiality, accuracy, and transparency.²²⁴ It is also true, conversely, that the credibility won by adherence to these principles can be diminished or lost through unprofessional, unethical, or irresponsible conduct. HRCs, like conventional NGOs, are not entirely immune to this dynamic. Even so, that association with university-based HRCs significantly boosts the legitimacy of a given cause is a fact that can be neither denied nor ignored. It has certainly proven so in the Mass Expulsions Case, where the interaction of the HRCs with other key players—Inter-American judges and commissioners; Dominican military and civilian officials; local and international NGO representatives; and even the victims themselves—has undisputedly enhanced the litigation’s impact and effectiveness.²²⁵

A primary reason behind this increased legitimacy is heightened accountability, both real and perceived.²²⁶ Conventional human rights NGOs are frequently criticized for displaying a lack of accountability and, at times,

221. For example, the Mass Expulsions Case was initiated by the Berkeley Clinic and led to fruition by the Columbia Clinic in substantial part because no other transnational non-governmental organizations involved, including various human rights NGOs, possessed the capacity or intention to do so.

222. Hurwitz, *supra* note 3, at 533–34.

223. See Steiner & Mann, *supra* note 77, at 11 (“The traditional strengths of the academy—intellectual independence and integrity—can be joined with service (dare we say ‘activism’) to help advance respect for human rights and dignity throughout the world.”).

224. See ICHRP, *supra* note 64, ¶¶ 112–26.

225. See *supra* Part II.B.3.

226. Accountability is directly linked to legitimacy. ICHRP, *supra* note 64, ¶ 49. A good working definition of accountability for our purposes would include reference to the principles and mechanisms by which individuals or organizations account for their actions or omissions, and are held responsible for them. See *id.* ¶ 45 (describing the relevant standard for humanitarian organizations).

abusing it.²²⁷ Part of the problem has been the lack of defined ethical rules applicable to all advocates—lawyers and non-lawyers alike—who ply their trade in the human rights context.²²⁸ Practitioners litigating in the Inter-American system, for example, or lobbying in the U.N. Commission on Human Rights are not subject to binding rules of professional conduct—or the threat of disciplinary actions—in the way that attorneys are who try human rights-based cases in the U.S. or other domestic courts.²²⁹ This is a major problem that has only recently drawn academic attention. The provocative question of NGO accountability is currently the subject of a sweeping international study designed to elucidate the complex issues and identify constructive responses to them.²³⁰ The results of this study and future academic work on the subject will be crucial to the constructive development of all transnational actors operating in the human rights context, including HRCs.

But HRCs, unlike most of their conventional non-governmental counterparts, are not without external ethical controls.²³¹ They are subject to inherent constraints imposed by their status as academic organizations that conventional NGOs do not, and cannot, experience. Within the administrative dynamic of the university, professors have both privileges and responsibilities. They may be empowered by academic freedom to carry out their teaching and research as they see fit, but in doing so they must also respect the rights, privileges, and responsibilities of faculty membership “in accordance with the highest accepted principles, practices, and procedures of the academic community.”²³² Moreover, most universities will have procedures established to

227. See *id.* Introduction, especially ¶ 12; Steiner & Alston, *supra* note 56, at 953.

228. The only exceptions are lawyers appearing before international criminal tribunals. See *Human Rights Lawyering: Litigative Strategy, Non-Litigative Advocacy, and Client Relations*, in Francisco Forrest Martin et al., *International Human Rights Law and Practice: Cases, Treaties and Materials* 1341, 1341–43 (1997).

229. Advocates nonetheless will always be judged by their adherence to the core principles of effective human rights advocacy— independence and impartiality, accuracy and objectivity in reporting—that are the hallmarks of a credible and therefore effective organization. See ICHRP, *supra* note 64, at 38.

230. See ICHRP, *supra* note 64.

231. By “external ethical controls,” I mean defined standards, guidelines, or codes that clearly apply to the activities carried out by practitioners working in the field that, where appropriate, provide the basis for potential inquiries or proceedings on grounds of alleged transgressions.

232. George Washington Univ., Faculty Code 16 (1996). This general language probably reflects the tenor of provisions adopted by the majority of American universities to regulate the privileges and duties of their faculty. See, e.g., Columbia University Code of Academic Freedom and Tenure § 70a (2000) (“All officers of instruction are entitled to freedom in the classroom in discussing their subjects . . . [and] freedom in research . . . but

implement their rules on safeguarding academic integrity.²³³ In this way, professors are accountable to their students, peers, and sponsoring institutions for their pedagogic activities which must fall within the basic parameters of competent and ethical academic practice. For these reasons, an important degree of accountability is built into the HRC paradigm, giving rise to enhanced credibility and legitimacy vis-à-vis non-academic interlocutors. It is no coincidence that these very virtues are, at the same time, the foundation of effective human rights advocacy.

The privileges and responsibilities of academic freedom, whether or not they are consciously appreciated by their faculty proprietors, confer upon HRCs certain comparative advantages in relation to conventional NGO actors. However, it is also true that an academic setting and university affiliation impose significant restrictions on the advocacy that HRCs carry out. First, HRCs are law school courses of reduced size that are neither equipped nor designed to handle the case or workload of even a mid-sized public interest law firm or human rights NGO.²³⁴ As a result, HRC dockets tend to consist of a limited number of carefully selected high-impact projects or cases that can be reasonably staffed by students and supervised by the instructor(s). Second, as a general rule, case-projects must meet a set of pre-defined criteria that emphasize the pedagogic value of the project as well as its public interest impact, framing the HRC's range of advocacy options.²³⁵ Third, there is the issue of turnover: Most students cannot spend more than two or three semesters at most working on a given case-project. The majority participate for one or two semesters. As a result, there is a permanent obligation on instructors to train new generations of student advocates as their predecessors move on or graduate.²³⁶ This is the flip side of the positive "multiplier effect" discussed above.

Finally, like many organizations in the public service, HRCs tend to rely to varying degrees on external resources or fundraising to finance their operations. While frequently necessary, outside funding exposes clinics to

they should bear in mind the special obligations arising from their position in the academic community.").

233. See, e.g., George Washington Univ., Faculty Code, *supra* note 232, at 16–17 (establishing a grievances procedure for alleged violations of "professional rights or privileges concerning academic freedom, research or other scholarly activities . . .").

234. See Wilson, *supra* note 17, at 267–68; see also Schrag, *supra* note 23, at 186–87, 198–200 (discussing the low student/teacher ratio that characterizes most clinics, and the careful consideration that goes into designing student caseloads).

235. See Hurwitz, *supra* note 3, at 540 (discussing how clinics choose a programmatic focus and select projects in order to maximize pedagogical goals).

236. See Schrag, *supra* note 23, at 198–200.

outside constraints. It is probably true, therefore, that insofar as funding is concerned, HRCs are subject to some of the same vagaries that plague the non-governmental sector. Conventional human rights NGOs are especially susceptible to external influences on their mandates and operations as a consequence of their dependence on outside resourcing.²³⁷ It is difficult to dispute that in many respects, as a result of this dependence, “philanthropic organizations are able to influence the agenda of human rights non-governmental organizations.”²³⁸ Will an HRC presenting grant proposals to foundations and other funding sources be subjected to the same agenda-shaping forces that critics say mold the conventional NGO agenda? So long as academic freedom is not linked to financial freedom—through inclusion in a law school budget or by virtue of an endowment, alumni donations, etc.—the answer is most likely in the affirmative. Even so, there are reasons to believe that the two scenarios will continue to be distinct, in favor of HRCs. First, not all clinical projects require outside funding. Most, if not all, HRCs are supported financially at least in part by their law schools (through faculty salaries and administrative support, for instance), thereby ensuring a minimum but crucial degree of unrestricted academic freedom. Second, HRCs enjoy largely free access to their university and law school’s “natural” resources, which can be both human and institutional. These include faculty and students for labor, libraries and university administrative services for support, as well as numerous other amenities normally associated with a university affiliation. This access to university-based resources and services maximizes the HRC’s potential to advocate independently of external funding.

3. HRCs Possess Greater Potential for Reflection, Innovation, and Interdisciplinary Work

The limitations on human rights clinics are compensated by numerous other unique qualities. Several of these stem from the combined academic and clinical nature of HRCs, which ensures an important degree of detached, critical reflection both *internally* (regarding the work of the clinic) and *externally* (regarding human rights issues and advocacy). At the same time, HRCs tend inherently to be more creative and less rigid than many other transnational non-governmental actors. HRCs are insulated from many of the foibles that hamstring human rights NGOs because they are academic institutions that

237. See Jay S. Ovsioitch, *Feeding the Watchdogs: Philanthropic Support for Human Rights NGOs*, 4 Buff. Hum. Rts. L. Rev. 341, 341–44 (1998); see also ICHRP, *supra* note 64, ¶¶ 414–22 (describing the relationship between donors and NGOs in which NGOs justify their activities to donors, and donors can substantially impact agendas).

238. Ovsioitch, *supra* note 237, at 341.

operate within the general parameters of clinical legal methodology.²³⁹ For these same reasons, they also are better situated to respond to the myriad of interdisciplinary issues raised by most human rights problems.²⁴⁰

Clinical legal methodology guarantees that human rights clinics are permanently engaged in the critical evaluation of the human rights issues addressed as well as the clinics' own role in advocating them. With respect to the latter, *internal* opportunities for reflection are paramount. The purpose of clinical education, as we have seen, is to train competent and ethical practitioners through the simulated and supervised practice of law by students.²⁴¹ Accordingly, HRCs, like all law clinics, are structured to provide their members with constant opportunities to evaluate their work in progress, process feedback, and engage in constructive critical reflection.²⁴² As a consequence, clinical instructors and their students are continuously evaluating their collective performance and success in promoting their clients' interests. This process tends to produce highly effective advocacy, since the reflection of clinic participants usually results in refinements to the clinics' strategy and practice, which can be implemented prospectively with positive consequences. While this dynamic is built into the HRC paradigm, it tends to be less characteristic of non-clinical models of university-based advocacy or conventional NGOs.

239. Conventional human rights NGOs are frequently criticized for being undemocratic, hidebound, and resistant to change or deviations from "human rights orthodoxy." See Kennedy, *supra* note 67; Steiner & Alston, *supra* note 56, at 945–54. Though some claims are exaggerated, they nonetheless contain elements of truth. For a self-critical discussion of these "foibles," see Henry J. Steiner, *Diverse Partners: Non-Governmental Organizations in the Human Rights Movement* 7–13 (1991).

240. Steiner, *supra* note 77, at 322. Most human rights problems "implicate[] large bodies of knowledge" because they inherently involve issues relating to a number of disciplines other than law, such as sociology, anthropology, education, religion, philosophy, political theory, economics, organizational studies, etc. *Id.*

241. See *supra* notes 23–27 and accompanying text.

242. See Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 Ariz. St. L.J. 277 (recommending process for structuring evaluative and self-critique components of a clinical law school course); see also Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner and the Comparative Failures of Legal Education*, 6 Clinical L. Rev. 401 (2000) (describing the work of Professor Donald Schön and his emphasis on reflection in teaching and professional inquiries); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 Hastings L.J. 725 (1989) (exploring the art of critique in the legal educational setting); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. Rev. L. & Soc. Change 109 (1993) (describing the supervisory experience of working with students on the Jessica Green case).

Due to the symbiotic blend of academic freedom and clinical methodology, HRCs are particularly well suited to maintaining a constructively critical perspective *externally* as well. I discussed above, in some detail, the constructive role played by HRCs as part of the university's critical perspective on the human rights movement.²⁴³ Suffice it to say that:

[s]ubjecting . . . aspects of the human rights movement to critical inquiry is important not simply for the education of students but for the development of the movement itself. Major actors like non-governmental or inter-governmental organizations are preoccupied with [other] tasks *The university remains the best-situated institution to engage in such critical work.*²⁴⁴

The point to underscore is that this critical perspective, a virtue in and of itself, is at the same time an element essential to the innovative functions that distinguish the HRC paradigm on the transnational stage.

The HRC's potential for innovation is derived in no small part from the freedom to choose novel issues and methodologies in the pursuit of the advocacy goals discussed above. In the Mass Expulsions Case, for instance, the Columbia Clinic pioneered the use of video documentaries as probatory "evidence" presented to international human rights bodies in the course of clinical litigation and advocacy.²⁴⁵ With technical support from WITNESS, a New York-based NGO dedicated to human rights video advocacy, the Columbia Clinic conceived and created two professionally produced documentaries that, when formally presented to the Inter-American Court of Human Rights and the U.N. Human Rights Committee, respectively, served to graphically reinforce the human impact of the rights violations denounced by the Clinic.²⁴⁶ This exercise had important pedagogic value as well. Members of the Columbia Clinic participated at every stage of the video production process. Students during the Clinic's on-site visits filmed the clients and other victims expelled from the Dominican Republic, as well as their living conditions on the Haitian-Dominican border. Clinic members edited the footage, scripted the films, and personally introduced them to the Inter-American Court and U.N. Human Rights Committee members as part of their litigation and advocacy efforts.

243. See *supra* Part I.B.2.

244. Steiner, *supra* note 77, at 325 (emphasis added).

245. See *supra* notes 111, 125–26, 165 and accompanying text.

246. *Id.* In March, 2001, one member of the U.N. Human Rights Committee confided to me after the hearing at which our film was presented that the images in the video had served to bring home to the Committee the human impact and urgency of the Dominican Republic's policies vis-à-vis the ethnic Haitian minority.

Rounding out the HRC's personality is a natural proclivity for interdisciplinary approaches to human rights work.²⁴⁷ Interdisciplinary projects are those that tackle human rights issues in context rather than in narrow abstraction.²⁴⁸ As Professor Henry Steiner points out:

Few institutions other than the university are positioned to undertake such work Many non-governmental human rights organizations absorbed in monitoring and reporting, lobbying, and developing policy papers on pressing issues, lack the time, resources or instinct to draw on diverse bodies of learning or experience to probe the problems presented within an interdisciplinary framework. Their mission is one of advocacy within the fray rather than broader public education in the issues.²⁴⁹

Law school HRCs are especially adept at taking full advantage of the university's interdisciplinary vocation and resources. In this respect, the Mass Expulsions Case again demonstrates the veracity of the virtue. The Berkeley Clinic's multi-faceted study of expulsions of Haitians and Dominicans of Haitian descent from the Dominican Republic to Haiti is exemplary.²⁵⁰ In the preparation of its statistical and analytical report, the Clinic at Berkeley collaborated closely with members of the University of California at Berkeley's Demography Department and with staff of the University's interdepartmental Human Rights Center. The demographers worked side by side with members of the Berkeley Clinic on field visits to Haiti to identify and collect the quantitative data required for the study. They also prepared the demographic analysis of the data that underlies the bulk of the report's findings. The final document was written by Professor Laurel Fletcher, Associate Director of the Berkeley Clinic, and her students, based in great part on the analysis provided by their colleagues at Berkeley.²⁵¹ As a collaborative effort then, the Berkeley Clinic's Expulsions Study illustrates effectively the "multiple routes [that] are open within the university to achieve the promise and synergy of interdisciplinary projects."²⁵²

247. For a general discussion of the inherently interdisciplinary nature of human rights education, clinical and non-clinical, within the academy, see Maran, *supra* note 205.

248. See *supra* note 240 and accompanying text.

249. Steiner, *supra* note 77, at 323.

250. See *supra* notes 168–69 and accompanying text.

251. The Berkeley Clinic also received technical assistance in the design and implementation of the Expulsions Study from experts at the American Association for the Advancement of Science (AAAS).

252. Steiner, *supra* note 77, at 324.

4. HRCs Bridge Theory and Practice

An effective combination of all the above qualities ensures that HRCs act as a necessary bridge between the as yet unreconciled worlds of academia and advocacy, to the benefit of both.²⁵³ The virtue of the HRC paradigm in this respect is that it resides at the intersection of theory and practice, to great natural advantage. From their privileged position within the university, HRCs participate in the real-world application of liberal international law and human rights theory to practice. In doing so, they also ensure the crucial engagement of the legal academy in the promotion, development, and enforcement of international human rights norms.

Through reflection and intellectual debate, universities—students and faculty alike—can and do influence the movements they assist Students are well-situated to engage in critical inquiry about the presumptions and directions of the human rights movement—an activity that meets an important pedagogical goal and also serves as a catalyst in the development of the movement itself.²⁵⁴

Involving law professors and students in human rights advocacy and teaching is of tangible benefit to the educational mission.²⁵⁵ The activities carried out since 1990 by the HRCs at American, Yale, Berkeley, Columbia, and other universities, for instance, have served to advance the study of Inter-American human rights law and practice in U.S. law schools as much, if not more, than any other single factor. Conversely, as demonstrated above, the HRC's academic grounding confers certain advantages on the human rights litigation and advocacy carried out by these clinics singly, or in conjunction with, other

253. As Steiner noted,

Many universities have traditionally looked suspiciously at work within the institution of an active, engaged character. That attitude stems from a belief that university studies should remain pure in their devotion to classroom teaching and research—a realm of relative detachment from the surrounding society that permits deeper thought. Despite historic exceptions in faculties such as medicine, and despite trends of recent decades in several other disciplines such as law toward complementary clinical training (particularly work in the public interest), such attitudes persist.

Steiner, *supra* note 77, at 325–26. *See also* Hurwitz, *supra* note 3, at 531 (claiming that clinic students can achieve pedagogical goals while also contributing to the human rights movement, in spite of inherent tensions between scholarship and advocacy work).

254. Hurwitz, *supra* note 3, at 531 (footnotes omitted).

255. Steiner, *supra* note 77, at 326.

transnational non-governmental organizations or networks. Critical detachment, external and internal; technical rigor; ethical commitment; full freedom of choice in the issues and methodologies selected; enhanced credibility and legitimacy; built-in creativity as well as a tendency towards innovation and interdisciplinary work—these are traits that the HRC paradigm combines and brings to the transnational legal process with uniquely positive results.

Bridging theory and practice in the human rights context also produces a number of dilemmas, some of which may well prove inconclusive.²⁵⁶ Other dilemmas may only appear so. One example is the potential conflict between the HRC's overarching educational objectives and the subjective interests of the HRC's clients in a given case or project. The concern is that once clients are involved, the HRC's trademark academic detachment and critical perspective can be checked by the clients' particular needs. This raises the question of what happens when the best educational scenario conflicts with the client's best interests. For instance, individual clients may, for personal reasons, wish to settle an action for compensation rather than proceed to the litigation of far-reaching legal issues, which, from a didactic point of view, would clearly provide a richer learning experience for students involved. (Not to mention the jurisprudential value that a favorable judgment by a domestic or international court in a high-profile public interest law case would have!).

There appears to be a dilemma in this not-so-hypothetical case, given the “competing” objectives of pedagogy and professional practice. In my view, however, it is based on a false dichotomy. As a rule, the interests of the students may predominate in the classroom, but those of the client(s) *must* prevail in an advocacy setting. Any other approach would give rise to serious ethical issues, especially if the litigation takes place in a U.S. or other domestic court. Even where binding professional responsibility rules do not apply, the best interest of the clients, as articulated by them with full information, must be the prevailing standard for any litigation or advocacy initiative that directly impacts their case. The fundamental lesson that the clinical instructor should impart to his or her students under such circumstances is simple: The clients and their causes are the *raison d'être* of public interest litigation and advocacy. All other considerations are secondary. Where apparent conflicts arise, therefore, it is the duty of the HRC instructor and his students to resolve them professionally and responsibly along these lines.

256. Hurwitz, *supra* note 3, at 536–38 (suggesting that students may have to anticipate that their work will follow non-traditional paths, and question their own assumptions about legal work); *see also* Hoffman, *supra* note 77, at 5–20 (examining the issues raised by the engagement of U.S. universities in countries where human rights violations occur).

CONCLUSION

I have argued that HRCs are original and distinct transnational actors that contribute to the progressive enforcement of international law through their participation in the transnational legal process. To fully appreciate the impact of HRCs on the international stage, it was necessary to first recognize them as unique transnational non-governmental organizations that are not, in the received sense of the term, "human rights NGOs." Upon closer examination, the qualitative differences that distinguish them from conventional NGOs are also the source of the HRC's novel and still under-exploited capacity to effectively promote human rights norms through innovative litigation and advocacy. HRCs are the fortunate fusion of pedagogy and practice in international law; as such, they draw constantly from one to improve the function of the other. Consequently, HRCs benefit from a unique blend of characteristics that ensure their relevance in contemporary law school curricula and guarantee the injection of positive new elements into the transnational legal process.

Though still in its early stages, the development of the human rights clinical paradigm at U.S. law schools is well underway. Increasingly, more law schools are realizing that the clinical training of transnational lawyers is an essential component of legal education in the age of globalization. HRCs have provided the best response to this challenge, and their numbers are sure to increase. At the same time, HRCs and their members—instructors, students, and cooperating attorneys—must become more aware of the novel contributions they make through clinical advocacy to promoting and enforcing international legal standards. They should challenge themselves to consciously explore and develop these attributes further, thereby honoring the imperative of clinical work in international law by constantly questioning and expanding its boundaries:

[A] lawyer who acquires knowledge of the body politic acquires a duty not simply to observe transnational legal process, but to try to influence it. Once one comes to understand the process by which international human rights norms can be generated and internalized into domestic legal systems, one acquires a concomitant duty . . . to try to influence that process, to try to change the feelings of that body politic to promote greater obedience with international human rights norms.²⁵⁷

In other words, there should be not only more HRCs, but more enlightened ones. The progressive realization of the HRC's extraordinary potential will

257. Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 *Ind. L.J.* 1397, 1416 (1999).

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work to the immeasurable benefit of international human rights law; it will also produce legal professionals who are better prepared to engage in the transnational practice of law in any field.